

KF

141

A3

v.55



THE LIBRARY
OF
THE UNIVERSITY
OF CALIFORNIA
IRVINE

GIFT OF

J. A. C. Grant

AMERICAN STATE KEYS

OF THE

UNITED STATES OF AMERICA

FOR THE

USE OF



Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. LV.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS,
1897.

KF

141

A3

V. 55

Entered according to Act of Congress in the year 1897,
By BANCROFT-WHITNEY COMPANY,
In the Office of the Librarian of Congress, at Washington.

SAN FRANCISCO:
THE FILMER-ROLLINS ELECTROTYPE COMPANY,
TYPOGRAPHERS AND STEREOTYPERS.

AMERICAN STATE REPORTS.

VOL. LV.

SCHEDULE

showing the original volumes of reports in which the cases herein selected and re-reported may be found, and the pages of this volume devoted to each state.

	PAGE.
ALABAMA REPORTS Vol. 109.	915-959
ALABAMA REPORTS Vol. 110.	17- 55
CALIFORNIA REPORTS Vol. 114.	56-111
COLORADO REPORTS Vol. 22.	112-161
INDIANA REPORTS Vol. 144.	162-216
INDIANA APPEALS Vol. 13.	217-258
LOUISIANA ANNUAL REPORTS . . . Vol. 48.	259-325
MARYLAND REPORTS Vol. 83.	326-356
MASSACHUSETTS REPORTS Vol. 166.	357-427
MICHIGAN REPORTS Vol. 105.	428-480
MISSISSIPPI REPORTS Vol. 73.	481-576
NEW JERSEY EQUITY REPORTS . . . Vol. 54.	577-605
NEW JERSEY LAW REPORTS Vol. 58.	606-631
NEW YORK REPORTS Vol. 150.	632-704
PENNSYLVANIA STATE REPORTS . . . Vol. 177.	705-756
SOUTH CAROLINA REPORTS Vol. 45.	757-813
SOUTH DAKOTA REPORTS Vol. 6.	814-870
WASHINGTON REPORTS Vol. 15.	871-914

SCHEDULE

SHOWING IN WHAT VOLUMES OF THIS SERIES THE CASES
REPORTED IN THE SEVERAL VOLUMES OF OFFICIAL
REPORTS MAY BE FOUND.

State reports are in parentheses, and the numbers of this series in bold-faced figures.

ALABAMA. — (83) **3**; (84) **5**; (85) **7**; (86) **11**; (87) **13**; (88) **16**; (89) **18**; (90, 91) **24**; (92) **25**; (93) **30**; (94) **33**; (95) **36**; (96, 97) **38**; (98) **39**; (99) **42**; (100, 101) **46**; (102) **48**; (103) **49**; (104, 105) **53**; (106, 107, 108) **54**; (109, 110) **55**.

ARKANSAS. — (48) **3**; (49) **4**; (50) **7**; (51) **14**; (52) **20**; (53) **22**; (54) **26**; (55) **29**; (56) **35**; (57) **38**; (58) **41**; (59) **43**; (60) **46**; (61, 62) **54**.

CALIFORNIA. — (72) **1**; (73) **2**; (74) **5**; (75) **7**; (76) **9**; (77) **11**; (78, 79) **12**; (80) **13**; (81) **15**; (82) **16**; (83) **17**; (84) **18**; (85) **20**; (86) **21**; (87, 88) **22**; (89) **23**; (90, 91) **25**; (92, 93) **27**; (94) **28**; (95) **29**; (96) **31**; (97) **33**; (98) **35**; (99) **37**; (100) **38**; (101) **40**; (102) **41**; (103) **42**; (104) **43**; (105) **45**; (106) **46**; (107) **48**; (108) **49**; (109) **50**; (110, 111) **52**; (112) **53**; (113) **54**; (114) **55**.

COLORADO. — (10) **3**; (11) **7**; (12) **13**; (13) **16**; (14) **20**; (15) **22**; (16) **25**; (17) **31**; (18) **36**; (19) **41**; (20) **46**; (21) **52**; (22) **55**.

CONNECTICUT. — (54) **1**; (55) **3**; (56) **7**; (57) **14**; (58) **18**; (59) **21**; (60) **25**; (61) **29**; (62) **36**; (63) **38**; (64) **42**; (65) **48**; (66) **50**; (67) **52**.

DELAWARE. — (5 *Houst.*) **1**; (6 *Houst.*) **22**; (7 *Houst.*) **40**; (9 *Houst.*) **43**.

FLORIDA. — (22) **1**; (23) **11**; (24) **12**; (25, 26) **23**; (27) **26**; (28) **29**; (29) **30**; (30) **32**; (31) **34**; (32) **37**; (33) **39**; (34) **43**; (35) **48**; (36) **51**; (37) **53**.

GEORGIA. — (76) **2**; (77) **4**; (78) **6**; (79) **11**; (80, 81) **12**; (82) **14**; (83, 84) **20**; (85) **21**; (86) **22**; (87) **27**; (88) **30**; (89) **32**; (90) **35**; (91, 92, 93) **44**; (94) **47**; (95, 96) **51**; (97) **54**.

IDAHO. — (2) **35**.

ILLINOIS. — (121) **2**; (122) **3**; (123) **5**; (124) **7**; (125) **8**; (126) **9**; (127) **11**; (128) **15**; (129) **16**; (130) **17**; (131) **19**; (132) **22**; (133, 134) **23**; (135) **25**; (136) **29**; (137) **31**; (138, 139) **32**; (140, 141) **33**; (142) **34**; (143, 144, 145) **36**; (146, 147) **37**; (148) **39**; (149, 150) **41**; (151) **42**; (152) **43**; (154) **45**; (153, 155) **46**; (156) **47**; (157) **48**; (158) **49**; (159) **50**; (160, 161) **52**; (162) **53**; (163) **54**.

INDIANA. — (112) **2**; (113) **3**; (114) **5**; (115) **7**; (116) **9**; (117, 118) **10**; (119) **12**; (120, 121) **16**; (122) **17**; (123) **18**; (124) **19**; (125) **21**; (126, 127) **22**; (128) **25**; (129) **28**; (130) **30**; (131) **31**; (132) **32**; (133) **36**; (134) **39**; (135) **41**; (136) **43**; (137) **45**; (138) **46**; (139) **47**; (140) **49**; (1, 2, 3, *Ind. App.*; 141) **50**; (4, 5, 6, *Ind. App.*; 142) **51**; (7, 8, *Ind. App.*; 143) **52**; (9, 10 *Ind. App.*) **53**; (11 *Ind. App.*) **54**; (13 *Ind. App.*; 144) **55**.

IOWA. — (72) 2; (73) 5; (74) 7; (75) 9; (76, 77) 14; (78) 16; (79) 18; (80) 20; (81) 25; (82) 31; (83) 32; (84) 35; (85) 39; (86) 41; (87) 43; (88) 45; (89, 90), 48; (91) 51; (92) 54.

KANSAS. — (37) 1; (38) 5; (39) 7; (40) 10; (41) 13; (42) 16; (43) 19; (44) 21; (45) 23; (46) 26; (47) 27; (48) 30; (49) 33; (50) 34; (51) 37; (52) 39; (53) 42; (54) 45; (55) 49; (56) 54.

KENTUCKY. — (83, 84) 4; (85) 7; (86) 9; (87) 12; (88) 21; (89) 25; (90) 29; (91) 34; (92) 36; (93) 40; (94) 42; (95) 44; (96) 49; (97) 53.

LOUISIANA. — (39 La. Ann.) 4; (40 La. Ann.) 8; (41 La. Ann.) 17; (42 La. Ann.) 21; (43 La. Ann.) 26; (44 La. Ann.) 32; (45 La. Ann.) 40; (46, 47 La. Ann.) 49; (48 La. Ann.) 55.

MAINE. — (79) 1; (80) 6; (81) 10; (82) 17; (83) 23; (84) 30; (85) 35; (86) 41; (87) 47; (88) 51.

MARYLAND. — (67) 1; (68) 6; (69) 9; (70) 14; (71) 17; (72) 20; (73) 25; (74) 28; (75) 32; (76) 35; (77) 39; (78) 44; (80) 45; (79) 47; (81) 48; (82) 51; (83) 55.

MASSACHUSETTS. — (145) 1; (146) 4; (147) 9; (148) 12; (149) 14; (150) 15; (151) 21; (152) 23; (153) 25; (154) 26; (155) 31; (156) 32; (157) 34; (158) 35; (159) 38; (160) 39; (161) 42; (162) 44; (163) 47; (164) 49; (165) 52; (166) 55.

MICHIGAN. — (60, 61) 1; (62) 4; (63) 6; (64, 65) 8; (66, 67) 11; (68, 69, 75) 13; (70) 14; (71, 76) 15; (72, 73, 74) 16; (77, 78) 18; (79) 19; (80) 20; (81, 82, 83) 21; (84) 22; (85, 86, 87) 24; (88) 26; (89) 28; (90, 91) 30; (92) 31; (93) 32; (94) 34; (95, 96) 35; (97) 37; (98) 39; (99) 41; (100) 43; (101) 45; (102) 47; (103) 50; (104) 53; (105) 55.

MINNESOTA. — (36) 1; (37) 5; (38) 8; (39, 40) 12; (41) 16; (42) 18; (43) 19; (44) 20; (45) 22; (46) 24; (47) 28; (48) 31; (49) 32; (50) 36; (51, 52) 38; (53) 39; (54) 40; (55) 43; (56) 45; (57) 47; (58) 49; (59) 50; (60) 51; (61) 52; (62) 54.

MISSISSIPPI. — (65) 7; (66) 14; (67) 19; (68) 24; (69) 30; (70) 35; (71) 42; (72) 48; (73) 55.

MISSOURI. — (92) 1; (93) 3; (94) 4; (95) 6; (96) 9; (97) 10; (98) 14; (99) 17; (100) 18; (101) 20; (102) 22; (103) 23; (104, 105) 24; (106) 27; (107) 28; (108, 109) 32; (110, 111) 33; (112) 34; (113, 114) 35; (115) 37; (116, 117) 38; (118) 40; (119, 120) 41; (121) 42; (122) 43; (123) 45; (124, 125) 46; (126) 47; (127) 48; (128) 49; (129) 50; (130) 51; (131) 52; (132) 53; (133) 54.

MONTANA. — (9) 18; (10) 24; (11) 28; (12) 33; (13) 40; (14) 43; (15) 48; (16) 50; (17) 52.

NEBRASKA. — (22) 3; (23, 24) 8; (25) 13; (26) 18; (27) 20; (28, 29) 26; (30) 27; (31) 28; (32, 33) 29; (34) 33; (35) 37; (36) 38; (37) 40; (38) 41; (39, 40) 42; (41) 43; (42, 43) 47; (44) 48; (45, 46) 50; (47) 53.

NEVADA. — (19) 3; (20) 19; (21) 37.

NEW HAMPSHIRE. — (64) 10; (62) 13; (65) 23; (66) 49.

NEW JERSEY. — (43 N. J. Eq.) 3; (44 N. J. Eq.) 6; (50 N. J. L.) 7; (51 N. J. L.) 45; (45 N. J. Eq.) 14; (46 N. J. Eq.) 52; (52 N. J. L.) 19; (47 N. J. Eq.) 24; (53 N. J. L.) 26; (48 N. J. Eq.) 27; (49 N. J. Eq.) 31; (54 N. J. L.) 33; (50 N. J. Eq.) 35; (55 N. J. L.) 39; (51 N. J. Eq.) 40; (56 N. J. L.) 44; (52 N. J. Eq.) 46; (57 N. J. L.) 53; (53 N. J. Eq.) 51; (54 N. J. Eq.) 58; (58 N. J. L.) 55.

NEW YORK. — (107) 1; (108) 2; (109) 4; (110) 6; (111) 7; (112) 8; (113) 10; (114) 11; (115) 12; (116, 117) 15; (118, 119) 16; (120) 17; (121) 18; (122)

19; (123) 20; (124, 125) 21; (126) 22; (127) 24; (128, 129) 26; (130, 131) 27; (132, 133) 28; (134) 30; (135) 31; (136) 32; (137) 33; (138) 34; (139) 36; (140) 37; (141) 38; (142) 40; (143) 42; (144) 43; (145) 45; (146) 48; (147) 49; (148) 51; (149) 52; (150) 55.

NORTH CAROLINA. — (97, 98) 2; (99, 100) 6; (101) 9; (102) 11; (103) 14; (104) 17; (105) 18; (106) 19; (107) 22; (108) 23; (109) 26; (110) 28; (111) 32; (112) 34; (113) 37; (114) 41; (115) 44; (116) 47; (117) 53; (118) 54.

NORTH DAKOTA. — (1) 26; (2) 33; (3) 44; (4) 50.

OHIO. — (45 Ohio St.) 4; (46 Ohio St.) 15; (47 Ohio St.) 21; (48 Ohio St.) 29; (49 Ohio St.) 34; (50 Ohio St.) 40; (51 Ohio St.) 46; (52 Ohio St.) 49; (53 Ohio St.) 53.

OREGON. — (15) 3; (16) 8; (17) 11; (18) 17; (19) 20; (20) 23; (21) 28; (22) 29; (23) 37; (24) 41; (25) 42; (26) 46; (27) 50; (28) 52; (29) 54.

PENNSYLVANIA. — (115, 116, 117 Pa. St.) 2; (118, 119 Pa. St.) 4; (120, 121 Pa. St.) 6; (122 Pa. St.) 9; (123, 124 Pa. St.) 10; (125 Pa. St.) 11; (126 Pa. St.) 12; (127 Pa. St.) 14; (128, 129 Pa. St.) 15; (130, 131 Pa. St.) 17; (132, 133, 134 Pa. St.) 19; (135, 136 Pa. St.) 20; (137, 138 Pa. St.) 21; (139, 140, 141 Pa. St.) 23; (142, 143 Pa. St.) 24; (144, 145 Pa. St.) 27; (146 Pa. St.) 28; (147, 150 Pa. St.) 30; (151 Pa. St.) 31; (148 Pa. St.) 33; (149, 152, 153 Pa. St.) 34; (154, 155 Pa. St.) 35; (156 Pa. St.) 36; (157 Pa. St.) 37; (158 Pa. St.) 38; (159 Pa. St.) 39; (160 Pa. St.) 40; (161 Pa. St.) 41; (162 Pa. St.) 42; (163 Pa. St.) 43; (164, 165 Pa. St.) 44; (166 Pa. St.) 45; (167 Pa. St.) 46; (168, 169 Pa. St.) 47; (170, 171 Pa. St.) 50; (172, 173 Pa. St.) 51; (174, 175 Pa. St.) 52; (176) 53; (177) 55.

RHODE ISLAND. — (15) 2; (16) 27; (17) 33; (18) 49.

SOUTH CAROLINA. — (26) 4; (27, 28, 29) 13; (30) 14; (31, 32) 17; (33) 26; (34) 27; (35) 28; (36) 31; (37) 34; (38) 37; (39) 39; (40) 42; (41) 44; (42) 46; (43) 49; (44) 51; (45) 55.

SOUTH DAKOTA. — (1) 36; (2) 39; (3) 44; (4) 46; (5) 49; (6) 55.

TENNESSEE. — (85) 4; (86) 6; 87) 10; (88) 17; (89) 24; (90) 25; (91) 30; (92) 36; (93) 42; (94) 45; (95) 49; (96) 54.

TEXAS. — (68) 2; (69, 24 Tex. App.) 5; (70; 25, 26 Tex. App.) 8; (71) 10; (27 Tex. App.) 11; (72) 13; (73, 74) 15; (75) 16; (76) 18; (77; 28 Tex. App.) 19; (78) 22; (79) 23; (29 Tex. App.) 25; (80, 81) 26; (82) 27; (30 Tex. App.) 28; (83) 29; (84) 31; (85) 34; (31 Tex. Cr. Rep.; 86) 37; (86; 32 Tex. Cr. Rep.) 40; (87; 33 Tex. Cr. Rep.) 47; (34 Tex. Crim. Rep.; 88) 53.

VERMONT. — (60) 6; (61) 15; (62) 22; (63) 25; (64) 33; (65) 36; (66) 44; (67) 48; (68) 54.

VIRGINIA. — (82) 3; (83) 5; (84) 10; (85) 17; (86) 19; (87) 24; (88) 29; (89) 37; (90) 44; (91) 50; (92) 53.

WASHINGTON. — (1) 22; (2) 26; (3) 28; (4) 31; (5) 34; (6) 36; (7) 38; (8) 40; (9) 43; (10) 45; (11) 48; (12) 50; (13) 52; (14) 53; (15) 55.

WEST VIRGINIA. — (29) 6; (30) 8; (31) 13; (32, 33) 25; (34) 26; (35) 29; (36) 32; (37) 38; (38, 39) 45; (40) 52.

WISCONSIN. — (69) 2; (70, 71) 5; (72) 7; (73) 9; (74, 75) 17; (76, 77) 20; (78) 23; (79) 24; (80) 27; (81) 29; (82) 33; (83) 35; (84) 36; (85, 86) 39; (87) 41; (88) 43; (89) 46; (90) 48; (91) 51; (92) 53.

WYOMING. — (3) 31.

AMERICAN STATE REPORTS.

CASES REPORTED.

VOL. LV.

NAME.	SUBJECT.	REPORT.	PAGE.
Alabama etc. Ry. Co. v. Jones.....	<i>Release.</i>	73 Mich. 110.....	488
Aultman etc. Co. v. Gunderson.....	<i>Negotiable inst's.</i>	6 S. Dak. 226..	837
Baddeley v. Shea.....	<i>Real property.</i>	114 Cal. 1.....	56
Baggett v. McCormack.....	<i>Bailment.</i>	73 Miss. 552....	554
Baker v. Hagey.....	<i>Negligence</i>	177 Pa. St. 128..	712
Bates v. Cullum.....	<i>Limita'ns of actions.</i>	177 Pa. St. 633. .	753
Bennett v. Eastern Bldg. etc. Assn.	<i>Contracts.</i>	177 Pa. St. 233..	723
Berkson v. Cox.....	<i>Limitations of act'ns.</i>	73 Miss. 339....	539
Birmingham Dry Goods Co. v. Roden.....	{ <i>Mortgages</i>	110 Ala. 511.....	35
Blood v. Crew Levick Co.....		<i>Deeds.</i>	177 Pa. St. 606..
Board of Administrators v. Mc-Kowen.....	{ <i>Officers.</i>	48 La. Ann. 251	275
Bradbury v. Davenport.....		<i>Mortgages</i>	114 Cal. 593.....
Brown v. Jarvis Engineering Co....	<i>Master and servant.</i>	166 Mass. 75	382
Brown v. Russell.....	<i>Officers.</i>	166 Mass. 14.	357
Brown v. Wilson.....	<i>Negotiable inst's.</i>	45 S. C. 519	779
Carley v. Gitchell.....	<i>License.</i>	105 Mich. 38.	428
Chapman v. Berry.....	<i>Attachment.</i>	73 Miss. 437....	546
Chase v. Henry.....	<i>Insolvency</i>	166 Mass. 577....	423
Chateau v. Singla.....	<i>Partnership.</i>	114 Cal. 91.....	63
Cheever v. Pittsburgh etc. R. R. Co.	<i>Negotiable inst's.</i>	150 N. Y. 59....	646
Cheney v. Nathan.....	<i>Acknowledgment.</i>	110 Ala. 254.....	26
Choppin v. Dauphin.....	<i>Cemeteries.</i>	48 La. Ann. 1217	313
Coffin v. State....	<i>Damages.</i>	144 Ind. 578....	188
Columbus Buggy Co. v. Turley.....	<i>Sales</i>	73 Miss. 529....	550
Commissioners v. Heaston.....	<i>Counties</i>	144 Ind. 583....	192
Consolidated Traction Co. v. Scott.	<i>Street railways.</i>	58 N. J. L. 682.	620
Corey v. Eastman.....	<i>Architects.</i>	166 Mass. 279....	401
County Comm'rs v. Ball.....	<i>Counties</i>	22 Colo. 125	117
Cowan v. London Assur. Corp.....	<i>Insurance.</i>	73 Miss. 321....	535
Daughtry v. Knights of Pythias...	<i>Insurance.</i>	48 La. Ann. 1203	310
Davis v. Childers.....	<i>Chattel mortgages.</i>	45 S. C. 133....	757
Doyle v. Fitchburg R. R. Co.....	<i>Railroads</i>	166 Mass. 492....	417

NAME.	SUBJECT.	REPORT.	PAGE.
Electric Lighting Co. v. Mobile etc. Ry. Co.	<i>Specific performance</i>	109 Ala. 190.....	927
Elliott v. Martin.....	<i>Innkeepers</i>	105 Mich. 506...	461
Ex parte Keeler.....	<i>Habeas corpus</i>	45 S. C. 537....	785
Failey v. Fee.....	<i>Insurance</i>	83 Md. 83	326
Farmers' etc. Ditch Co. v. Agri- cultural Ditch Co.....	<i>Irrigation</i>	22 Colo. 513....	149
Farmers' Loan etc. Co. v. New York etc. R. R. Co.....	<i>Corporations</i>	150 N. Y. 410... 639	
Fawcett v. Superior Court.....	<i>Judgments</i>	15 Wash. 342... 894	
Franklin Min. Co. v. O'Brien.....	<i>Corporations</i>	22 Colo. 129.... 118	
Fulper v. Fulper	<i>Husband and wife</i> ..	54 N. J. Eq. 431 590	
Gaston v. Gaston	<i>Mar'ge and divorce</i> ..	114 Cal. 542..... 86	
Gibbons v. Hecox.....	<i>Banks</i>	105 Mich. 509.... 463	
Gilliland v. Jones.....	<i>Fraudulent conveys</i> ..	144 Ind. 662..... 210	
Gist v. Western Union Tel. Co.....	<i>Contracts</i>	45 S. C. 344.... 763	
Glas v. Glas.....	<i>Mortgages</i>	114 Cal. 566..... 90	
Globe etc. Ins. Co. v. Helwig.....	<i>Insurance</i>	13 Ind. App. 539 247	
Good v. Golder	<i>Subrogation</i>	73 Miss. 91.... 486	
Goodhart v. Pennsylvania R. R. Co.....	<i>Damages</i>	177 Pa. St. 1.... 705	
Grand Rapids v. Brandy	<i>Ordinances</i>	105 Mich. 670... 472	
Green v. Stone	<i>Mistake</i>	54 N. J. Eq. 387 577	
Hancock Nat. Bank v. Ellis.....	<i>Corporations</i>	166 Mass. 414... 414	
Hardy v. Lancaster Ins. Co.....	<i>Insurance</i>	166 Mass. 210... 395	
Harrison v. Pepper.....	<i>Insurance</i>	166 Mass. 288... 404	
Hauenstein v. Gillespie.....	<i>Depositions</i>	73 Miss. 742.... 569	
Heard v. Crum.....	<i>Attachment</i>	73 Miss. 157.... 520	
Hedges v. West Shore R. R. Co.....	<i>Waters</i>	150 N. Y. 150... 660	
Heironimus v. Sweeney.....	<i>Banks</i>	83 Md. 146.... 333	
Henderson v. Sun etc. Ins. Co.....	<i>Real property</i>	48 Ia. Ann. 1031 292	
Highlands v. Lurgan etc. Ins. Co.....	<i>Insurance</i>	177 Pa. St. 566... 739	
Hili v. Alliance Building Co.....	<i>Mechanics' liens</i>	6 S. Dak. 160 . 819	
Hoboken Printing etc. Co. v. Kahn.....	<i>Libel</i>	58 N. J. L. 359.. 609	
Hope v. Linden Park etc. Assn.....	<i>Contracts</i>	58 N. J. L. 627. 614	
Howes v. Rose.....	<i>Apothecaries</i>	13 Ind. App. 674 251	
Hughes v. Gross.....	<i>Master and servant</i> ..	166 Mass. 61.... 375	
In re Kohler's Estate.....	<i>Ex'rs and adm'rs</i> ... 15	Wash. 613... 904	
In re Sneden.....	<i>Habeas corpus</i>	105 Mich. 61.... 435	
In re State Warrants.....	<i>States</i>	6 S. Dak. 518.. 852	
In re Wharton.....	<i>Attorneys at law</i> ... 114	Cal. 367..... 72	
Jarvis v. State Bank.....	<i>Mechanics' liens</i>	22 Colo. 399.... 129	
Johnson v. Johnson.....	<i>Mar'ge and divorce</i> 22	Colo. 20. ... 112	
Jones Lumber etc. Co. v. Faris.....	<i>Attachment</i>	6 S. Dak. 112.. 814	
Jurgenson v. Diller.....	<i>Mechanics' liens</i>	114 Cal. 491.... 83	
Kellogg v. King.....	<i>Injunctions</i>	114 Cal. 378.... 74	
Kittermaster v. Brossard.....	<i>Attorneys' fees</i>	105 Mich. 219.... 437	
Klein v. Livingston Club.....	<i>Injunctions</i>	177 Pa. St. 224.. 717	
Kujek v. Goldinan.....	<i>Actions</i>	150 N. Y. 176... 670	

CASES REPORTED.

13

NAME.	SUBJECT.	REPORT.	PAGE.
Leaphart v. Commercial Bank....	<i>Banks</i>	45 S. C. 563	800
Long v. Harvey	<i>Religious societies</i> ...	177 Pa. St. 473. . .	733
Ludden v. Sumter.....	<i>Attorney and client</i> .	45 S. C. 186.	761
Luick v. Driscoll.....	<i>Slander</i>	13 Ind. App. 279	224
Lumbert v. Woodward.....	<i>Chattel mortgages</i> ...	144 Ind. 335.....	175
Lynch v. Rosenthal.....	<i>Lotteries</i>	144 Ind. 86.....	163
Manchester etc. Assur. Co. v. Glenn.	<i>Insurance</i>	13 Ind. App. 365	225
Manchester etc. Assur. Co. v. Koerner.....	<i>Insurance</i>	13 Ind. App. 372	231
Manly v. Pattison.....			
Matter of Bronson.....	<i>Inheritance taxes</i> ...	150 N. Y. 1.....	632
Matter of Houdayer.....	<i>Inheritance taxes</i> ...	150 N. Y. 37.....	642
Matter of Whiting.....	<i>Inheritance taxes</i> ...	150 N. Y. 27.....	640
Maynard v. East.....	<i>Mechanic's liens</i> ...	13 Ind. App. 432	238
McAnally v. Alabama Insane Hospital.....	<i>Married women</i> ...	109 Ala. 109.....	923
McConnell v. Lemley.....			
McCully v. Cooper.....	<i>Landlord and ten'nt</i> .	48 La. Ann. 1433	319
McDonald v. Pittsburgh etc. Ry. Co.	<i>Ex'rs and adm'rs</i> ...	114 Cal. 258.	66
McDougall v. Walling.....	<i>Parent and child</i> ...	144 Ind. 459.....	185
McGarry v. Nicklin.....	<i>Suretyship</i>	15 Wash. 78....	871
Merrill v. Hurley.....	<i>Conflict of laws</i> ...	110 Ala. 559.....	40
Merrill v. Luce.....	<i>Negotiable inst's</i> ...	6 S. Dak. 592..	859
Merrill v. Luce.....	<i>Mortgages</i>	6 S. Dak. 354..	844
Metcalf v. Arnold.....	<i>Corporations</i>	110 Ala. 108.....	24
Middleton v. Middleton.....	<i>Statutes</i>	54 N. J. Eq. 692	602
Mills v. Davidson.....	<i>Trusts</i>	54 N. J. Eq. 659	594
Morgan v. Long.....	<i>Cotenancy</i>	73 Miss. 406....	541
Munzer v. Stern.....	<i>Sales</i>	105 Mich. 523....	468
Murtha v. Lovewell.....	<i>Nuisance</i>	166 Mass. 391....	410
Myers v. County Commrs.....	<i>Taxes</i>	83 Md. 385.....	349
Myers v. Holborn.....	<i>Physic'ns and surg'ns</i>	58 N. J. L. 193.	606
Newton v. Joyce.....	<i>Statutes</i>	166 Mass. 83....	385
Packwood v. County of Kittitas...	<i>Municipal bonds</i> ...	15 Wash. 88....	875
Palmer v. Palmer.....	<i>Private ways</i>	150 N. Y. 139....	653
Palmer Sav. Bank v. Insurance Co.	<i>Insurance</i>	166 Mass. 189....	387
Pipe v. Jordan.....	<i>Lis pendens</i>	22 Colo. 392.....	138
Powell v. Wade.....	<i>Agency</i>	109 Ala. 95.....	915
Reed v. Gould.....	<i>Partnership</i>	105 Mich. 368. .	453
Rice v. Hosking.....	<i>Statutes</i>	105 Mich. 303....	448
Richardson v. Foster.....	<i>Negotiable inst's</i> ...	73 Miss. 12.....	481
Richberger v. American Express Co.	<i>Master and servant</i> .	73 Miss. 161....	522
Sampson v. Fox.....	<i>Payment</i>	109 Ala. 662.....	950
Sarmiento v. Davis Boat etc. Co...	<i>Corporations</i>	105 Mich. 300....	446
Schellenback v. Studebaker.....	<i>Partnership</i>	13 Ind. App. 437	240
Schlottman v. Hoffman.....	<i>Wills</i>	73 Miss. 188....	527
Seamans v. Temple Co.....	<i>Corporations</i>	105 Mich. 400....	457
Smith v. Smith.....	<i>Husband and wife</i> ..	22 Colo. 480....	142

NAME.	SUBJECT.	REPORT.	PAGE.
Soderberg v. King County.....	<i>Mortgages</i>	15 Wash. 194...	878
Southern Bell Tel. Co. v. Francis...	<i>Mun. corporations</i> ...	109 Ala. 224.....	930
Spencer v. Myers.....	<i>Insurance</i>	150 N. Y. 269....	675
State v. Klook.....	<i>Habeas corpus</i>	48 La. Ann. 67..	259
State v. Sarvis.....	<i>Arson</i>	45 S. C. 668.....	806
State v. Sasse.....	<i>Intoxicating liquors</i> ...	6 S. Dak. 212..	834
State v. Superior Court.....	<i>Prohibition</i>	15 Wash. 668...	907
Steppe v. Alter.....	<i>Real Property</i>	48 La. Ann. 363.	281
Succession of Allen.....	<i>Wills</i>	48 La. Ann. 1036	295
Sweet v. Kimball.....	<i>Duress</i>	166 Mass. 332....	406
Tebo v. Betancourt.....	<i>Attachment</i>	73 Miss. 868....	573
Terry v. Provident Fund Society...	<i>Insurance</i>	13 Ind. App. 1..	217
Thompson v. New England Mort- gage etc. Co.....	} <i>Homestead</i>	110 Ala. 400.....	29
Turner v. Great Northern Ry. Co..		15 Wash. 213. ..	883
Upland Land Co. v. Ginn.....	<i>Vendor and purch'r</i> ...	144 Ind. 434....	181
Vincent v. Morgan's Louisiana etc. R. R. etc. Co.....	} <i>Railroads</i>	48 La. Ann. 933.	287
Washington v. Soria.....		73 Miss. 665....	555
Washington Bank v. Fidelity Ab- stract etc. Co.....	} <i>Execution</i>	15 Wash. 487....	902
Watson v. Reed.....		15 Wash. 440...	899
Way v. Abington etc. Ins. Co.....	<i>Insurance</i>	166 Mass. 67.....	379
Westfield Gas etc. Co. v. Nobles- ville etc. Road Co.....	} <i>Contribution</i>	13 Ind. App. 481	244
Wharton, In re.....		114 Cal. 367.....	71
Wilkins v. Young.....	<i>Joint tenancy</i>	144 Ind. 1.....	162
Willson v. Mayor.....	<i>Damages</i>	83 Md. 203.....	339
Wilson v. Lewiston Mill Co.....	<i>Contracts</i>	150 N. Y. 314...	680
Wilson v. State.....	<i>Homicide</i>	110 Ala. 1.....	17
Wood v. Boyle.....	<i>Libel</i>	177 Pa. St. 620...	747
Wood v. Pennsylvania R. R. Co...	<i>Railroads</i>	177 Pa. St. 306..	728
Wooten v. Steele.....	<i>Fraudul't convey's</i> ...	109 Ala. 563.....	947
Yazoo etc. R. R. Co. v. Davis.....	<i>Railroads</i>	73 Miss. 678....	562

AMERICAN STATE REPORTS.
VOL. LV.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

WILSON *v.* STATE.

[110 ALABAMA, 1.]

EVIDENCE, CONFESSIONS MADE DURING THE EXAMINATION OF A WITNESS.—If one is called as a witness at an inquest before a coroner, or an officer acting as such, held for the purpose of ascertaining the cause of the death of a human being, and whether anyone was guilty of a criminal act in connection therewith, and is sworn, he not then being arrested nor accused of the crime, and testifies as such under oath, his statements are regarded as voluntary, and may be given in evidence against him on a trial for the murder of such deceased person.

EVIDENCE—STATEMENTS MADE PRIOR TO A HOMICIDE.—If one, on being warned of the presence of another, replies: "That damned little [naming him] had better not bother me," such reply is admissible in evidence against him on a trial for killing the person thus referred to.

Indictment for the murder of one Jackson. During the progress of the trial the state offered a witness who, against the objections of the defendant, testified that about three weeks before the killing and while defendant and several other persons were standing together, the witness heard one of such persons say to the defendant, "Look out, Wilson, Jackson is near," and that defendant replied, "That damned little Jackson had better not bother me." The trial court also received in evidence, against the objection of the defendant, certain statements made by him in giving his testimony on an examination before the coroner.

William C. Fitts, attorney general, for the state.

² BRICKELL, C. J. The defendant was convicted of murder in the second degree for the killing of one Ed Jackson, and was sentenced to imprisonment in the penitentiary for a term of

twenty years. The case comes before this court on exceptions taken on the trial to the admission of evidence.

The killing was in the city of Girard, about 12 o'clock at night. On the next day, a justice of the peace, acting in the capacity of coroner, proceeding according to the statute, held an inquest to ascertain if the deceased came to his death by the unlawful act of another, and, if such was the fact, who was the guilty agent. With others, the defendant was examined as a witness before the jury of inquest, and testified to his proximity to the place of killing at the time of its occurrence, that he then had a pistol, and to the declaration of the deceased that George Wilson shot him. The examination was reduced to writing and subscribed by the defendant, and its admission ³ in evidence against him on the trial is the matter of the first exception.

Though it is apparent that the defendant must at the time of the examination have been suspected, and must have known he was suspected of having perpetrated, or of participation in the perpetration of, the homicide, he was not, so far as is shown by the bill of exceptions, under arrest; nor had any accusation in form of law been preferred against him. The case has not been argued by counsel, and we suppose the point of objection to the admissibility of the examination is, that regarding the situation of the appellant, it was not voluntary—that it was under the duress of an oath in the course of a judicial proceeding, the particular object of which was to ascertain whether a criminal homicide had been committed, and by whom it was committed.

In the absence of the coroner from the county, or in the event of his inability to act, a justice of the peace has the authority to hold the inquest on the body of a deceased person it is the duty of the coroner to hold, and, in this respect, has all the powers of the coroner. It is the duty of the coroner, when there is reasonable ground to believe that death has been caused by the unlawful act of another, to summon a jury to inquire into the cause of the death. If, after an inspection of the body, and the hearing of evidence, the jury are satisfied that death was the result of unlawful means, or of the unlawful act of another, they must render a verdict setting forth who the deceased was, and the means or manner of death, and, if discovered, by whose act death was produced. Upon the rendition of the verdict, it is the duty of the coroner to issue a warrant for the arrest of such person. The attendance of witnesses before the jury may be compelled; and it is the duty of the coroner "to summon and examine as a witness any person who, in his opinion, or that of any of the jury,

has any knowledge of the facts." A witness refusing "to answer any questions in relation to the cause of such death, except on the ground that it may criminate himself, is guilty of a misdemeanor," and, on conviction, is subject to a fine of not less than two hundred nor more than five hundred dollars, and may be imprisoned not exceeding three months: Crim. Code, secs. 4801-4814.

The recital of the bill of exceptions is, that the defendant ⁴ with other witnesses was called before the coroner and jury and examined. The recital admits of no other interpretation than that the examination was involuntary—in obedience to the summons or command of the coroner. It is incapable of being interpreted as an examination of the defendant at his own request, and as a witness, in pursuance of the statute: Crim. Code, sec. 4473.

It seems to have been an unsettled question in England, the decisions varying, whether, if a person accused or suspected had been examined before the coroner touching the crime, his deposition or examination could be given in evidence against him; on a subsequent trial for the commission of the crime. The more recent authorities seem to have settled that such deposition or examination is admissible, especially if the accused was properly cautioned by the coroner: 1 Roscoe's Criminal Evidence, 8th ed., 95; Reg. v. Owen, 9 Car. & P. 83; Reg. v. Colmer, 9 Cox C. C. 506; Reg. v. Wiggins, 10 Cox C. C. 562. In 1 Greenleaf on Evidence, 15th ed., section 225, note a, it is said: "The rule in the United States seems to be that if the person testifying is not under arrest, though he may be under great suspicion at the time, and may be arrested after the examination, yet his testimony given under oath is admissible; but if he is actually under arrest, though it may be without a warrant, his testimony is inadmissible." The subject has been of frequent and elaborate consideration and discussion in the courts of New York, and the doctrine there prevailing is carefully summarized in *People v. Mondon*, 103 N. Y. 221, 57 Am. Rep. 709: "When a coroner's inquest is held before it has been ascertained that a crime has been committed, or before any person has been arrested charged with the crime, and a witness is called and sworn before the coroner's jury, the testimony of that witness, should he afterward be charged with the crime, may be used against him on his trial, and the mere fact that at the time of his examination he was aware that a crime was suspected, and that he was suspected of being the criminal, will not prevent his being regarded as a mere witness, whose testimony may be afterward given in evidence against himself.

If he desires to protect himself, he must claim his privilege. But if, at the time of his examination, it appears that a crime has been committed, and that he is in custody as the supposed criminal, he is not regarded merely as a ⁵ witness, but as a party accused, called before a tribunal vested with power to investigate preliminarily the question of his guilt, and he is to be treated in the same manner as if brought before a committing magistrate, and an examination not taken in conformity with the statute cannot be used against him on his trial for the offense."

The confession of guilt, or the admission of facts having a tendency to establish guilt, made by the accused after he is charged with, or is conscious of being suspected of, crime, is not a species of evidence the common law favors. "Nemo tenetur seipsum accusare," is its inflexible maxim, a shield of protection, so that, as Blackstone puts it, "his guilt be not wrung out of himself, but rather be discovered by other means and other men": 4 Blackstone's Commentaries, 296. Before they are receivable as evidence against him, it must be shown that they were made freely and voluntarily, without the application of hope or fear; without extraneous pressure in either direction from other persons. Made in the presence of threatening circumstances, or under the pressure of calamity when, for ease or freedom, the man is so easily seduced, as different agitations may prevail, to speak falsehood or truth, the law presumes against their admissibility—presumes that they are not a basis upon which a jury can safely render a verdict. Whether confessions or admissions were freely, voluntarily made, is matter of law to be decided by the court; and if, after a consideration of the condition of the accused and of the circumstances under which they were made, there is reasonable doubt of their freedom and voluntariness, the doubt must be resolved against their admissibility: *Porter v. State*, 55 Ala. 95; *Bonner v. State*, 55 Ala. 242.

The authorities in England distinguish the examination before a coroner from an examination before a committing magistrate, who is forbidden to administer an oath to the prisoner. The New York authorities exclude the examination before the coroner, if taken while the prisoner was under arrest. The fact that the accused was under arrest, while it excites the vigilance of the court in inquiring into the circumstances attending a confession or admission, and will affect the weight of either before the jury, does not, according to our decisions, render them necessarily inadmissible: *Franklin v. State*, 28 Ala. 9; *Porter v. State*, 55 Ala. 95; *Redd v. State*, 68 Ala. 492. A committing magistrate is with-

out authority to examine a prisoner, and if, on the preliminary inquiry, without subjecting him to oath, he should interrogate him, the answers to the interrogation are deemed involuntary: *Kelly v. State*, 72 Ala. 244. An inquest by a coroner has for its object not only the identification of the deceased person, and the manner or means of death, but, if death was caused by unlawful means or the unlawful act of another, the discovery of the person who employed the lawful means, or did the unlawful act. It opens a similar, if not the identical, field of inquiry which is opened on the preliminary inquiry before the committing magistrate, and terminates in the issue of a warrant for the arrest of the person discovered to have caused the death. Under the English statutes of Philip & Mary, if a prisoner under examination of his own guilt before a committing magistrate was sworn, his statement was not evidence, for the reason that the statute intended to leave him free to admit or deny his guilt, and the oath deprived him of the freedom. In *State v. Broughton*, 7 Ired, 96, 45 Am. Dec. 507, Ruffin, C. J., expressed the opinion that evidence, the equivalent of a confession of guilt, given by a prisoner before a grand jury while investigating the crime, could not be used as evidence against him, for the reason that the oath deprived him of the freedom to admit or deny guilt, and because the proceeding before the grand jury was in its nature inquisitorial: See, also, *State v. Matthews*, 66 N. C. 106.

There is much of force in the observation of Professor Greenleaf: "It may, at first view, appear unreasonable to refuse evidence merely because it was made under oath, thus having in favor of its truth one of the highest sanctions known in the law. But it is to be observed that none but voluntary confessions are admissible; and that if to the perplexities and embarrassments of the prisoner's situation are added the danger of perjury, and the dread of additional penalties, the confession can scarcely be regarded as voluntary; but, on the contrary, it seems to be made under the very influences which the law is particularly solicitous to avoid": 1 Greenleaf on Evidence, 15th ed., sec. 225. The examination before the coroner was taken immediately after the death in the presence of all the excitement a homicide of this character naturally engenders. The prisoner, an object of suspicion, of which he is conscious, is called and examined as a witness under the obligation of an oath. He was not free to remain silent, for silence would have been regarded as confession; he was not free to refuse to answer questions propounded to him except upon the ground that the answers would tend to criminate him,

the answer magnifying whatever suspicion may have beclouded him, which naturally he would be solicitous to remove rather than to increase. The law does contemplate that parties accused or suspected of crime shall be compelled by its officers into such situations; and if compelled into them, their statements cannot be regarded as voluntary, and a basis on which verdicts may be safely rendered. If this course of procedure was tolerated, the inquest of the coroner would become an inquisition and every witness called before it compelled to betray himself. The statute provides for but one examination under oath of a party accused or suspected of crime, and that examination is not compulsory; it cannot be had except upon his own request; and it will seldom be had until there is some time for deliberation and opportunity to obtain legal advice. There was, in my opinion, error in the admission of the examination before the coroner.

There was no error in the admission of the evidence of the declarations of the defendant made about three weeks before the homicide, when warned that the deceased was approaching him, "that damned little Jackson had better not bother me." It had some tendency to show the animus of the defendant to the deceased; and its weight was for the consideration of the jury.

The majority of the court do not concur in the views expressed upon the first point considered, and the result of their opinion is, that the judgment must be affirmed.

COLEMAN, J. The court deems it unnecessary to consider any question other than the one relative to the admission of statements deposed to by the defendant upon his examination as a witness before the coroner's inquest. The record shows that the defendant was examined as a witness, before any charge had been preferred against him, and when he was not under arrest. The one question is, whether, as matter of law, the statements ^s of a witness must be held to be involuntary, merely because, when made, he was under oath, there being no accusation against him or other person. No authority has been cited in support of the proposition, and we are of opinion none can be found of recent adjudication. Even in those states where the rule prevails, that confessions of a party charged with an offense and under arrest are not admissible, it is held that his statements are admissible when made under oath as a witness, there being no charge against him and he not being in custody. All the authorities cited in the able opinion of the chief justice where the confessions were excluded were cases where the defendant was under arrest at the time they were made. The reasoning of the court in these cases

wasto show that the custody of the party rendered the confessions involuntary. In this state, the decisions are uniform, that confessions made by a prisoner in custody and charged with an offense, although made to an officer in charge of the defendant, are not thereby conclusively rendered involuntary and inadmissible: *Jackson v. State*, 69 Ala. 249; *Sands v. State*, 80 Ala. 201; *McQueen v. State*, 94 Ala. 53. Much less can this court consistently declare that the statements of a witness, not accused and not under arrest, are conclusively involuntary, because made under the sanction of an oath. To so hold would place this court in antagonism to the other courts upon both propositions. "Formerly," says Mr. Roscoe in his work on Criminal Evidence, section 18, "it was doubted whether if a person who had given evidence before a coroner were afterward made the subject of a criminal charge, arising out of the same facts, his deposition could be given in evidence against him; but in several later cases they have been admitted" (citing the cases); and in the case of *Reg. v. Biggdike* (1868), *Boyles, J.*, admitted in evidence a statement upon oath made by the prisoner voluntarily before the coroner, saying: "The authorities were in favor of the admissibility of the evidence, and he himself had no doubt on the subject": *Roscoe's Criminal Evidence*, sec. 18. 'The same rule is declared in 2 *Wharton on Criminal Law*, sec. 690, tit. "Confessions." In 4 *American and English Encyclopedia of Law*, page 180, the text is as follows: "The testimony of a witness before the coroner, such person not being at the time under arrest, or charged with the crime, may be used ⁹ against him on a subsequent trial for the alleged murder of the deceased": *Hendrickson v. People*, 10 N. Y. 13; 61 Am. Dec. 721. See, also, 3 *Russell on Crimes*, 411, 414, and notes. By a statute of this state, a defendant, at his own request, is made a competent witness. He has the opportunity to explain or qualify any statement or confession he may have made. There is less reason now why such confessions may not be admitted, subject to the same restrictions as other confessions.

The weight of authority and sound principle favor the rule that the statements of a witness before a coroner, given in under oath, not charged with the offense and not under arrest, there being no constraint, are admissible in evidence against him.

On other questions, the court concurs in the conclusions of the chief justice.

Affirmed.

EVIDENCE—CONFESSIONS UNDER OATH.—A statement made by a party under oath before a grand jury concerning a crime then

under investigation, prior to his indictment or arrest therefor, and after he has been warned that he is under suspicion and that he need not testify and that he cannot be compelled to criminate himself, is voluntary and admissible against him on his subsequent trial for such crime: *Jenkins v. State*, 35 Fla. 737; 48 Am. St. Rep. 267. Answers of a witness at the coroner's inquest, before any criminal charge has been made or process issued against the witness, may be proved against him on his subsequent trial for having killed the deceased: *Hendrickson v. People*, 10 N. Y. 13; 61 Am. Dec. 721, and note. This subject is fully discussed in the extended note to *State v. Clifford*, 41 Am. St. Rep. 522.

HOMICIDE—EVIDENCE—THREATS OF DEFENDANT.—Former grudges and menaces may be proved against a prisoner charged with the murder of the person menaced: *Dunn v. State*, 2 Ark. 229; 35 Am. Dec. 54. The declaration of one indicted for homicide, that he would put fourteen buckshot into the deceased, being complete as to the purpose, is admissible in evidence, where there is nothing to indicate that it was subject to any qualification, though the witness cannot recollect all that was said: *State v. Vallery*, 47 La. Ann. 182; 49 Am. St. Rep. 363, and note.

METCALF v. ARNOLD.

[110 ALABAMA, 108.]

FRAUDULENT TRANSFER TO A CORPORATION.—If persons doing business as copartners and indebted as such form a corporation for the purpose of defrauding their creditors, and to that end convey all the property of the partnership to the corporation in consideration of its capital stock issued to them and members of their families, their judgment creditors may maintain a suit in equity to have the formation of the corporation declared fraudulent as against the complainants, and that they have a lien on the property so transferred for the satisfaction of their indebtedness.

Creditor's bill filed by the appellees for the benefit of themselves and other creditors of the Metcalf Drug Company. The averments of the bill were to the effect that certain persons named therein had been doing business under the firm name of H. B. Metcalf, and as such had created indebtedness which had become the basis of the judgments held by the complainants; that the members of the partnership conducted an extensive drug business, and had a large stock of goods and other assets subject to execution, and, with the intention of hindering, delaying, and defrauding complainants and their other creditors, attempted to form a corporation with a capital stock of eight thousand dollars; that the members of the partnership put into said corporation, as its only capital stock, the goods, wares, and other assets of the partnership and received in payment therefor stock of the corporation, and issued certificates for various amounts thereof in favor of the copartners and the members of their families; that

the property put into the corporation consisted of substantially all the property belonging to the firm and to the respective members thereof. The prayer of the bill was for an injunction to restrain the defendants from disposing, transferring, or encumbering any property referred to in the bill, and that a receiver be appointed of the property of the Metcalf Drug Company, and that the court decree that the formation of the corporation was fraudulent and void as to the complainants. A demurrer to the bill having been interposed, it was overruled by the court, and the defendants appealed.

Marks & Sayre and John G. Winter, for the appellant.

Graham & Steiner and Tompkins & Troy, contra.

¹⁸⁴ BRICKELL, C. J. The demurrer was properly overruled. The bill is not, as is supposed by several of the causes of demurrer, a bill assailing collaterally the incorporation of the Metcalf Drug Company and seeking a forfeiture of its charter. It is a bill by judgment creditors, seeking the aid of a court of equity to remove obstacles and hindrances to the enforcement of their judgments, which the judgment debtors have fraudulently interposed. Whatever may be the character of the obstacle or hindrance; whatever may be the scheme or device to which the debtor resorts, it lies within the province of a court of equity to remove it. The formation of a corporation, investing it with the legal title to all the property and rights of property of the judgment debtor, and parceling out the stock of the corporation to the debtors and their wives, may be a new device for hindering, delaying, and defrauding creditors. The novelty of the device is not of consequence; the fraud of ¹⁸⁵ its conception and consummation vitiates it, as fraud vitiates all transactions tainted with it. The bill does pray that the formation of the corporation be deemed fraudulent and void as to the complainants. Such a decree would be proper in granting to the complainants the full measure of relief to which they are entitled, if the allegations of the bill be true. But it would not work a forfeiture of the charter, or a dissolution of the corporation; it would simply be ancillary to the divestiture of the title to the property, liable to the debts of the complainants, with which it had been invested by the judgment debtors.

Let the decree of the chancellor be affirmed.

CORPORATION—FRAUDULENT TRANSFER TO BY PARTNERSHIP.—If the managing members of an embarrassed firm

unite in forming a corporation under the general law, and then transfer to it the property of the partnership, the transaction is fraudulent as to existing creditors, and the property so transferred may be taken in execution as that of the former firm: *Booth v. Bunce*, 33 N. Y. 139; 88 Am. Dec. 372. To the same effect, see *Gardner v. Keogh Mfg. Co.*, 63 Hun, 519. So it was held in *San Francisco etc. R. R. Co. v. Bee*, 48 Cal. 398, that if persons interested in one railroad corporation form a new one, which chooses for its officers the officers of the old corporation, and the persons owning the stock of the old corporation receive in exchange therefor, stock of the new, and the trustees then cause the property of the old corporation to be conveyed to the new, the conveyance is a fraud upon the creditors of the old corporation.

CHENEY v. NATHAN.

[110 ALABAMA, 254.]

ACKNOWLEDGMENT OF DEED, IMPEACHING NOTARY'S CERTIFICATE.—Parol evidence is admissible to prove that the certificate of the acknowledgment of a deed was affixed thereto by the notary, purporting to certify to the acknowledgment of a husband and wife, before either of them had signed it, that the husband at first refused to sign it, and the deed was then delivered to the grantee with a notary's certificate thereon; and that, at a subsequent date, the husband was persuaded by the grantee to sign the deed, but that he did not do so in the presence of the notary, nor did he at any time acknowledge the execution of the deed to the notary, and if the deed was of the separate property of a married woman, and the acknowledgment of the husband was essential to its validity, it is void.

ACKNOWLEDGMENT OF A CONVEYANCE, WHAT ESSENTIAL TO CALL THE POWERS OF THE OFFICER INTO EXISTENCE.—Though the acknowledgment of a conveyance by a proper officer is regarded as a judicial act, it is essential that he have jurisdiction, and he cannot have jurisdiction if, at the time he affixes the certificate, the deed had not been signed by anyone. This want of jurisdiction on the part of the officer may be proved by parol.

QUIETING TITLE—GRANTING RELIEF TO DEFENDANT.—Under the statutes of Alabama authorizing proceedings to determine claims of title alleged to be made to real property by the defendant, he is not, where he appears only by answer praying no relief except the determination whether he has an estate, interest, or right in the property, entitled to a decree restraining the complainant from asserting any further claim or interest in the property, and directing a reference to ascertain the rents, taxes, insurance, etc.

Tompkins & Troy and Horace Stringfellow, for the appellant.

A. A. Wiley and W. S. Thorington, contra.

²⁶³ **McCLELLAN, J.** The deed from Mrs. Nathan to complainant's predecessors was invalid, the land embraced in it being her statutory separate estate, unless ²⁶⁴ her husband joined therein "in the mode prescribed by law for the execution of conveyances of land": Code, sec. 2348.

Attached to the deed is the certificate of a notary public in due form, to the effect that the husband, Lewis Nathan, acknowledged his signature to the deed; and his signature appears to the paper. But it is clearly proved that at the time this certificate was made he had not signed the deed, that he did not sign it at any time in the presence of the notary or while the latter had the paper, and that he at no time acknowledged his signature, nor was it attested. More than this, it was affirmatively shown that the only time he was ever in the presence of the notary was upon an occasion when the notary came to him at the instance of a third party for the purpose of having him execute the instrument, and that on this occasion he positively declined and refused to sign the same. At this time, the notary's certificate of acknowledgment both as to himself and Mrs. Nathan was on the paper, fully perfected in form and subscribed by the officer, having been written out and signed even before the deed was presented to Mrs. Nathan for signature; and she had signed it before it was thus presented to her husband. Upon Nathan's refusal to sign, the notary delivered the paper, still bearing his certificate that both the husband and the wife had acknowledged their signatures to it, to the third party who had sent him to have it executed. Some days after this, Nathan yielded to the solicitations of this third party and signed the paper.

We have carried the doctrine forbidding the impeachment of certificates of acknowledgments of the execution of deeds by parol evidence as far as any court; but we have never laid down a rule, nor proceeded upon considerations which would involve the establishment of a rule, which would protect this certificate from impeachment by such oral evidence as has been adduced. We have held that the certification is a judicial act, done in the exercise of judicial power; and that where the grantor appears before the officer for the purpose of acknowledgment, or for the general purpose of executing the instrument, or that where the officer has the paper for the purpose of having it executed, and the grantor is in his presence and there signs, parol evidence will not be received to contradict the certificate of acknowledgment; ²⁶⁵ and it may be that the principles we have laid down would involve the further proposition, though we have not so declared, that, if the name of the grantor appears to the instrument—if he has previously signed it—and the notary takes it and goes into his presence for the purpose of securing his acknowledgment, the certificate of acknowledgment could not be impeached, even by showing that the grantor was ignorant of the purpose of the

notary's visit and even of his official capacity, and of his possession of the paper at that time, and that no acknowledgment was made, and that nothing suggesting or looking to an acknowledgment was said or done. But these principles in their broadest application would not protect the certificate involved in this case. The paper was not signed in the presence of the notary. It was never in the presence of the grantor and the notary after it was signed, nor in the possession of the notary after it was signed. When the notary had it and executed his certificate of acknowledgment, there was nothing to acknowledge, there was no signature, nor was there any signature at any time while it was in his possession. Treating his powers and acts as judicial, they were lacking in one essential of jurisdiction. There was no signature of any kind, genuine or otherwise, before him. He had to do officially only with signatures. His powers were not called into exercise until there was a subscription to be acted upon. There being no signature, there was nothing for him to certify an acknowledgment of. The grantor was not before him; Nathan, refusing to sign was not a grantor. He had a paper writing in the form of a deed before him, but he had neither a signature to be acknowledged nor a signatory to acknowledge his execution of the paper. He was without jurisdiction to act in the premises, and his action, like that of other judicial officers and of courts proceeding without having acquired jurisdiction, is void, may be shown to be so by parol, and has been shown to be so in this case.

x The chancellor, however, erred in so far as he undertook to enjoin the complainant "from asserting any further claims or interest in" the land, and in ordering a reference to ascertain rents, taxes, insurance, etc. We do not construe the statute under which this bill was filed (Acts 1892-93, p. 42) to authorize any affirmative relief to the defendant, coming into the case only by answer, ²⁶⁶ propounding his claim of title or interest to or in the land and praying no relief, except to adjudge whether he "has any estate, interest, or right in, or encumbrance upon said lands, or any part thereof, and what such interest, estate, right, or encumbrance is, and in or upon what part of said land the same exists." The purpose of this statute is simply to fix the status of the land in respect of ownership, to re-establish by the decree muniments of title to it (*Ward v. Janney*, 104 Ala. 122), and, upon a bill filed under the statute and to which only the answer provided for by it is interposed, only the statutory relief can be awarded. This we think is emphasized by section 6, which is to the effect that, except as otherwise provided in the

act, all proceedings under it shall be had in accordance with the practice of courts of equity in this state. Of course, the chancery court, taking jurisdiction on a statutory bill, might go on and settle the claims of the parties in respect of the land, whether they are claims for the settlement of which the statute provides or not, but an adherence to the practice of the court would require that such other claims be presented by appropriate pleadings. The injunction which was awarded the respondent and the reference to the register with a view to awarding her rents was the granting of affirmative relief not contemplated by the statute, and which could have been properly decreed only upon a cross-bill by her with appropriate averments, sustained by competent evidence. The decree will be modified here by striking from it these two features, and as modified it will be affirmed.

ACKNOWLEDGMENTS OF DEEDS—JURISDICTION OF OFFICER.—Where a party is stated in the certificate to have acknowledged the deed, who never in fact appeared before the officer nor otherwise acknowledged it before him, nor authorized him to certify that such acknowledgment was made, there is no jurisdiction and the certificate may be proved void by any satisfactory evidence: Extended note to American Freehold etc. Co. v. Thornton, 54 Am. St. Rep. 154, where the subject of the conclusiveness of certificates of acknowledgment of deeds, and their impeachment by parol or other extrinsic evidence, is fully discussed.

THOMPSON v. NEW ENGLAND MORTGAGE SECURITY CO.

[110 ALABAMA, 400.]

HOMESTEAD.—AN INSANE WIFE IS INCAPABLE of giving her consent to an alienation of the homestead.

HOMESTEAD.—A CONVEYANCE OF A HOMESTEAD, NOT ACKNOWLEDGED BY THE WIFE, or acknowledged by her while insane, is void.

ACKNOWLEDGMENT OF DEEDS, ATTACK UPON BY EXTRINSIC EVIDENCE.—The certificate of the acknowledgment of a deed is not conclusive evidence of the sanity of the person acknowledging. Therefore, a conveyance of a homestead may be avoided by evidence that the wife when she acknowledged it was insane.

O. D. Street, for the appellant.

James E. Webb and Caldwell Bradshaw, contra.

404 HEAD, J. The action is statutory ejectment to recover possession of land. The plaintiff in the court below offered in evidence a mortgage executed by the defendant, proved default

therein, and a regular foreclosure, at which it became the purchaser, and rested. The mortgage showed that the wife joined in the conveyance; her name appeared to be signed thereto, and the certificates of acknowledgment in the common form and of the separate examination of the wife were appended in strict compliance with the statute. The defendant proved that the property sued for constituted his homestead at the time of the execution of the mortgage, and that it was within the statutory limit, in area and value. The sole defense which defendant sought to make consisted in his offer to show that at the time his wife signed the mortgage, and when she acknowledged it separately and ⁴⁰⁵ apart from him, she was totally insane, and that she had no idea or understanding whatever of the nature, character, or consequences of the act she was performing. The court, upon plaintiff's objection, refused to permit him to make this line of defense, and we have only to decide whether this ruling was correct, the appeal being prosecuted from a judgment, based upon a verdict in favor of the plaintiff after the affirmative charge had been given in its favor.

It requires no argument to prove that an insane wife is incapable of giving her voluntary consent to the alienation of the homestead; and, hence, the question presented for our decision must resolve itself into, and must be determined by the result of, two other inquiries: 1. Whether, by reason of the insanity of the wife, the husband may alone alienate the homestead; and, if not, then 2. Whether the certificate of the officer who examined her apart from the husband is conclusive of her capacity to assent to the conveyance. These questions have not heretofore been directly presented in this state.

1. The purpose of the statutes in securing an exempt homestead to every resident of the state, and in requiring the wife's voluntary signature and assent to any alienation thereof when belonging to the husband, is to protect the wife, and through her the family, in the enjoyment of a dwelling place: *Turner v. Bernheimer*, 95 Ala. 241; 36 Am. St. Rep. 207. This court, as well as those in other states having a similar system, has adopted a strict rule on this subject, in accordance with which it is generally held that to convey the homestead there must be a strict compliance with the statutory mode of alienation. In a recent case, where we collected our previous decisions, speaking of a deed which was without the acknowledgment of the wife, we said: "By the repeated decisions of this court, as well as by the terms of the statute itself, such a conveyance is void. It is said

of such a deed that it is a nullity to all intents and purposes, and confers no rights present or prospective, is totally insufficient as a muniment of title to support an action of ejectment, and is incapable of passing any estate or interest whatever in the homestead": *Parks v. Barnett*, 104 Ala. 438; *Alt v. Banholzer*, 39 Minn. 511; 12 Am. St. Rep. 681, and note. The insanity of the wife does not dissolve the ⁴⁰⁶ bond of marriage, nor withdraw her or her family from the beneficial purpose of the homestead laws. The statute is plain, unambiguous, and admits of no exceptions, which would destroy its obvious design. If the occupant be a married man, the voluntary signature and assent of the wife, evidenced in the manner prescribed, are essential to a valid alienation of the homestead, unless the conveyance be made to her. Efforts have been made to ingraft other exceptions, arising out of the supposed necessities of the case, upon similar statutes, but they have uniformly failed. Thus, the fact that the wife is living apart from her husband and even in another state, has been held insufficient to dispense with her signature and assent: *Johnston v. Turner*, 29 Ark. 280; *Williams v. Swetland*, 10 Iowa, 51; *Herron v. Knapp*, 72 Wis. 553; *Bradford v. Central etc. Co.*, 47 Kan. 587; *Ott v. Sprague*, 27 Kan. 620; *Lies v. De Diablar*, 12 Cal. 328; *Castlebury v. Maynard*, 95 N. C. 281. In a note to *Poole v. Gerrard*, 65 Am. Dec. 481, on page 488, Mr. Freeman says: "That the wife is living apart from her husband, or is insane, will not render his sole conveyance of the premises valid." One of the cases he cites, *Alexander v. Vennum*, 61 Iowa, 160, is directly in point upon the question we are considering, and the later case of *Whitlock v. Grosson*, 35 Neb. 829, is to the same effect. No cases in conflict with these have been cited, and, after diligent search, we have found none. In the last case referred to, the court, after quoting their statute, which is not essentially different from our own, says: "Here is a plain prohibition against the encumbrance of the homestead without the joint act of both husband and wife. It contains no exception with reference to an absent or insane husband or wife. Had Mrs. Grosson, defendant's wife, been in fact a resident of this state, and her domicile the premises in controversy, it is plain that she would have been incapable of relinquishing her homestead, and a mortgage executed by her would have been ineffectual for the purpose of creating a lien thereon." In the case of *Alexander v. Vennum*, 61 Iowa, 160, the insane wife joined the husband in the execution of the deed. After the conveyance the grantors abandoned

the homestead. The court held that as the wife of McKean was insane at the time of the sale and conveyance to the defendant, the ⁴⁰⁷ wife could not have concurred therein, and that it was void. As the result, the premises were declared to be subject to a judgment lien against the grantor, which attached to the property, after its abandonment, as a homestead. If the conveyances were void because of the wife's insanity, the conclusion reached necessarily follows: *Smith v. Pearce*, 85 Ala. 264; 7 Am. St. Rep. 44.

In volume 11 of the American and English Encyclopedia of Law, page 147, there is a note which states that where a statute provided that the deed of a married woman, in which her husband does not join, shall not be valid, and it appears that a husband while insane joined in a deed with his wife, such deed was held absolutely void. The case is not cited by name and we have been unable to find it. The following extract from the opinion, however, is given, which we think correctly states the law: "We think that the learned judge who presided at the trial correctly ruled that if the defendant's husband was, at the time he signed the deed, insane, he could give no such assent as would satisfy the statute. The deed was void to the same extent as if there had been no assent by the husband, and no subsequent action or failure to act on his part could give it validity. The cases cited by the tenant to the point that the deed or any other contract of an insane person is voidable only, and may be ratified by him after he becomes sane, do not apply to this case. No subsequent assent or ratification by the husband could fulfill the requirements of the statute, or give validity to the deed as the deed of the wife." These remarks apply with equal force to the joinder by an insane wife in the husband's mortgage of the exempt homestead in this state.

2. It is insisted, however, by the appellee that evidence aliunde may not be offered by the husband to prove the mental incapacity of his wife, and that the certificate of the officer in statutory form is not only the only permissible evidence of the wife's voluntary assent, but is conclusive evidence of her capacity to give that assent. We have had occasion in a series of cases to consider the nature and character of the certificate which an authorized officer makes of acknowledgments of deeds, when the parties appear before him and come within his jurisdiction, for that purpose. We have held that a justice of the peace of one county may not ⁴⁰⁸ go into another and take acknowledgments and make a certificate thereof, and that proof might be made to

show that the justice did not certify truly when he stated in his certificate, that the grantors appeared before him in his county: *Edinburgh etc. Mortgage Co. v. Peoples*, 102 Ala. 241. We have also held that if, in fact, the wife did not appear before the officer at all, nor make any acknowledgment to him, his certificate would not preclude her from proving the real facts: *Giddens v. Bolling*, 99 Ala. 319; *Grider v. American etc. Mortgage Co.*, 99 Ala. 281; 42 Am. St. Rep. 58. These rulings do not conflict with the now definitely settled doctrine in this state, that an officer, within his local jurisdiction taking and certifying acknowledgments, acts judicially and not ministerially, and that if the officer acquires jurisdiction of the parties, his certificate in the statutory form cannot, in the absence of fraud or duress, be assailed by evidence that in point of fact they did not acknowledge what he certifies. Our latest utterance upon this subject is in *American etc. Mortgage Co. v. James*, 105 Ala. 347. It is not, however, everything which an officer chooses to include in his certificate that is conclusively established thereby. Our language is, that, under the circumstances stated, "the parties will not be allowed to impeach the truth of the facts he is required by law to certify." The certificate of an officer to a fact which the law did not intrust him to certify is of no value: *Draper v. Bryson*, 17 Mo. 71; 57 Am. Dec. 257. Upon an examination of the certificate which the statute requires, we do not find that he is authorized to certify, nor in the mortgage introduced in this case did he certify, anything whatever in regard to the mental status of Mrs. Thompson. He must examine her touching her signature, and must certify, not that she did or could sign the instrument of her own free will and accord, but simply that she acknowledged, meaning thereby that she stated or admitted the signature to have been so made. The officer is not required to pass upon her capacity to give voluntary assent, and his certificate cannot be conclusive of the question. In *Williams v. Baker*, 71 Pa. St. 476, the court considered this question, under a statute requiring a separate acknowledgment by married women of conveyances of their separate property, and requiring also a certificate very similar in form to that contained in section 2508 of the code of 1886. The wife sought to ⁴⁰⁹ avoid her conveyance, certified in due form, by parol evidence, on the ground of her incapacity because of infancy, to execute the same. The certificate of the officer was relied on as conclusive of the validity of her deed against an attack of that kind. The court said that the form of the certificate did not make it the duty of the mag-

istrate to ascertain and certify in relation to anything, except whether the woman executed voluntarily, of her own free will and accord, without compulsion from her husband; and that inasmuch as the certificate is conclusive only of such facts as the officer was required to certify, she was not concluded by his certificate from showing she was a minor when she signed. We must give a similar construction to our statute.

The circuit court should have allowed the defendant to prove, if he could, that his wife was insane when she affixed her name to the mortgage and acknowledged the same, as he offered to do; and because of its refusal to allow such evidence to be introduced, the judgment must be reversed and the cause remanded.

INSANE PERSONS—CONVEYANCE OF HOMESTEAD.—A deed by an insane husband of the homestead, perfect in form, and executed by him and his wife, is voidable only, but not void; and, if the wife seeks to avoid it, she must return the consideration received thereunder: *Pearson v. Cox*, 71 Tex. 246; 10 Am. St. Rep. 740, and note. The deed of an insane person, not under guardianship, and whose capacity has not been judicially determined, is not void, but voidable only: *Castro v. Geil*, 110 Cal. 292; 52 Am. St. Rep. 84, and note.

HOMESTEAD—CONVEYANCE OF—ACKNOWLEDGMENT OF WIFE.—A conveyance of a homestead by a husband and wife, without the separate acknowledgment of the wife, as required by the statute, is a mere nullity: *Hodges v. Winston*, 95 Ala. 514; 36 Am. St. Rep. 241, and note. A conveyance of an interest in a homestead, executed by the husband alone, is invalid for any purpose: *McKenzie v. Shows*, 70 Miss. 388; 35 Am. St. Rep. 654, and note. A conveyance of a homestead, in which the wife does not join, is absolutely void under a statute which declares that no conveyance affecting the homestead of a married man shall be of any validity unless his wife joins in the execution thereof: *Pipkin v. Williams*, 57 Ark. 242; 38 Am. St. Rep. 241, and note. See further on this subject the extended notes to *Alt v. Banholzer*, 12 Am. St. Rep. 683, and especially that to *Poole v. Gerrard*, 65 Am. Dec. 484.

ACKNOWLEDGMENTS OF DEED.—THE CONCLUSIVENESS of certificates of, is the subject of the extended note to *American Freehold etc. Co. v. Thornton*, 54 Am. St. Rep. 150-159.

BIRMINGHAM DRY GOODS COMPANY v. RODEN.

[110 ALABAMA, 511.]

MORTGAGE, SUBSEQUENT AGREEMENT, WHEN BECOMES A PART OF IT.—If, after the execution of a mortgage on a stock of goods, the parties agree in writing that the mortgagor shall have possession of and shall sell them at private sale, paying the proceeds to the mortgagees, receiving for his services a stated sum monthly, to be retained out of the proceeds of the sale, such new agreement becomes a part of the mortgage, and has the same effect as if it had been originally inserted therein and the provisions inconsistent therewith omitted. If not placed on record, it is to be regarded as a secret agreement.

MORTGAGE, SECRET RESERVATIONS.—If, immediately after the execution of a mortgage on a stock of goods, the parties agree in writing that the mortgagor shall have possession thereof, and shall sell them at private sale, paying the proceeds to the mortgagees, reserving from them a stated monthly salary, such agreement, not being recorded, is a secret agreement for a benefit to him, making the mortgage void as to his creditors, if he was in a failing condition at the time and the facts were sufficient to indicate such condition to the mortgagees.

Claim interposed by B. F. Roden & Co. to goods attached in an action by the Birmingham Dry Goods Company against W. J. Kelso. The court refused the request of the plaintiff to charge the jury that if they believed the evidence, they must find for it. Judgment was thereupon entered for the claimants, and the plaintiff appealed.

E. J. Symer, for the appellant.

F. E. Blackburn and John H. Miller, contra.

514 HEAD, J. A question of prime importance in this case is, whether a mortgage executed by the defendant, Kelso, to the claimants, Roden & Co., is to be declared void as to creditors, upon the undisputed evidence. Kelso was a merchant at Pratt Mines, in Jefferson County, Alabama, and the mortgaged property consisted of the stock of goods which he had been using in carrying on his business as such. The law day was fixed at February 18, 1893, the mortgage being executed on January 25, 1893. There is no express stipulation to that effect, but it is implied that Kelso should continue in possession of the property until the law day. After that time, the secured debt remaining unpaid, Roden & Co. were expressly authorized to take possession of the property, and, after giving ten days' notice by posting, etc., to sell the same at auction to the highest bidder for cash, before the courthouse door of Jefferson county, and apply the proceeds to the payment of the expenses and the secured debt, returning any surplus to the mortgagor; and the mortgagees were author-

ized to bid and become purchasers at the sale: Without contemplating such an agreement, at the time the mortgage was made, but as an entirely independent different transaction, about an half hour afterward, an agreement was entered into, in writing, by Kelso and Roden & Co., by which it was stipulated as follows: "The undersigned W. J. Kelso agrees to take charge of and sell for the said B. F. Roden & Company the stock of goods, wares, and merchandise this day mortgaged by him to the said B. F. Roden & Co., the same being situated in his storehouse in Pratt Mines, Ala., he acting therein as the agent for the said B. F. Roden & Co., the mortgagees in said mortgage. It is further agreed that all moneys arising from the sale of said goods shall immediately be the property of the said B. F. Roden & Co., the mortgagees in the mortgage, above referred to, and shall be paid over to them by the said W. J. Kelso on the last day of each month, beginning on January 31, 1893, or oftener if required, and shall go as credits on the mortgage debt. It is expressly agreed and understood that the said W. J. Kelso, the mortgagor in said mortgage above referred to, renounces and releases all benefit he may have in said stock of goods, and that all sales shall be for and on account of said mortgagees, B. F. Roden ⁵¹⁵ & Co. It is further agreed that, if any of the goods and merchandise are sold on credit, the accounts also are to pass to the mortgagees, B. F. Roden & Co., as their property, and be credited as so many payments of the mortgage debt. This agreement to hold and be in effect till mortgage debt with interest thereon is paid in full. It is agreed further that the said W. J. Kelso shall receive for his services the sum of fifty (\$50.00) dollars per month, to be paid by the said B. F. Roden & Co." The mortgage was duly recorded on the day of its date. The subsequent agreement was never recorded. Kelso remained in possession, selling the goods and making payments to Roden & Co., and in March, 1893, their debt was paid in full; and thereafter the store remained in Kelso's hands. Kelso was paid his wages of fifty dollars per month.

It is clear this agreement was a modification of the contract of the parties, as set forth in the mortgage, binding upon both parties. It was a substitution, in the mortgage, of the new provisions for the provisions therein which were inconsistent with them. As such, the new agreement became essentially a part of the mortgage, of like practical and legal effects as it had been set out therein and the first inconsistent provisions omitted. By it an entirely new and different defeasance and new and different

methods of disposition of the goods were created, which, being withheld from the record, whilst the original was put upon the record as representing the contract of the parties, became and was a secret agreement. To all the world, therefore, the contract was represented to be that Kelso's right to possession should terminate on February 18, 1893, and Roden & Co. should be then empowered to take and sell the goods at auction, etc., whilst the real agreement, known only to the parties themselves, created the relation of principal and agent between themselves, removed all limitation upon the time of Kelso's right to possession, empowered him to sell the goods at private sale, and entitled him to receive for his services fifty dollars per month.

In *Bryant v. Young*, 21 Ala. 264, Young made an absolute transfer of a certain bond to Hall, but, by an extraneous agreement, the transfer was really intended as a security for a specified liability, Young being entitled to the surplus of the avails of the bond after the liability ⁵¹⁶ was discharged. The transaction was held void as to creditors. The court said that "here was a parol trust in favor of Young, the vendor, and the contract was designed to operate in the nature of a mortgage, as between the parties, but as to all the world beside, the sale should be absolute as evinced by their writings." The opinion proceeds to point out how such an arrangement was calculated to mislead and hinder creditors, and the reasoning, we think, applies to the present case. This case was affirmed in *Hartshorn v. Williams*, 31 Ala. 149. Also in *Sims v. Gaines*, 64 Ala. 392; and the court there said that such is the law, though there may be no intent to hinder, delay, or defraud creditors; but, because such is the inevitable consequence of such a transaction, the law condemns it; and, speaking of the secret reservation of a benefit to the debtor, the court said: "It cannot be supposed that, under any circumstances, the law will permit a failing debtor to sell or convey his lands, unconditionally, absolutely, so far as apparent on the face of the instruments to which creditors can have access, and yet reserve to himself the right to the use and occupation thereof for a period of time which may be a source of profit to him: *Lukins v. Aird*, 6 Wall. 78. All such secret arrangements by which a debtor obtains valuable rights, to the prejudice of his creditors, are fraudulent. . . . And the law cannot enter into nice calculations of the value of the benefit the debtor has reserved": See, also, *Proskauer v. People's Sav. Bank*, 77 Ala. 257. In *Stephens v. Regenstein*, 89 Ala. 561, 18 Am. St. Rep. 156, the appointment of the seller of a stock of goods as agent to sell

the same, at a salary of forty dollars per month, was held such a reservation of a benefit as rendered the sale void as to creditors: See, also, Page v. Francis, 97 Ala. 379. "A conveyance absolute in form, but intended only as security for a loan, as shown by a bond with condition to convey on payment of the debt, the papers not being recorded and no change of possession being shown, is constructively fraudulent as against existing creditors": Tryon v. Flourney, 80 Ala. 321; McGhee v. Importers etc. Bank, 93 Ala. 192.

The evidence shows, without conflict, that Kelso owed about \$3,000, and that Roden & Co. knew he was indebted, but did not know how much, or to whom. Kelso's business, as we have seen, was that of a merchant, ⁵¹⁷ and the mortgage was upon his stock in trade. He agreed to assume a new relation involving the suspension of his occupation and the acceptance of an agency to sell out his goods for the benefit of Roden & Co. at a fixed salary, indicating that by reason of his indebtedness he was so involved that he could not carry on the business. To this must be added the undisputed evidence that "Kelso could not see his way out unless he could get time to pay." He executed a second and a third mortgage on this stock of goods. The undisputed evidence shows the maximum value of his property, including the stock of goods, the highest estimated value of which was about sixteen hundred dollars, to have been about two thousand six hundred dollars besides the storehouse at Pratt Mines, in which he did business, and his homestead, occupied by himself, and family, both together worth about two thousand two hundred dollars, and encumbered by a mortgage for seven hundred dollars. It does not appear what the separate value of the store was. When his homestead and one thousand dollars' worth of personal property, which are not subject to the payment of debts, are withdrawn from his assets, and his conduct in reference to his business and financial affairs and the sacrifice and expense incident to enforced judicial sales are considered, it appears from evidence, about which there is no dispute, that he was in very embarrassed circumstances and unable to go on with his business, if not badly insolvent. Roden & Co. found him so, for the proof shows that on the day the mortgage was executed Kelso owed them about one thousand dollars, and paid them two hundred dollars on the debt, and that they were not satisfied with this payment, and demanded a mortgage on his stock of goods for the balance, which was given; and which, with the agreement an half hour afterward, amounted to a disruption of

the business. It cannot be supposed that Roden & Co. contemplated when they first took the mortgage that Kelso would go on with the business, on his own account, as he had done before, for that would be to contemplate a fraud. Hence, we say that the transactions amounted to a disruption of the business. It would be idle to contend that Roden & Co. were not put on inquiry as to Kelso's true condition. We hold, therefore, that all legitimate inferences which a jury could draw from the evidence established Kelso's failing condition, and that Roden & Co. knew, or ought to have known, that such ⁵¹⁸ was his condition; that his transactions with them created a trust—a reservation of a benefit to the debtor—which stamps them as, at least, constructively fraudulent, and they cannot stand. The general charge requested by the plaintiff ought to have been given, and its refusal was error.

Reversed and remanded.

CHATTEL MORTGAGES—SUBSEQUENT AGREEMENTS.—A mortgagee may employ a mortgagor to remain in possession of chattels mortgaged and to sell them and pay the proceeds of the sale in satisfaction of the mortgage: *Hage v. Campbell*, 78 Wis. 572; 23 Am. St. Rep. 422, and note; *Conkling v. Shelly*, 28 N. Y. 360; 84 Am. Dec. 348, and note. A chattel mortgage to secure the payment of a bona fide debt authorizing the mortgagor to retain possession and continue the sale of the goods exclusively for the benefit of the mortgagee, paying the proceeds of sales to him each week, is not fraudulent on its face, but is valid as against creditors, and makes the mortgagor the agent of the mortgagee to sell and account to him: *Murray v. McNealy*, 86 Ala. 234; 11 Am. St. Rep. 33. Where a mortgage is given on a stock of goods with a stipulation for possession by the mortgagor and by agreement outside the mortgage the mortgagor is permitted to sell the goods in the ordinary course of business, and to use a portion of the proceeds thereof in support of his family, paying the remainder over in discharge of the mortgage debt, the whole transaction is not, as a matter of law, fraudulent as against creditors or subsequent purchasers, but will be upheld or condemned according as the arrangement is entered into and carried out in good faith or not: *Frankhouser v. Ellett*, 22 Kan. 127; 31 Am. Rep. 171, and extended note: See *Eckman v. Munnerlyn*, 32 Fla. 367; 37 Am. St. Rep. 109, and also the monographic note to *Peabody v. Landon*, 15 Am. St. Rep. 912.

McGARRY v. NICKLIN.

[110 ALABAMA, 559.]

CONTRACT, PLACE OF.—If a note drawn in Tennessee is sent to Alabama to be executed by a resident of the latter state, who, instead of signing it in the form in which it was drawn, substantially changes it, and then signs and forwards it to his creditor in Tennessee, where it is accepted by the latter in its changed form, it is a Tennessee contract, and, if usurious and void by the laws of that state, is void in the state where the maker lived when he signed it.

CONFLICT OF LAWS—USURY.—A note void by the laws of the state wherein it is made and payable, because of usury, is also void in another state in which the maker resided at the time he signed it, though, by the laws of the latter state, it would not be usurious if executed therein.

Simpson & Jones, for the appellants.

Thurston H. Allen and Thomas R. Roulhac, contra.

561 McCLELLAN, J. This suit is prosecuted by Nicklin against McGarry et al. on a promissory note. The note **562** was signed by the defendants at Florence, Alabama, and is payable at the People's Bank of Chattanooga, Tennessee. A prominent, and indeed, as we shall see, the controlling, question in the case is as to whether the obligation is an Alabama or Tennessee contract. The facts in legal effect bearing upon that issue may be stated as follows: Originally, a corporation of which the defendants were stockholders executed at Florence, Alabama, where it was also payable, a note to one Foster, which was by Foster indorsed to one Chandler, who discounted it with the plaintiff in due course of trade. On the maturity of this note, it was renewed, with the defendants as accommodation indorsers thereon. This renewal note was signed, indorsed, and dated at Florence, Alabama, but was delivered to and accepted by plaintiff at Chattanooga, Tennessee, where it was payable, an officer of the maker corporation going to the latter place in person to arrange for said renewal, taking this note with him, and there arranging for the renewal and delivering the note accordingly. This note was in turn renewed by a note dated at Florence, payable at People's Bank, Chattanooga, bearing eight per cent interest on its face, and signed by the defendants, being like the note in suit except as to date. On the maturity of this note the defendants desired to again renew it, and one of them—Jordan—wrote thus to the plaintiff: "I think I can give you the same paper, with another name on it, that of W. P. Campbell, if you will renew it for six months on payment of the interest accrued," and asked a reply.

Plaintiff replied accepting Jordan's proposition to pay interest and renew the note, and inclosing the form of a note, which, as originally printed, specified Chattanooga as the place of execution and also stipulated for interest at the "legal rate." The words "Chattanooga, Tenn.," in the date line and "legal rate" in the body of the paper were marked out by plaintiff, and the words "Florence, Ala.," substituted for the former, and "8 per cent" for the latter, before the form was sent to the defendants. The letter of plaintiff accompanying this paper requested that the interest accrued on the former note be paid at once, and that the note as made out and indorsed be signed and returned. The paper, as sent to and received by the defendants, contained this stipulation: "If suit is brought on this note, I agree to pay all ⁵⁶³ the attorney's fees and costs of collection." Before signing, the defendants erased or struck out, by drawing a line through them, the words: "I agree to pay all attorney's fees and costs of collection," and added to the paper this memorandum: "Renewal Foster M'fg. Co. note." With this erasure and this addition they signed the paper, had W. P. Campbell to indorse the same, and mailed it to plaintiff at Chattanooga, inclosed in a letter written by Jordan in which he states he has been unable to get the money to pay the accrued interest on the old note, but will pay it soon, and asks that the amount of the new note be credited upon the old, and the latter so credited be held for the unpaid interest. The paper thus changed reached the plaintiff at Chattanooga in due course of mail, and was accepted by him there as the contract between him as payee, the defendants as makers and Campbell as indorser. On these undisputed facts, it is too clear for much discussion that the contract evidenced by this note was consummated at Chattanooga, Tennessee, and, being also payable there, was in every sense and for all purposes a Tennessee contract. The paper sent by the plaintiff to the defendants to be signed and indorsed was essentially a proposition involving certain specified terms. Had it been signed without alteration and then remailed at Florence to the plaintiff at Chattanooga, the contract evidenced by it would have been consummated at Florence by the unqualified acceptance there of plaintiff's proposition evidenced by signing the note containing the terms of that proposition and by delivering the paper thus signed into the mail, which, postage being prepaid, would have been an efficacious delivery to the plaintiff, whereby execution of the note would have been consummated. But this did not happen. The defendants did not accept plaintiff's proposition; but submitted to

the plaintiff at Chattanooga a counter proposition for his acceptance or rejection at that point. 'They, in effect, said, We will not agree to pay the debt and attorney's fees and costs of collection, as you propose, but we will agree, as set forth in the accompanying note, to pay the debt only, and we inclose said note as our proposition counter to yours for your consideration, and acceptance or rejection. Again, plaintiff's proposition was upon the condition that the defendants ⁵⁶⁴ presently pay the interest which had accrued on the existing note. This condition was not met by the defendants, but another was submitted in its stead; that they would pay the interest as soon as practicable in the future, and that in the mean time plaintiff should hold the original note credited with the amount of the renewal note as security for the past due interest. Had there been no change in the paper itself, this failure to meet plaintiff's proposition in respect of the interest, and this submission to the plaintiff at Chattanooga of a counter proposition in that regard, would have left the whole matter open until the plaintiff received the note and the proposition as to interest at Chattanooga and there assented to it, whereby the receipt of the note would have constituted its delivery to him, or rejected it, whereby the whole matter would have been set at large. With these new matters injected into the negotiation by the defendants, the case stands in principle, as if, without previous communication, the defendant had proposed by letter addressed to the plaintiff at Chattanooga to renew the existing note as to its principal by a new note, and had to that end inclosed to the plaintiff for his acceptance or rejection a paper in the form of a note dated and signed by them at Florence, but payable at Chattanooga, and this paper had been delivered to and accepted by the plaintiff at Chattanooga. Upon these facts, which are in legal effect the facts of this case, the note is essentially and for all purposes a Tennessee contract, because it is not only payable in that state but also was executed—made—in that state: Story on Conflict of Laws, secs. 242, 242 a, 280, 291, 292, 293, 293 a, 293 b, 296-306; 3 Am. & Eng. Ency. of Law, 546-549, 561-563; Parsons on Notes and Bills, 324-327; Young v. Harris, 14 B. Mon. 556; 61 Am. Dec. 170; Lee v. Selleck, 33 N. Y. 615; Hyde v. Goodnow, 3 N. Y. 266; Murphy v. Collins, 121 Mass. 6; Rindskopf v. De Ruyter, 36 Mich. 1; 33 Am. Rep. 340; Bell v. Packard, 69 Me. 105; 31 Am. Rep. 251; Milliken v. Pratt, 125 Mass. 374; 28 Am. Rep. 241; 1 Daniel on Negotiable Instruments, secs. 868, et seq; Andrews v. Pond, 13 Pet. 65; Cowles v. Townsend, 37 Ala. 77; Evans v. Kittrell, 33 Ala. 449; Broughton v.

Bradley, 36 Ala. 689; 2 Parsons on Contracts, 696, et seq; Backman v. Jenks, 55 Barb. 468; Johnston v. Gawtry, 83 Mo. 339; Story on ⁵⁶⁵ Promissory Notes, secs. 155, et seq., 165; 1 Randolph on Commercial Paper, sec. 28.

On the trial below, the defendants pleaded that this is a Tennessee contract, and that it was void under the laws of that state for that it stipulates for the payment of a greater rate of interest than is allowed by those laws; and, in support of the plea, certain sections of the code of that state and decisions upon them by its court of last resort were adduced in evidence. The statutes thus relied on and proved are the following:

"Sec. 2700. Interest is the compensation which may be demanded by the lender from the borrower, or the creditor from the debtor, for the use of money.

"Sec. 2701. The amount of said compensation shall be at the rate of six dollars for the use of one hundred dollars for one year; and every excess over that rate is usury.

"Sec. 5622. No person shall receive by way of compensation for the use of money more than at the rate of six dollars for the use of one hundred dollars for one year.

"Sec. 5623. The punishment of this offense shall be a fine, in no case less than ten dollars, nor more than the amount of the usury received, to be ascertained by the jury. In case the defendant plead guilty to the charge, or judgment go against him on a plea in abatement, a jury shall be sworn to ascertain the amount of usury received."

And it was further shown by another section of the code that the word "person" used in section 5622 includes a corporation. The adjudged cases put in evidence were Thompson v. Collins, as reported in 2 Head, 441, and Islar v. Brunson, as reported in 6 Humph. 277. In these cases, it is held by the supreme court of Tennessee that, under the statutes we have quoted, a contract for the payment of money in that state which contains a stipulation for the payment of interest at a greater rate than six dollars for one hundred dollars—or six per cent—is illegal and void, and will not be enforced in the courts. The note sued on here contains an express stipulation for the payment of eight per cent interest on the debt evidenced by it. We have seen that not only was it to be paid in Tennessee, but also that it was made there. The law of that state ⁵⁶⁶ is, therefore, the law of this contract in respect of its validity vel non. By that law and in that state it is void, and this upon principles which are not only not offensive to our laws and public policy, but which, to the

contrary, are given like effect upon similar contracts made in this state: *Youngblood v. Birmingham etc. Sav. Co.*, 95 Ala. 521; 36 Am. St. Rep. 245. The note being void at the place and under the law of the contract, is void in Alabama, and everywhere else, and will not be enforced in our courts: *Authorities supra*; *Story on Conflict of Laws*, secs. 243, 291, 292, 296; 3 Am. & Eng. Ency. of Law, 552-53, and this, of course, though had the same contract been made in this state, it would have been valid and enforceable in our tribunals: *McAllister v. Smith*, 17 Ill. 328; 65 Am. Dec. 651; *Yerger v. Rains*, 4 Humph. 259.

The principle invoked by plaintiff that where a contract for the payment of money is executed in one state or country, and is by its terms to be performed in another, the parties may therein stipulate for any rate of interest allowed by the laws of either such state or country. *Hunt v. Hall*, 37 Ala. 702, *Cubbedge v. Napier*, 62 Ala. 518, can have no application here, since this contract was both executed and to be performed in the state of Tennessee.

The trial below was without a jury. The district judge on the evidence found for the plaintiff, and judgment was entered up accordingly. There was exception taken to this finding and judgment, presenting the case for trial *de novo* on the facts: *Acts 1890-91*, sec. 8, pp. 605 et seq. The trial judge erred in applying the law to the undisputed facts; and we are constrained to reverse the judgment of the district court. A judgment will be here entered for the defendants.

Reversed and rendered.

The Place of the Contract.

In the note to *Forā v. Buckeye State Ins. Co.*, 99 Am. Dec. 668, we have considered the subject of the place where a contract is deemed to have been made, and can here do little more than to cite the cases arising since the writing of the former note, and to illustrate the principles governing the subject by showing their application by the courts in adjudged cases. We wish here to remark that in many of the cases the question determined was not so much what was the place of the contract as it was what was the place which the parties intended to be that of the contract, or, rather, at what place was it intended by the parties that the contract should be operative and be performed. For, if there is otherwise doubt as to what is the place of the contract, and it appears that the parties intended it to be executed in a particular place or state, it will naturally be assumed that they intended it to be controlled by the laws of that state and to be so construed as to be valid there.

The Place of Final Assent.—It is undoubtedly true that a contract cannot exist to which the assent of two or more parties is essential

until that assent has been given by all, and, therefore, where there are negotiations or various steps leading to the contract, the last of which is necessary before it can become a contract, it is not finally executed until that step has been taken, and, wheresoever the other steps have been taken, the last only is regarded as giving the contract a place or locality, and it is, therefore, deemed executed at that place only where the final or last act of consent is given. The principal case is a good, though perhaps an extreme, illustration of this rule. The note there in question was drawn in Tennessee, and sent to the maker in Alabama, his state of residence, to be there executed. Had it been executed as drawn, the final assent would have been manifested by the maker when he affixed his signature in the state of his residence and deposited the note in the mails, or otherwise transmitted it to the payee in Tennessee. The note, under these circumstances, would have been valid, because it violated no law of the state of the maker's residence, where the last act of assent had been given. But the maker did not execute the note as drawn. He made changes in it of so substantial a character that the payee might have refused to accept it as a compliance with what had hitherto been proposed, and, until the acceptance by him, the note was manifestly inoperative. On receipt of the note, he, in effect, ratified the changes that had been made in it by accepting it in the altered form, and by such acceptance it became, for the first time, an obligation. This final assent was given in Tennessee, and, therefore, the note was deemed a Tennessee contract, and as falling within the statutes of that state respecting usury, and was declared void, though had it been drawn in Tennessee in the form in which it was finally executed, and sent to Alabama, and there signed without alteration by the debtor, it would have been regarded as an Alabama contract in nowise affected by the usury laws of Tennessee. We cannot but feel that the application of the rule in the principal case was a miscarriage of justice, and that in so applying it the court overlooked other principles which are at least as well established as that the place of final assent is usually deemed to be the place of the execution of a contract. There is no doubt, however, of the general rule that a contract is, for most purposes, deemed to have been executed at the place or within the state where the final assent to its provisions was given: *Gipps etc. Co. v. De France*, 91 Iowa, 108; 51 Am. St. Rep. 329; *Dord v. Bounaffee*, 6 La. Ann. 563; 54 Am. Dec. 573; *Whiston v. Stodder*, 8 Mart. 95; 13 Am. Dec. 281; *Cromwell v. Royal etc. Co.*, 49 Md. 366; 33 Am. Rep. 258; *Milliken v. Pratt*, 125 Mass. 374; 28 Am. Rep. 241; *Mactier v. Frith*, 6 Wend. 103; 21 Am. Dec. 262; *Wilson v. Lewiston etc. Co.*, 150 N. Y. 323; post, p. 680; *Shelby etc. Co. v. Burgess Gun Co.*, 8 App. Div. 444; 40 N. Y. Supp. 871. Therefore, a bill of exchange drawn upon a partnership is controlled by the laws of the state where it was accepted, though the partners resided, and carried on their business, in another state: *Scudder v. Union Nat. Bank*, 91 U. S. 406; and a contract made by an agent without authority, but ratified by his principal, must be regarded as the contract of the latter made at the place of its ratification: *Dord v. Bounaffee*, 6

La. Ann. 563; 54 Am. Dec. 573. So if an agent receives a proposition for a contract to sell goods of his principal, and transmits it to him in another state, where it is accepted, and the goods shipped to the purchaser, the contract is deemed to be made in the state where accepted, and rights reserved to the vendors by the contract of sale will be respected in the state where the purchaser resided and to which the property was sent, though such rights could not have been reserved had the contract been made in the state of the purchaser's residence: *Barrett v. Kelley*, 66 Vt. 515; 44 Am. St. Rep. 862. It will be observed that the law of the place of acceptance was in this case regarded as attaching to the contract for the purpose of validating its provisions and carrying out the intention of the parties, while in the principal case the law of the place of final acceptance was resorted to for the purpose of invalidating the contract, thwarting the intention of the parties, and rendering inoperative a contract which did not conflict with any law existing at the residence of the debtor and the place where the contract was doubtless intended to be operative and enforceable. It is, as we have elsewhere shown, a rule applicable to the law of usury that if an obligation is made in one state, but is to be performed in another, the parties to it are at liberty to regard it as the contract of either state, and to stipulate for any rate of interest allowable in either: *Note to Bank of Newport, v. Cook*, 46 Am. St. Rep. 201; *McAllister v. Smith*, 17 Ill. 328; 65 Am. Dec. 651; *Kilgore v. Dempsey*, 25 Ohio St. 413; 18 Am. Rep. 306; *Bennett v. Eastern etc. Assn.*, 177 Pa. St. 233; post, p. 723; *Peck v. Mayo*, 14 Vt. 33; 39 Am. Dec. 205; *Kennedy v. Knight*, 21 Wis. 340; 94 Am. Dec. 543. The application of this rule to the facts involved in the principal case would have permitted the enforcement of the note sued upon. In that case, it is clear that, had the last act of assent been given in Alabama, the note as executed would not have offended any statute or any rule of public policy enforceable in the state; and it is further evident that the parties intended to make a valid and enforceable contract, and the court, in our judgment, seized upon a circumstance of an immaterial character, and made it the basis of judicial action. In all contracts the chief question is, What is the intention of the parties? and that, when lawful, is allowed to prevail; and no test or rule of law ought to be applied for the purpose of thwarting such intention, unless the laws of the state do not permit it to have effect. While the place of final assent may, in some circumstances, be controlling, the better rule is, we think, that it is to be considered with other circumstances, but not necessarily to have controlling effect. As was said in a recent case: "The question must be determined with reference to the facts and circumstances surrounding the parties in each case present, and the intention of the parties, so far as it is disclosed, must control. The place where the contract is accepted is important. It fixes the time that the minds of the parties met and the contract consummated. It does not, however, necessarily determine the place or the law under which the contract must be executed. So, also, is the place important where the contract was talked over, and its substantial details arranged. Yet this

standing alone would not control, for the place in which the contract is to be executed is of equal importance in determining what must have been the intention of the parties": *Wilson v. Lewiston etc. Co.*, 150 N. Y. 314, 323; post, p. 000.

Letters and Telegrams.—The place of final assent usually determines the place where a contract is made, when it consists of letters or telegrams passing between parties situate in different places or countries. When a telegram is sent, or a letter deposited in the post-office, accepting a proposition received by mail or telegram, the contract thus consummated is deemed to have been made at the time when, and the place where, the last act of assent was thus done or made, and the contract is, therefore, binding, though, as a matter of fact, the letter or telegram is not received by the person to whom it was addressed: *Dord v. Bounaffee*, 6 La. Ann. 563; 54 Am. Dec. 573; *Bell v. Packard*, 69 Me. 105; 31 Am. Rep. 251; *Vassar v. Camp*, 11 N. Y. 441; *Trevor v. Wood*, 36 N. Y. 307; 3 Abb. Pr., N. S., 355; 93 Am. Dec. 511; *Perry v. Mt. Hope Ins. Co.*, 15 R. I. 380; 2 Am. St. Rep. 902; *Taloe v. Merchants' Ins. Co.*, 9 How. 390; *Garrettson v. North Atchinson Bank*, 47 Fed. Rep. 867; 51 Fed. Rep. 168; *Adams v. Lindsell*, 1 Barn. & Ald. 681; *Household etc. Ins. Co., v. Grant*, L. R. 4 Ex. Div. 216. In one instance, where a telegram was sent to a person in another state, and was acted upon by his agent, it was held that the resulting contract was made in the state whence the telegram was sent. This decision overlooked the principle to which we have referred and the authorities which we have cited, but did not, at least upon its face, manifest any intent to overrule them or to establish a doctrine contrary to that maintained by them: *Tillinghast v. Boston etc. Lumber Co.*, 39 S. C. 484.

Guaranties.—The general rule that a contract is deemed to be made where the last assent or act necessary to its existence as a contract takes place is frequently applied to the law of guaranties. Thus, a guaranty until its acceptance by some one is inoperative. Hence, if an offer of guaranty is made in one state, but is accepted in another, the contract is deemed to be a contract of the state or country wherein it was accepted: *Jordan v. Dobbins*, 122 Mass. 168; 23 Am. Rep. 305; *Milliken v. Pratt*, 125 Mass. 375; 28 Am. Rep. 241.

The delivery of a contract is usually the last act necessary to its becoming a binding obligation, and the place of such delivery must, for most purposes, be deemed the place of the contract: *Lawrence v. Bassett*, 5 Allen, 140; *Hyde v. Goodnow*, 3 N. Y. 266. It is familiar law that the writing or signing of a contract, or the acknowledgment of a deed, cannot alone give it effect. It must also be delivered. Hence, though a note should be signed in the partnership name by one of its members, yet if it be not delivered until after the dissolution of the firm, it cannot be received as a partnership obligation: *Woodford v. Dorwin*, 3 Vt. 82; 21 Am. Dec. 573. And a note drawn, dated, and signed on Sunday, but not delivered on that day, does not fall within the statute making void instruments executed on Sunday: *Flanagan v. Meyer*, 41 Ala. 132; *King v. Fleming*, 72 Ill. 21; 22 Am. Rep. 131; *Fritsch v. Heislen*, 40 Mo. 555. The fact that a note is

dated at a designated place, while it is prima facie evidence of its execution at that place, is not conclusive, and parol evidence may be received to show that it was actually executed elsewhere: *Overton v. Balton*, 9 Helsk. 762; 24 Am. Rep. 367; *First Nat. Bank v. Mann*, 94 Tenn. 17; *Wells, Fargo & Co. v. Vansickle*, 64 Fed. Rep. 944. If it is signed in one state or country, but is first delivered and becomes a binding obligation in another, the latter is the place of the contract: *Gay v. Rainey*, 89 Ill. 221; 31 Am. Rep. 76; *Hart v. Wills*, 52 Iowa, 56; 35 Am. Rep. 255; *Briggs v. Latham*, 36 Kan. 255; 59 Am. Rep. 546; *Fant v. Miller*, 17 Gratt. 47. A somewhat extreme application of this rule was made in *Bell v. Packard*, 69 Me. 105; 31 Am. Rep. 251. See also, *Milliken v. Pratt*, 125 Mass. 374; 28 Am. Rep. 241. By the laws of Massachusetts, a married woman could not bind herself by a promissory note, but by the laws of Maine she could. A married woman residing in the former state signed therein a note as surety of her husband, and it was mailed from her place of residence to the debtor in Maine, and was, on that account, held to have been executed within the latter state and to be there binding on her. This note, however, according to the cases hereinbefore cited, was not executed in Maine, but in Massachusetts, for it was in that state that the wife did the last act which it was necessary for her to do, and when the note was inclosed in the mails, she had placed herself beyond the power of recalling it. The opinion of the court, if justifiable at all, is best justified on the ground that the parties intended to make a contract valid by the laws of the state wherein it was to operate, and that "no contract must be held as intended to be made in violation of the law, whenever, by any reasonable construction, it can be made consistent with the law and which it was competent for the parties to adopt."

Place of Performance.—Where the parties to a contract reside in different states or countries, unless they take the trouble to both go to the same place, one of them must manifest his assent in one state or country and the other in another. We think it absurd, for the purpose of determining the place of the contract and by what laws it shall be construed and its validity adjudged to inquire which of the parties happened to manifest his assent last, or what was the mode or place of delivery. From the contract, or from it and other competent evidence, the place where it was intended to be executed or enforced can be made evident. The performance of the contract is the essential thing, and, in our judgment, should control, and the place where that performance is to take place should be deemed, for all substantial purposes, the place of the contract. "Where the contract is either expressly or tacitly to be performed in any other place, there the general rule is in conformity to the presumed intention of the parties that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance": *Story on Conflict of Laws*, sec. 280; *Bennett v. Eastern etc. Assn.*, 177 Pa. St. 233; post, p. 000; *Liverpool etc. Co. v. Phoenix Ins. Co.*, 129 U. S. 397; *Coghlan v. South Carolina etc. Co.*, 142 U. S. 101; *Andrews v. Pond*, 13 Pet. 65. Hence, a check drawn in one state, but

payable in another, is governed by the laws of the latter: *Abt v. American etc. Bank*, 159 Ill. 467; 50 Am. St. Rep. 175; *Bowen v. Newell*, 13 N. Y. 290; 64 Am. Dec. 550. As a general rule, if the contract is by its terms to be performed in a state or country, such state or country is to be deemed the place of the contract, though it may have been delivered, and the last assent or act necessary to its operation may have taken place or been manifested, elsewhere: *Orcutt v. Nelson*, 1 Gray, 536; *Shoe etc. Bank v. Wood*, 142 Mass. 563; *Hart v. Livermore etc. Co.*, 72 Miss. 809; *Johnston v. Gawtry*, 83 Mo. 339; *National etc. Assn. v. Ashworth*, 91 Va. 706; *Hefflebower v. Detrick*, 27 W. Va. 16.

Contracts for the Sale of Personal Property made between persons residing and doing business in different states, when the laws of the states differ upon some question connected with a contract of sale or with obligations arising out of it, have frequently called for decisions respecting the place of the contract. In some instances, the place where the last act of assent was given, may have been regarded as controlling, but more usually the place of performance has been accepted as fixing the place of the contract, and if the goods are, by the terms of the contract, to be delivered to the vendee or to a carrier for him in the state where the vendor resides, or if the last act necessary on his part to otherwise consummate the sale takes place in that state, it is regarded as the place of the contract, which is valid, though it offends the laws of the state of the purchaser's residence and wherein the goods sold are to be used, perhaps in violation of its laws: *Parsons etc. Co. v. Boyett*, 44 Ark. 230; *Thurman v. Kyle*, 71 Ga. 628; *Dunn v. State*, 82 Ga. 27; *Osgood v. Baudér*, 75 Iowa, 550; *McIlvane v. Lagare*, 36 La. Ann. 359; *Newman v. Cannon*, 43 La. Ann. 712; *Orcutt v. Nelson*, 1 Gray, 536; *Hardy v. Potter*, 10 Gray, 89; *Merchant v. Chapman*, 4 Allen, 362; *Abberger v. Marlin*, 102 Mass. 70; *Brockway v. Maloney*, 102 Mass. 308; *Dolan v. Green*, 110 Mass. 322; *Garland v. Lane*, 46 N. H. 245. Though had the sale been made in the state where the vendee resides and to which the goods were sent, upon order, it would have been void, and the consideration thereof not collectible, yet, if the contract must be regarded as the contract of the state where the sale was consummated, a promissory note given in payment, signed by the vendee in the state of his residence, and by him forwarded to the vendor, is enforceable in the courts of the state of the vendee's domicile: *Atlantic etc. Co. v. Eby*, 82 Ga. 438. Other decisions refuse to apply the test of delivery or consummation of the sale as fixing the place of the contract. Thus, in Michigan it was held that where a vendor of goods who, being within the state, solicited and received an order for certain intoxicating liquors, which he afterward delivered at his residence to a carrier for the purchaser, could not recover the purchase price thereof, the sale being prohibited by the laws of Michigan: *Webber v. Howe*, 36 Mich. 150; 24 Am. Rep. 590; and, on the other hand, it was held in Rhode Island that a recovery could be sustained for a breach of a contract to deliver goods in New York, though, by the laws of

the latter state, such contract was within its statute of frauds and therefore not enforceable in its courts: *Hunt v. Jones*, 12 R. I. 265; 34 Am. Rep. 635.

Borrowing and Lending of Money.—The parties to a contract for the borrowing and lending of money often reside in different places, and the result of the loan is a bond or other obligation valid by the laws of one of the states and not valid by the laws of the other. In these and other circumstances the question is presented whether the transaction or contract is deemed to take place in the state of the borrower's residence or in that of the lender's. Where statutes defining usury and imposing penalties therefor are involved, the majority of the authorities affirm that if a contract "was made in one state, but was to be performed in another, the parties were at liberty to regard it as a contract of either state, and to stipulate for any rate of interest allowable in either, and, as a result of this rule, the parties to a contract may make it payable or otherwise stipulate for the performance of it in a state other than that of its execution, and, when they do so, may agree to pay the highest rate of interest permissible in either state": *Note to Bank of Newport v. Cook*, 46 Am. St. Rep. 201. The decisions respecting the place of a contract consisting of the borrowing and lending of money and the taking of an obligation for its repayment, it must be admitted, are not harmonious. In the case of the borrowing of money by a resident of one state from a resident of another, secured by a mortgage on real property of the mortgagor, situate in the state of his residence, it has been held that the note, though payable by its terms in the state of the lender's residence, is not a contract of that state, and, therefore, may be enforced, though usurious by its laws. This decision was based partly upon the ground that the parties to the contract were entitled to have it sustained, if it was valid, at the place of residence of either: *Depau v. Humphries*, 28 Mart. N.S. (La.) 1; and partly upon the ground that the mortgage, being upon real property and being valid by the law of the state in which such property was situate, that being also the domicile of the mortgagor, it was the duty of the court to give full effect to the security: *Chapman v. Robertson*, 6 Paige, 633; 31 Am. Dec. 264; *Fitch v. Remer*, 1 Biss. 337. This decision is in harmony with *Arnold v. Potter*, 22 Iowa, 194. Where a resident of Pennsylvania became a member of a New York building and loan association, and subsequently applied for a loan therefrom, and signed promissory notes payable to the association at its office in New York, and executed a mortgage upon land in Pennsylvania to secure such notes, it was held that the contract was a New York contract governed by the laws of that state and not by those of Pennsylvania, and therefore that the Pennsylvania laws respecting usury were inapplicable: *Bennett v. Eastern etc. Assn.*, 177 Pa. St. 233; post, p. 000. In *Bank of Harrison v. Gibson*, 60 Ark. 269, a proposition for borrowing money, made by a resident of Arkansas was accepted by a resident of Indiana who took in payment of the loan a note payable in the latter state, secured by a mortgage on real estate situate in Arkansas. It was held that the

contract was an Indiana contract. In *Falls v. United States etc. Co.*, 97 Ala. 417, 38 Am. St. Rep. 194, a loan was negotiated in Alabama by an agent of a loan association situate in another state, to whom the money borrowed was sent and by whom it was paid to the borrower. The security taken being a mortgage upon real property situate in Alabama, the contract was regarded as an Alabama contract and within the law of that state respecting usury. The general tendency of the authorities where a loan is secured by a mortgage is to regard the contract, at least in so far as it is attempted to be enforced against the mortgaged premises, as a contract of the place where they are situated, though it is by its terms made payable elsewhere. Especially is this the case where the moneys loaned are paid to the borrower in the state in which the property is situate, though the obligation given for repayment is forwarded to the lender residing in another state or country: *Thompson v. Edwards*, 85 Ind. 414; *Pine v. Smith*, 11 Gray, 38; *Joslin v. Miller*, 14 Neb. 91; *Oregon etc. Co. v. Rathbun*, 5 Saw. 32. Where a person, desiring to borrow money, requested a person residing in another state to effect the loan for her, and a resident of the latter state agreeing to make the loan, delivered the money to be loaned to the person thus authorized to request the loan, together with a paper for the borrower to sign which was dated in the state where the moneys were to be delivered, and simply acknowledged the borrowing and delivering of the money, and which paper was to be signed by the borrower in the state of her residence and forwarded to the lender, it was held that the justifiable inference from this transaction was that the parties intended it to be a loan made by the lender at her place of residence, and, this being so, the fact that the paper was signed in another state was immaterial, and that, the contract of loan being made upon condition that the paper should be signed and returned to the lender in the state of her residence, the paper, when so signed and returned, became operative as evidence of a contract made in the state of the lender's residence and subject to its laws: *Hill v. Chase*, 143 Mass. 129.

A Contract of Insurance, where the insurer and the assured reside in different states, may, it is said, adopt the law of either state by express provisions contained in such contract, and, when such is the case, it will be deemed a contract of the state thus adopted: *Greisemer v. Mutual etc. Assn.*, 10 Wash. 202; *Penn etc. Co. v. Mechanics' etc. Co.*, 72 Fed. Rep. 413; 73 Fed. Rep. 653. In the absence of a stipulation of this character, a contract of insurance is deemed to be a contract of the place where the last act was done or assent given necessary for it to become a binding and operative contract. This, according to the weight of authority, is not necessarily nor ordinarily the actual delivery of the contract to the insured. If he makes application for insurance, which is forwarded to the insurer at its home office or place of business in another state, where it is necessary that the application shall be approved or accepted, and the policy or some other writing showing such approval or acceptance, duly signed by the requisite officials, is deposited in the United States mails directed

to, or for the purpose of being delivered to, the insured, the policy takes effect from that time, and the contract is deemed to have been executed at the place where such acceptance or mailing took place: *Ford v. Buckeye etc. Co.*, 6 Bush, 133; 99 Am. Dec. 663; *Northampton etc. Co. v. Tuttle*, 40 N. J. L. 476; *Hyde v. Goodnow*, 3 N. Y. 266; *Western v. Genesee etc. Co.*, 12 N. Y. 258; *Shattuck v. Mutual etc. Co.*, 4 Cliff. 598; *Taylor v. Merchants' etc. Ins. Co.*, 9 How. 390. In a recent case, it appeared that Chicago insurance brokers at St. Louis, Missouri, solicited insurance from a Wisconsin corporation doing business there upon property owned by it in the state of Iowa, and this soliciting resulted in a request to an insurance company of Milwaukee, Wisconsin, to write a policy upon such property. The insurance company sent the policy to the brokers, together with a blank application, containing questions for the applicant to answer, and a premium note for it to sign. This blank and note were forwarded by the brokers to the applicant, at St. Louis, where it accepted the policy, and, after filling out the blank, signed the note and returned it with the cash premium to the brokers at Chicago, who, in turn, forwarded the cash and the premium note to the insurance company at Milwaukee. The policy recited that the application and premium note had been given, and were on file in the company's office in Milwaukee, and the application was a part of the contract of insurance. Under these circumstances, it was held that the contract did not become complete until the application and premium note were received and approved by the insurance company, and it was, therefore, a Wisconsin contract: *Seamans v. Knapp etc. Co.*, 89 Wis. 171; 46 Am. St. Rep. 825. Where, on the other hand, it appears that though the application for insurance has been accepted and the policy signed by the proper officers of the insurer, yet that it cannot take effect until the happening of some further act, then the place at which this latter act occurs is deemed to be the place of the contract, and by the laws prevailing at that place it must be construed and its validity determined, as where the policy of insurance provides that it shall not take effect until the first premium shall have been actually paid, and such premium is paid and the policy delivered in the state in which the person insured resides: *Equitable etc. Soc. v. Clements*, 140 U. S. 226; *Equitable etc. Assur. Soc. v. Winning*, 58 Fed. Rep. 541. A state may enact a statute applicable to all insurance policies delivered within that state, and, if so, a foreign insurance company doing business therein is bound by such statute, though the insurance may have been accepted and the policy issued in another state: *White v. Insurance Co.*, 4 Dill. 177; *Wall v. Equitable etc. Ins. Co.*, 32 Fed. Rep. 273. If an application for insurance is made in one country and forwarded to an insurance company doing business in another, and such company, instead of accepting the insurance proposed by the application, issues a policy differing from the application and forwards it to the other country in which the applicant resides, where he accepts the policy and signs

the premium note, the transaction is consummated by such acceptance by the insurer. Until such acceptance the policy is not a binding obligation, for it does not conform to the original proposals. The policy must, therefore, be deemed a contract of the place where the insurer resides, rather than that of the country in which it was issued: *In re State etc. Ins. Co.*, 22 Fed. Rep. 109.

Fixing Place of Contract by Agreement.—Where the parties to a contract reside in different states or countries, there appears to be no doubt that they may choose to be governed by the law of one state rather than of the other. This may be done by a direct stipulation in the contract that it shall be deemed a contract and governed and construed by the laws of one of such states or countries, naming it: *Griesemer v. Mutual etc. Assn.*, 10 Wash. 202; *Penn. etc. Ins. Co. v. Mechanics etc. Co.*, 72 Fed. Rep. 413; 73 Fed. Rep. 653. The same result may be accomplished by a stipulation in the contract, valid and enforceable in one of the states or countries and not in the other. Such a stipulation manifests the assent of the parties to be governed by the laws of the country in which the stipulation was legal. This rule was applied in *In re Missouri Steamship Co.*, L. R. 42 Ch. Div. 321. In that case, it appeared that a contract had been made in Massachusetts between an American citizen and a British company of shipowners for the shipment of cattle from Boston to England in a British ship, and that the contract contained a clause to the effect that the company should not be liable for the negligence of the master or crew of the ship. A contract of this character was valid by the laws of England, but in Massachusetts was deemed to be against public policy and void. Through the negligence stipulated against the cattle were lost, and the question presented in the case was, whether, notwithstanding the stipulation, the owner of the cattle might recover for their loss. The various judges who announced their opinions all agreed that as there was nothing immoral in the stipulation, and as it was valid according to the laws of England, it should be given effect by the courts of that country, and preclude any recovery for the loss of the property. In a later case arising in the same country, the contract in question was entered into between an English and a Scotch firm, signed in London, but to be performed in Scotland, and contained a stipulation that, if any dispute should arise out of the contract, it should be settled by arbitration of two members of the London Corn Exchange. In an action brought under this contract by the Scotch firm in Scotland the English firm pleaded that the action could not be maintained because of the arbitration clause, but the Scotch courts held that this clause was subordinate to the laws of Scotland, and would not be given effect. In giving his opinion in favor of the reversal of this judgment, Lord Herschell said: "Where a contract is entered into between parties residing in different places, where different systems of law prevail, it is a question, as appears to me, in each case, with reference to what law the parties contracted, and according to what

law it was their intention that their rights, either under the whole, or any part of the contract, should be determined. In considering what law is to govern, no doubt the *lex loci solutionis* is a matter of great importance. The *lex loci contractus* is also of importance. In the present case, the place of the contract was different from the place of its performance. It is not necessary to enter upon the inquiry, which was a good deal discussed at the bar, to which of these considerations the greatest weight is to be attributed, namely, the place where the contract was made, or the place where it is to be performed. In my view, they are both matters which must be taken into consideration, but neither of them is, of itself, conclusive, and still less is it conclusive, as it appears to me, as to the particular law which was intended to govern particular parts of the contract between the parties. In this case, as in all cases, the whole of the contract must be looked at and the rights under it must be regulated by the intention of the parties as appearing from the contract. It is perfectly competent to those who, under such circumstances as I have indicated, are entering into a contract, to indicate by the terms which they employ which system of law they intend to be applied to the construction of the contract and to the determination of the rights arising out of them": *Hamlyn v. Talisker Distillery*, L. R. [1894] App. Cas. 202, 207. On the other hand, if, in a contract to carry passengers or freight from one country to another made in the country where the carriage is to commence, a stipulation is inserted, valid by the laws of that country, but not valid where the carriage is to end, such stipulation, if not immoral, will be treated as valid in the latter country: *Fonseca v. Cunard S. S. Co.*, 153 Mass. 553; 25 Am. St. Rep. 660; *Forepaugh v. Delaware etc. Co.*, 128 Pa. St. 217; 15 Am. St. Rep. 672; *O'Reagan v. Cunard S. S. Co.*, 160 Mass. 356; 39 Am. St. Rep. 484.

The questions presented in the cases herein cited determining what was the place of the contract pursued that inquiry for the purpose of ascertaining whether the contract in question was valid, and, if so, by what law it should be construed. Other cases must necessarily arise in which the question must be determined, though neither the validity nor the construction of the contract is in issue. Thus, in some of the states, statutes of limitation have been enacted designating the periods within which actions may be brought upon written contracts executed within the state and fixing a different period for those executed without the state. In many instances in which the parties to a contract reside in different states or countries at the time of its execution, it will appear that the obligation was drawn and signed by the debtor in the state of his residence and forwarded by mail to his creditor residing in another state. In such cases, shall the contract be deemed executed in the place where it was written, signed, and deposited in the mails, or in the place where it was received? Upon the principle applied in many of the cases, that a contract must be deemed executed at the place where the last act of

assent was given, the contract should be deemed to be one of the place where it was signed and deposited in the mails, provided, as so signed, it conformed to the previous negotiations between the parties, so that the person to whom it was sent was under obligation to accept it. Other cases may be suggested in which an obligation drawn and signed in one state is forwarded to another and which may there become obligatory, though there is no person residing therein who has any option whether he will accept it or not. Thus, an undertaking, or bond upon appeal, may be executed in one state by residents thereof for the purpose of being filed in a court of another state to support an appeal from or procure a stay of execution upon, a judgment. In this case, when the bond or undertaking is received and filed in the court, the respondent in the action may not have any option to determine whether he will accept it or not. Upon its filing it becomes operative, though before such filing it was not. Shall it be regarded as a contract of the state wherein it is thus filed or of the state wherein the obligors signed it and parted with possession of it with intent that it should be used for the purpose indicated in it? If the statute of the state in which they reside provides a shorter period of limitation upon instruments executed beyond the state than upon those executed within it, may they insist that, because the instrument was not effective until filed in the court of another state, it was executed in that state only, and that no remedy exists because an action was not brought against them within the time provided for the bringing of actions upon instruments executed within the state of their residence? To the questions here proposed, and others of kindred character which must frequently arise, we have been unable to find any response in the reported cases, and are surprised that the topic seems not to be suggested in any of the text-books upon the statutes of limitation.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

BADDELEY v. SHEA.

[114 CALIFORNIA, 1.]

REAL PROPERTY—LIABILITY OF OWNER—LATENT DEFECTS.—The owner of a private house is not liable to invited visitors on lawful business for injuries occasioned by those latent defects which are either concealed in defective workmanship, or are incidental to the ordinary wear and tear of houses. Such defects are among the casualties which no man can avoid without that extraordinary care and vigilance which the law does not impose.

REAL PROPERTY—CARE REQUIRED OF OWNER TOWARD PERSONS INVITED.—The law imposes upon the owners of private houses the duty of only ordinary care to avoid injury to persons who are invited there upon lawful business. Ordinary care, in such cases, is that which good housekeepers ordinarily exercise to avoid danger of personal injuries in their own private dwelling-houses.

REAL PROPERTY—DUTY OF OWNER TO INSPECT FOR LATENT DEFECTS.—The owner of a private dwelling who has a platform at the bottom of the front steps of his house, constructed of good materials, in a substantial manner, and which is only seven or eight years old, and which has been repainted every year, is under no legal obligation to inspect the platform from time to time, to make sure that those who pass into and out of the house may avoid injury.

REAL PROPERTY—LATENT DEFECTS—LIABILITY OF OWNER—ILLUSTRATION.—The owner of a private dwelling who has a platform at the bottom of the front steps of his house, about three feet above the sidewalk, is not liable for an injury to the servant of a transfer company, who, in carrying a heavy trunk on his back from the house, breaks through the platform and fractures a bone of his leg, where the platform was constructed in a substantial manner, of good materials, about seven or eight years before the accident, and would ordinarily wear sixteen or twenty years without repair, where it had been repainted every year, and where the owner had no knowledge, until after the accident, that the platform was unsound by reason of dry rot, or partial decay.

INSTRUCTIONS—QUESTIONS OF FACT.—An instruction which merely applies the law to hypothetical facts, and submits to the jury the question whether the facts hypothetically stated are true, is not an instruction as to questions of fact.

Sawyer & Burnett, for the appellant.

M. M. Estee and Charles A. Shurtleff, for the respondent.

³ VANCLIFF, C. Action for recovery of damages for personal injuries.

Plaintiff, being a servant of the City Transfer Company, of the city of San Francisco, called at the private dwelling-house of defendant, at the latter's request, for the purpose of carrying two trunks from there to the railroad depot. After having taken the smaller trunk to his wagon, he returned for the larger trunk, which was very heavy. Defendant then told him he would not be able to carry that heavy trunk downstairs, and offered to assist him; but plaintiff declined the proffered assistance, and placed the trunk upon his back, saying to defendant: "You put that young lady on top of this trunk and I can take her down." He then went down the inside stairs, passed out at the front door and down the front steps to a platform about three steps above the sidewalk. When he stepped down upon the platform, the plank upon which he stepped broke, letting his leg through the opening made by the break, and fracturing one of the bones (fibula) at the juncture of the ankle.

The issues of fact were tried by a jury, whose verdict was in favor of the plaintiff, and the judgment of the court was in accordance with the verdict. The defendant has appealed from the judgment and from an order denying his motion for a new trial.

The evidence, without conflict, shows that the front steps, including the platform which broke, was built for defendant, about seven or eight years before the accident, by a carpenter and builder whose competency and skill was in no degree impeached; that it was well constructed of first-rate material, which would ordinarily wear sixteen to twenty years without repair; that it had been repainted every year; that it appeared to defendant ⁴ and those who had passed over it to be perfectly sound and safe up to the time of the accident; and that the defendant had no knowledge that it was unsound, unsafe, or at all defective until after the accident. But an examination after the accident disclosed a partial decay (dry rot) of the under side of the plank that broke and of a stringer on which it rested, which was not apparent from the outside, and which could not have been discovered without making an opening through or under the vertical side of the

steps sufficient to admit a person under the platform, which was only about one foot above the ground. It is not pretended by respondent that there was any defect in the construction of the steps or platform, except that he contends there was not sufficient ventilation under them; and upon this question the evidence was conflicting. On the part of defendant, it was shown that the open space under the platform extended back to and connected with the open space under the house, and that the open space under the house was ventilated in the ordinary way; but, on the part of plaintiff it was contended that there should have been ventilating holes immediately connected with the open space under the platform and steps. But there was no evidence that defendant had any knowledge or notice of the alleged deficiency of ventilation, nor that any other ventilation than that under the house was necessary.

At the request of defendant's counsel the court, properly, I think, gave to the jury the following instruction: "The defendant is only bound to exercise the care which housekeepers or owners of houses of common prudence are accustomed to exercise; and if you find from the evidence that the defendant did exercise such care in and about keeping the platform in good condition, then your verdict will be in favor of the defendant."

Counsel for plaintiff contended that under the rule expressed in this instruction the defendant must be found guilty of negligence, in that he had not examined the under side of the platform for the purpose of ascertaining ⁵ whether it was sound and safe, this being the only negligence claimed to have been proved."

In answer to this, defendant's counsel contended that to have made any examination of the under side of the steps or platform within eight years after they were built, under the circumstances proved, and without any notice or indication that they were unsound or unsafe, would have been extraordinary care and vigilance on the part of the defendant, which the law does not require; and to this effect asked the following instruction, which was refused, on the express ground that it was a "charge as to fact":

"The latent defects which are either concealed in defective workmanship, or are incident to the ordinary wear and tear of houses, are among the casualties which no man can avoid without that extraordinary care and vigilance which the law does not impose. If you believe from the evidence that the platform through which the plaintiff broke was constructed in a good and substantial manner, and gave no indication of being unsafe up to the accident testified to, then I instruct you the defendant

was under no legal obligations to have the said platform inspected from time to time; and if you find from the evidence that the defect in said platform was secret and unknown to defendant, and was incident to the ordinary wear and tear of said platform, then you will find a verdict for the defendant."

I think this instruction is substantially correct and should have been given.

In speaking of the liability of owners of private houses for the consequences of defects therein dangerous to invited visitors on lawful business, Mr. Wharton, in his book on Negligence, section 825, says: "For the question, when such liability is mooted in reference to such a visitor, is whether the proprietor exercised in his house the care which good housekeepers are accustomed to exercise. What is such care? Certainly, when we recollect the great varieties of habit and taste in this respect, all we can ask is, that the house, to those ⁶ visiting it, should be free from those obvious defects of which an occupant, not an expert in mechanics, would be cognizant. Those latent defects which are either concealed in defective workmanship, or are incidental to the ordinary wear and tear of houses, are among those casualties which no man can avoid without the exercise of that extraordinary care and vigilance which the law does not impose": Citing English cases.

There can be no question that in such cases the law imposes the duty of only ordinary care, which is properly defined to be such as good housekeepers ordinarily exercise to avoid danger of personal injuries in their own private dwelling-houses. Nor do I think it questionable that an examination by the defendant of his stairs and platform at any time before the accident, for the purpose of detecting latent defects, under the circumstances and facts assumed and hypothetically stated in the requested instruction, would have been extraordinary care.

The only ground upon which the instruction was refused is that it instructs as to questions of fact which should have been submitted to the jury. But I do not so understand it. It merely applies the law to hypothetical facts, and submits to the jury the question whether the facts hypothetically stated are true. The questions of fact thus submitted were: 1. Whether the platform which broke had been constructed in a good and substantial manner; 2. Whether the defects therein, if any, were latent, and were unknown to defendant before the accident; 3. Whether the platform gave any indication of being unsafe before the accident. And, in case the jury should find the affirmative of the first two of these questions and the negative of the third, instruct-

ed, as legal conclusions, that it had not been the duty of the defendant before the accident to examine the platform for the purpose of discovering latent defects either in the workmanship or caused by ordinary wear, and that the verdict of the jury should be for the defendant. That these were simple conclusions of law is unquestionable (Shearman and Redfield on Negligence, secs. 52, 53); and that such conclusions were correct appears not only from the above extract from Wharton on Negligence, supported by English cases, but from the following American cases: Lunney v. The Concord, 58 Fed. Rep. 913; Hobbs v. Stauer, 62 Wis. 108; De Graff v. New York etc. R. R. Co., 76 N. Y. 125; East St. Louis etc. Co. v. Hightower, 92 Ill. 139; Hoffman v. Dickinson, 31 W. Va. 152; Warner v. Erie Ry. Co., 39 N. Y. 468; Sjogren v. Hall, 53 Mich. 275; Mars v. Delaware etc. Canal Co., 54 Hun, 625; Chicago etc. Ry. Co. v. Elliott, 55 Fed. Rep. 949; Loftus v. Union Ferry Co., 22 Hun, 33; 84 N. Y. 455; 38 Am. Rep. 533. It should be borne in mind, however, that the ultimate question of law to be decided is, whether it was the duty of the defendant, under the circumstances proved, to examine his platform for the purpose of ascertaining whether there were latent defects in it; for, if such was not his duty, his omission to make such examination was not negligence in any degree, and the defendant was entitled to a verdict (Smith v. Whittier, 95 Cal. 279); and whether or not such was his duty depends entirely upon whether or not he had notice of facts which would induce a man of ordinary prudence to suspect the existence of a latent defect in consequence of which danger of injury to person or property might be reasonably apprehended; and when, in such a case, the facts, of which one charged with negligence had notice, are known and undisputed, the question of duty to examine for latent defects is a pure question of law, though it may involve a question as to the degree of care required, which is also a question of law when the facts are given: Stratton v. Central etc. Horse Ry. Co., 95 Ill. 25; Sackett on Instructions to Juries, 15. In accordance with these principles, courts grant nonsuits and direct verdicts in actions for negligence, whether the negligence in question be that of the defendant or contributory negligence of the plaintiff: Glascock v. Central Pac. R. R. Co., 73 Cal. 137; Orcutt v. Pacific Coast Ry. Co., 85 Cal. 291; Smith v. Occidental S. S. Co., 99 Cal. 462.

Counsel for respondent have cited many cases, none of which seems to be relevant. Only those of them, however, from which counsel have copied extracts, without stating the facts bearing on the point decided, need special notice.

In Carleton v. Franconia Iron etc. Co., 99 Mass. 216, cited for

respondent, the unsafe condition by which plaintiff was injured, and of which he was not warned, was known to the defendant.

In *Currier v. Boston Music Hall Assn.*, 135 Mass. 414, in which it was held that if defendant neglected his duty to keep the hall in a safe condition, so that in fact it was unsafe when plaintiff entered it, "defendant's knowledge or ignorance of the defect was immaterial," the only defects complained of were a depression in the floor and that the hall was not sufficiently lighted. These defects, if they existed, must have been patent to all who entered the hall, and it was not questioned that they were so. Had the hall been properly lighted, the depression in the floor would have been apparent, so that the negligence which was the immediate cause of the injury was the omission of the duty to light the hall, which duty was not questioned.

In *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295, "it was admitted that the defendant knew that the stairs (by the breaking of which plaintiff was injured) were greatly decayed and unsafe, and there was no evidence that he cautioned or notified the plaintiff that they were so."

In *Holmes v. Drew*, 151 Mass. 578, the only question was, whether the public had been invited to use a sidewalk, on defendant's private land.

In *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548, it was assumed to have been the duty of defendant, arising from contract, to use ordinary skill in repairing a privy so as to make it safe. He failed to use such skill, in consequence of which the plaintiff was injured. The ⁹ defendant asked the trial court to instruct the jury "that the defendant is not liable, unless he knew or believed that the repairs which he made were insufficient and that the premises were still unsafe and dangerous." The appellate court overruled an exception to the refusal of this instruction, saying: "His undertaking required at least the skill of an ordinary mechanic, and his failure to furnish it, either because he did not possess or neglected to use it, would be gross negligence." While this implies that the knowledge or belief of the defendant in that case was immaterial, it is obvious that it does not touch the question involved in the case at bar.

In *Lindsey v. Leighton*, 150 Mass. 285, 15 Am. St. Rep. 199, the plaintiff was injured by a defect in a platform at the head of stairs which the defendant was in duty bound to repair and keep in safe condition. The defect was, that a board in the platform had become loose. The defendant asked the court to instruct the jury: "If the jury find that there was such defect, but that it was not known to the defendant at or previous to the accident, then they must find for the defendant." The instruction was

refused, and the appellate court overruled an exception to the refusal of it. There was no evidence that the defect was latent, nor that the defendant had no knowledge of it. The plaintiff had made a prima facie case by proving the defect and consequent injury; and unless there was rebutting evidence tending to show that the defect was latent, and that the defendant was ignorant of it, the instruction was properly denied, because not applicable to the evidence. For like reasons the case of *Camp v. Wood*, 76 N. Y. 92, 32 Am. Rep. 282, is not in point.

As considerable importance has been attributed to the fact that plaintiff was invited to remove the trunks from defendant's house, it should be observed that he was not invited to carry the heavy trunk downstairs, but that defendant protested against his doing so; and also that plaintiff did not accept defendant's invitation gratuitously. ¹⁰ It was the business of plaintiff's employer to carry trunks for hire. The parties were equally interested in the transaction.

I think the order and judgment appealed from should be reversed, and a new trial granted.

Haynes, C., and Searls, C., concurred.

For the reasons given in the foregoing opinion, the order and judgment appealed from are reversed, and a new trial granted.

Henshaw, J., Temple, J., McFarland, J.

REAL PROPERTY—NEGLIGENCE—DUTY AND LIABILITY OF OWNERS—LATENT DEFECTS.—The owner of premises must keep them safe for those who come there by his invitation, express or implied: Note to *Pomponio v. New York etc. R. R. Co.*, 50 Am. St. Rep. 133; *Beehler v. Daniels*, 18 R. I. 563; 49 Am. St. Rep. 790. He must exercise ordinary care and prudence to render the premises reasonably safe for the visit, and is liable in damages to persons, so invited, for injuries sustained by reason of defects of which he has, or ought to have, notice, and of which he has not given his visitor warning: *Atlanta etc. Oil Mills v. Coffey*, 80 Ga. 145; 12 Am. St. Rep. 244; monographic note to *Zoebis v. Tarbell*, 87 Am. Dec. 660, 662, showing when an owner is liable for injuries to persons coming on his premises. But, "those latent defects which are incident to the ordinary wear and tear of houses, or which spring from the bad faith or negligence of the builders, and of which the owner has no notice, are among those casualties which no man can avoid without the exercise of that extraordinary care and vigilance which the law does not impose," and will not render him liable to visitors or guests: See monographic note to *Godley v. Haggerty*, 59 Am. Dec. 733, 736, on the liability of owners of premises defectively constructed or out of repair for injuries resulting therefrom. An invitation is inferred where there is a common interest or mutual advantage: Note to *Hayward v. Miller*, 34 Am. Rep. 236. A tenant, or occupant of property, having the control thereof, is so far as third persons are concerned, the owner: See monographic note to *Lowell v. Spaulding*, 50 Am. Dec. 776, 782, on the respective liability of landlord and tenant for nuisances or injuries from failure to repair.

CHATEAU v. SINGLA.

[114 CALIFORNIA, 91.]

PARTNERSHIP FOR IMMORAL PURPOSE—ACCOUNTING.—A contract of partnership to let furnished apartments for the purposes of prostitution is illegal and immoral, contrary to public policy, and against the express mandate of a statute declaring every person who lets any apartment or tenement, knowing that it is to be used for the purpose of assignation or prostitution, to be guilty of a misdemeanor. Hence, neither partner can maintain an action against the other for an accounting of the business.

Appeal from a judgment, and from an order denying a new trial.

A. Ruef, for the appellant.

A. B. Treadwell, for the respondent.

⁹¹ HENSHAW, J. The action is a proceeding in equity by one partner to dissolve a copartnership between himself and defendant, for the appointment of a receiver, for a statement of accounts, and generally for the closing up of the business of the partnership. In the complaint it is averred that the partnership was formed for the business "of subletting and renting certain tenements, and in supplying and furnishing the necessary ⁹² household furniture therein to fit the same for habitations and dwellings for human beings." Further averments of the complaint were that the defendant had excluded plaintiff from all share in the proceeds and profits of the partnership, and from all dealings with the partnership property, and had collected rents and profits of the partnership which he claimed to own and hold as his individual property, and for which he refused to account.

Defendant admitted the partnership, made denial of any and all the wrongful acts charged against him, and for a further and separate defense averred that the copartnership was and is illegal, against good morals and against public policy, "in this, that the same consisted in the letting, subletting, leasing, and hiring of said tenements and premises in the complaint set forth, and the furniture therein contained, for immoral and unlawful purposes, to wit, for the purpose of maintaining, keeping, and conducting, and carrying on brothels and houses of ill-fame, and houses, places, apartments, and resorts for the purposes of assignation and prostitution, and that the business carried on by said copartnership has been the letting of said premises, tenements, and furniture for such purposes, and that the plaintiff, at the time of entering into and forming said copartnership, and at all times since, well knew that such was to be and was the business of said

copartnership, and that said copartnership was carrying on said business and letting said premises and furniture for the purposes aforesaid, and that all the rents received or collected by or on account of said copartnership, from the tenants in the complaint referred to and mentioned, were received and collected as rents for the houses and apartments used for the purposes aforesaid."

The court found "that the said copartnership business has not at any time, never has been, and is not now, illegal, against good morals, or against public policy; that said copartnership firm simply rented the real property from one David M. Richards, between said ⁹³ December 30, 1890, and October 31, 1893, and then and thereafter sublet said property, consisting of four tenements, to four common prostitutes, and that said common prostitutes, during all of said time have been common prostitutes, supporting themselves by prostitution at said premises; that said prostitutes, as tenants of said copartnership firm, composed of plaintiff and defendant, paid to said copartnership the rents of said premises so occupied and hired by said tenants of and from said copartnership, and that said copartnership firm, and the individual members thereof, are not participants in any manner with said prostitutes in carrying on said business of prostitution; that said premises are situate in a section of this city and county of San Francisco occupied mainly and largely by common prostitutes, and said common prostitutes, including the tenants of said copartnership firm, are permitted and allowed by the police authorities of the city and county of San Francisco to carry on their said business in said district and on said premises."

The court then proceeded to decree a dissolution of the partnership and the winding up of its affairs, instructing the receiver to hold the partnership property, effects, moneys, debts, etc., subject to the further order of the court.

It is difficult to see how the court, in view of the evidence and of the law, could have found that the copartnership business was not illegal, against good morals, and against public policy. Section 316 of the Penal Code declares that every person who lets any apartment or tenement, knowing that it is to be used for the purpose of assignation or prostitution, is guilty of a misdemeanor. If this contract of copartnership had for its purpose the letting of apartments for purposes of prostitution, and if the business of the copartnership, as pleaded by the answer, was the doing of this precise thing, then the copartnership contract was

illegal, against good morals, against public policy, and against the express mandate of the statute, and equity would no more ⁹⁴ entertain an action founded upon such contract for the relief of either of the parties to it, than it would entertain an action between two thieves for an equitable division of their plunder. A void contract, a contract against public policy or against the mandate of the statute, may not be made the foundation of any action, either in law or in equity: *Estate of Groome*, 94 Cal. 69; *Buck v. Eureka*, 109 Cal. 504; *Parsons on Partnership*, 4th ed., sec. 8; *Lindley on Partnership*, 105.

That this partnership was based upon such an illegal contract and had for its business purpose the unlawful act of letting furnished apartments for purposes of prostitution, the evidence does not for a moment permit us to doubt. Going no further into its consideration than is necessary, the testimony of the plaintiff himself concludes the question. He says: "The houses are used for purposes of prostitution and no other purpose, and the women who occupy them are common prostitutes. When I sold Mr. Singla a half interest in this business, and took him in as a partner, I knew what these houses were being used for. We were to rent the houses for women to carry on the business of prostitution there, and, on getting the leases from Mr. Richards on the several occasions, it was for the purpose of being able to sublet the premises for those purposes." The evidence of the defendant, Singla, is identical in effect, and throughout the whole record there is no conflict upon the subject.

The latter portion of the finding, to the effect that the section of the city where these tenements are located is mainly inhabited by prostitutes, who are permitted to remain there by the police authorities, is meaningless in the case. Public policy is not made or unmade by the acts or omissions of a police department, nor will it be contended that the police department may abrogate a penal statute or annul an express mandate of the law.

The finding, therefore, that the copartnership business was not illegal is unsupported, and cannot stand. It must fall, and with it must fall the judgment and decree ⁹⁵ which depend upon it. The cause must be reversed, with directions to the trial court to take evidence and determine in accordance with these views whether or not the business of the copartnership was the letting of apartments or tenements for the purpose of assignation or prostitution, knowing that the same were to be so used. If it shall determine that such was in truth the purpose for which

the copartnership was formed, and that such was the business which the copartnership conducted, it will deny to either party in this proceeding any relief.

It is ordered accordingly.

McFarland, J., and Temple, J., concurred.

CONTRACTS FOR ILLEGAL OR IMMORAL PURPOSES—PARTNERSHIP—ACCOUNTING.—A contract designed to defeat the policy of a statute is void: *Brooks v. Cooper*, 50 N. J. Eq. 761; 35 Am. St. Rep. 793, and note; *Woods v. Armstrong*, 54 Ala. 150; 25 Am. Rep. 671; and no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. A court of equity will leave the parties to such an agreement where it finds them: Note to *Bradtfeldt v. Cooke*, 50 Am. St. Rep. 708. A contract to rent a house for a purpose forbidden by a valid city ordinance is illegal, and cannot be enforced: *Milne v. Davidson*, 5 Mart., N. S., 409; 16 Am. Dec. 189, and note showing that no action will lie upon a contract originating in a transaction forbidden by statute. But the mere avowal by a lessee of an intent to use the leased premises for an immoral purpose, as to keep a bawdy house, does not justify the lessor in repudiating his contract: Note to *Michael v. Bacon*, 8 Am. Rep. 140. In the note to *Lemon v. Grosskopf*, 99 Am. Dec. 65, it is said that where a joint agreement, or contract of partnership, is illegal, and money is paid to one of the associates upon an illegal contract, a fellow associate cannot recover his share of the money, because, in order to do so, he must rely upon the illegal contract of partnership; but in *Crescent Ins. Co. v. Bear*, 23 Fla. 50, 11 Am. St. Rep. 331, it was held that one partner, in an illegal venture, might have an accounting, in equity, against the other, where profits had been made and the latter was attempting to appropriate them to himself.

McCULLY v. COOPER.

[114 CALIFORNIA, 258.]

EXECUTORS AND ADMINISTRATORS—POSSESSION OF ASSETS—CONFLICT OF LAWS.—If a domiciliary administrator happens to be temporarily in this state, with the evidence of a simple contract debt, in the form of a certificate of deposit in an insolvent national bank situated here, the ancillary administrator appointed in this state is entitled, upon demand and refusal, to recover the certificate from the domiciliary administrator, in an action therefor, after its rejection by the receiver as a valid claim against the bank.

Trippet & Neale, for the appellant.

J. W. Hughes, for the respondent.

258 *SEARLS, C.* This is an action to recover possession from George H. Cooper, the defendant, of a certificate of deposit, issued by the Consolidated National Bank of San Diego, located in

San Diego, California, for eight thousand dollars, dated April 2, 1892, payable to the order of James L. Mason, and upon which certificate there is indorsed a credit of two thousand two hundred dollars.

Defendant had judgment, from which judgment and from an order denying her motion for a new trial plaintiff appeals.

James L. Mason, the holder and owner of the certificate of deposit, was a resident of the county of Hancock, in the state of Indiana, at which place he died ²⁵⁹ on the second day of January, 1894, leaving a large amount of property, real and personal, situate and being in said county and state.

On the twentieth day of January, 1894, George H. Cooper was, by an order of the circuit court in and for said county of Hancock, state of Indiana, duly appointed administrator of the estate of said James L. Mason, deceased, duly qualified as such administrator, and letters of administration were duly issued to him, and he is still such administrator.

At the time of his death the said James L. Mason was the owner of and in possession of said certificate of deposit, in said county and state, and the same came into the possession of said Cooper, as his administrator, on the twentieth day of January, 1894.

In June, 1893, the Consolidated National Bank of San Diego became insolvent, closed its doors and refused to pay its depositors, and thereafter, in said year 1893, Andrew J. O'Connor was duly appointed and qualified as receiver of said bank, and is still acting as such receiver.

On the twenty-fourth day of January, 1894, defendant Cooper, as such administrator, sent by mail the said certificate of deposit to said Andrew J. O'Connor, receiver, at San Diego, California, for the purpose of proving up his claim as said administrator of said Cooper, deceased, against said insolvent bank, and thereupon the receiver of the bank declined either to permit Cooper to prove up the claim or to return the certificate of deposit to him upon demand.

On the ninth day of March, 1895, the said receiver, upon a second demand, returned the certificate of deposit to Cooper, as administrator, at the county of San Diego, California, where it was retained when this action was brought, and for twenty days thereafter, and then was returned to the state of Indiana, where it has since been held by said Cooper, as administrator of said Mason, deceased.

Under the laws of the state of Indiana administrators ²⁶⁰ ap-

pointed therein may, by order of the circuit court of said state, sell and dispose of all certificates of deposit in the state of Indiana, lawfully in their possession as such administrators.

The status of Jane Mason McCully, the plaintiff herein, may be thus stated: On the twentieth day of March, 1894, said plaintiff was duly appointed, by order of the superior court in and for the county of San Diego, state of California, the administratrix of the estate of said James L. Mason, and thereupon duly qualified as such administratrix, and letters of administration were duly issued to her, and she ever since has been and still is the administratrix of the estate of said Mason.

The estate of said James L. Mason had not, so far as appears in this action, any property or assets in the county of San Diego, or state of California, save and except the demand hereinbefore mentioned against the Consolidated National Bank of San Diego, evidenced by the certificate of deposit hereinbefore mentioned.

Before this action was brought plaintiff demanded possession of said certificate of deposit from defendant Cooper, but defendant refused and still does refuse to deliver the same to her.

Plaintiff sought judgment for possession of the certificate, if such possession could be had, and, if not, for five thousand eight hundred dollars, the value thereof, and for damages and costs.

The question involved is this: Can the California administratrix recover from the domiciliary administrator, appointed in the state of Indiana, who is temporarily in this jurisdiction, with the evidence of a simple contract debt, which contract debt is due and owing here, the certificate of deposit which is the evidence of such debt.

There are a number of propositions bearing more or less upon the question, which are either universally conceded, or established by such a preponderance of authority as not to call for comment. Among these are:

1. Save as otherwise provided by statute, the proper jurisdiction in which to obtain letters testamentary or of ²⁶¹ administration is in the state and place of the decedent's domicile at the time of his death: Williams on Executors, 6th Am. ed., 495, et seq; Wilkins v. Ellett, 108 U. S. 256; Crosby v. Leavitt, 4 Allen, 410.

2. The authority of an executor or administrator does not extend beyond the jurisdiction of the state or government under which he is invested with his authority: Civ. Code, sec. 1913; Story on Conflict of Laws, sec. 512, and cases there cited.

3. Where there are no debts owing by the estate in the juris-

diction where the foreign debtor resides, and no ancillary administration has been granted there, the principal administrator may, in such foreign state, receive a voluntary payment from the debtor, which will be a good acquittance to him, even if an ancillary administrator should be subsequently appointed: *Klein v. French*, 57 Miss. 662; *Wilkins v. Ellett*, 108 U. S. 256; *Schluter v. Bowery Sav. Bank*, 117 N. Y. 125; 15 Am. St. Rep. 494; *Reynolds v. McMullen*, 55 Mich. 568; 54 Am. Rep. 386; *Gray's Appeals*, 116 Pa. St. 256.

4. So an administrator who has, within the jurisdiction of his appointment, obtained a judgment against a debtor of a foreign state, or has reduced the personal property of the estate to possession, so as to acquire the legal title thereto, and it is wrongfully taken from him and carried to a foreign state, he may in such foreign state maintain an action, not officially, but in his individual capacity, upon such judgment, or to recover such personal property so wrongfully taken from him: *Talmage v. Chapel*, 16 Mass. 71; *Biddle v. Wilkins*, 1 Pet. 686; *Greasons v. Davis*, 9 Iowa, 219; *Lewis v. Adams*, 70 Cal. 403; 59 Am. Rep. 423; *Fox v. Tay*, 89 Cal. 339; 23 Am. St. Rep. 474; *Low v. Burrows*, 12 Cal. 188; *Story's Conflict of Laws*, sec. 516.

5. If there be assets in another state or states than that in which the principal letters are granted, an administration may be obtained there, and such administration will be regarded as ancillary to the administration of the domicile, and, as a general rule, the excess of the ²⁶² assets resulting from such ancillary administration, after the payment of local debts, expenses of administering and local legacies, if any, in the jurisdiction of the ancillary administration, will be transmitted to the administrator of the domicile, to be there distributed according to the law of the vicinage: *Estate of Apple*, 66 Cal. 432.

6. A certificate of deposit is a negotiable security, and to that extent is upon the same footing with promissory notes: *Welton v. Adams*, 4 Cal. 37; 60 Am. Dec. 579; *Brummagim v. Tallant*, 29 Cal. 503; 89 Am. Dec. 61; *Mills v. Barney*, 22 Cal. 240; *Poorman v. Mills*, 35 Cal. 118; 95 Am. Dec. 90.

7. An executor or administrator, duly qualified to act as such, may assign negotiable securities due and owing to his decedent at the time of his death, which have come to him by virtue of his office, and his assignee may sue the maker thereof in another state without the necessity of letters testamentary or of administration being had in such latter state, if, by the law of the forum, actions are maintainable by the assignees of negotiable securities:

Harper v. Butler, 2 Pet. 239; *Sanford v. McCreedy*, 28 Wis. 103; *Robinson v. Crandall*, 9 Wend. 425; *Patchen v. Wilson*, 4 Hill, 57. There are some authorities in opposition to the proposition last enunciated, but it is thought that the cases cited, and others to like effect, are upon principle correct.

8. For the purpose of founding administration, a simple contract debt is assets where the debtor resides, even if a bill of exchange or promissory note has been given for it, and without regard to the place where the bill or note is found payable: *Wyman v. Halstead*, 109 U. S. 654.

Under this state of the law, and upon the facts of the case as demonstrated in the bill of exceptions and findings, what was the duty of the defendant when plaintiff was appointed administratrix in California?

He had not indorsed or assigned the certificate. The receiver had refused to allow it as a valid claim against ²⁶³ the bank. Defendant could not maintain an action to establish it as a claim in this state.

The very object of the ancillary administration in this state is to collect assets of the estate here, and it is the bounden duty of plaintiff to so collect them.

A paramount object of the local or ancillary administration is to collect the assets, locally situated, and to pay therefrom the demand of local creditors, if any there be. Whether there are any such creditors can only be determined by giving the notice to creditors required by our law. It would seem that, upon principle, it became the duty of defendant, when plaintiff was appointed and qualified, to surrender to the latter the evidence of the debt in question, which is upon simple contract, the payment of which can only be enforced here.

We concur in the views of the supreme court of the state of Mississippi, as expressed in *Klein v. French*, 57 Miss. 670, 671, where, after discussing cognate questions and enunciating the general principles applicable, it is said of the domiciliary administrator: "He has the title and the possession; he has the right to receive voluntary payment; he has the right to apply for and receive the appointment of ancillary administration, or to secure it to his nominee. He cannot, therefore, hold the evidence of debt and do nothing, for this would be most unjust to the distributees, and would result in a loss of the debt to them," etc., and after pointing out his duty to secure his own appointment, if practicable, and if not, it is said: "He should then take proper steps to

have another appointed, and turn over to him the collection of the debt."

We conclude that when after her appointment plaintiff demanded from defendant possession of the certificate of deposit, it was the duty of the latter to have delivered the same to her, and that upon his refusal so to do, as against plaintiff, he was the wrongful holder thereof.

It follows that the findings of the court that plaintiff at the time of the filing of the complaint was not, never ²⁶⁴ has been, and is not now, the owner of, or entitled to, the possession of the certificate of deposit, and that defendant was and is the owner of, and lawfully entitled to the possession of, said certificate of deposit, are not supported by the evidence.

We recommend that the judgment and order appealed from be reversed and a new trial ordered.

Haynes, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed and a new trial ordered.

Temple, J., Henshaw, J., McFarland, J.

ADMINISTRATION, ANCILLARY AND DOMICILIARY—JURISDICTION.—The personal estate of a decedent in another state can only be reached by ancillary administration obtained in the state where the property is situated: *Lines v. Lines*, 142 Pa. St. 149; 24 Am. St. Rep. 487. The courts of every state into which a person may temporarily come acquire jurisdiction of him by the service of its process, whether the cause of action arose therein or not: *Alley v. Caspari*, 80 Me. 234; 6 Am. St. Rep. 178; monographic note to *De La Montanya v. De La Montanya*, 53 Am. St. Rep. 181, on jurisdiction over absent citizens. The general rule is, that no executor or administrator can either sue or be sued, in his official capacity, in the courts of any other country than that from which he derives his authority to act in virtue of the letters there granted to him: Note to *Jackson v. Johnson*, 89 Am. Dec. 273; monographic note to *Goodall v. Marshall*, 35 Am. Dec. 484, on ancillary administration; but if foreign executors or administrators come within the jurisdictional limits of a state, they are liable to be sued there by creditors, or to be brought to an account by legatees or distributees: See monographic note to *Alley v. Caspari*, 6 Am. St. Rep. 179, 184, on the jurisdiction of the courts of one state or country over citizens of another.

IN RE WHARTON.

[114 CALIFORNIA, 367.]

ATTORNEYS—DISBARMENT—FALSE AND FRAUDULENT AFFIDAVITS.—It is sufficient to disbar an attorney that he has been found guilty of knowingly exhibiting to the court false and fraudulent affidavits of service of summons, and inducing the court to accept such affidavits as genuine.

APPEAL—DISBARMENT OF ATTORNEY—CONFLICTING EVIDENCE.—If the evidence in proceedings for the disbarment of an attorney, though conflicting, lends support to the findings of the court, such findings will not be disturbed upon appeal.

ATTORNEYS—DISBARMENT—RESORT TO CRIMINAL COURTS.—It is not a prerequisite to the disbarment of an attorney that resort should first be had to the criminal courts, where the charge against him for a violation of his obligations involves a felony.

ATTORNEYS—DISBARMENT—JURY TRIAL.—An accused attorney, in disbarment proceedings, is not entitled to a trial by jury. The constitutionality of a statute providing for a trial by the court, in such cases, is beyond question.

J. H. Leggett, E. C. Hart, and W. H. Layson, for the appellant.

S. Solon Holl, W. P. Harlow, and Clinton L. White, for the respondent.

368 **GAROUTTE, J.** This appellant, an attorney at law, was charged by accusation before the superior court of the county of Sacramento with violating his obligations as an attorney, and after issue joined, upon a hearing, he was found guilty of the charges filed against him, and his license as a practicing attorney revoked. An appeal to this court being accorded by section 287 of the Code of Civil Procedure, the matter is now here for consideration.

The main charges against Wharton, as indicated by the accusation, may be briefly and substantially stated as follows:

“1. As attorney for plaintiff in the divorce action of Hoxie v. Hoxie, commenced in the superior court of the county of Sacramento, Wharton, in violation of his oath and duty as an attorney and to mislead the court, exhibited to the court and filed as genuine a false and fraudulent affidavit of service of summons, to which the name of one Peter Stortz was attached; that the defendant Hoxie had not been a resident of Sacramento county for more than two years, and was not in the county, and personal service of the summons could not be made on him in that county, and his whereabouts was unknown, all of which was well known to said Wharton. In fact, the summons was never served on Hoxie, either by personal service or by publication, nor did

he ever appear in the action. Wharton obtained Stortz' signature by leading the latter to believe he was signing a receipt, and then upon the false affidavit procured the default of Hoxie to be entered, induced the court to accept the ³⁶⁹ affidavit as genuine, had the case tried and a decree rendered in favor of plaintiff, purporting to dissolve the marriage between plaintiff and defendant."

"2. The accusation further shows that in 1895 Wharton, acting as his own attorney, filed in court a complaint in which he, as plaintiff, sought a decree of divorce from his wife, Hattie Wharton. He returned the summons in this case with a false and fraudulent affidavit of service attached to it, also signed by Peter Stortz, the latter being led to believe by Wharton that he was signing his name as a witness to a will. Upon this fraudulent affidavit Wharton caused the default of his wife to be entered in the action, the same as if she had been served with the summons and had failed to appear within the time allowed by law. He also induced the court to accept the fraudulent affidavit as genuine, and he called the case for trial the same as if the defendant in the case had been regularly served with summons and copy of the complaint and had made default."

The trial court found both of these charges made out by the evidence beyond a reasonable doubt; and that these acts of the accused are amply sufficient to demand his discontinuance of the practice of the law there is no doubt.

The accused has brought the evidence of the trial here in bulk, and, after a careful perusal of it, we are entirely satisfied that the findings of the court are fully supported therein. The general reputation of the accused, and also that of the principal witness against him, were largely involved in the investigation. Again, the evidence upon various branches of the case was contradictory, and for this reason, as to the facts, the case was pre-eminent-ly one for the trial judge, whose conclusions we would not readily disturb.

It is further insisted that the accusation filed against the accused contains a charge amounting to felony, and that recourse should first be had to the criminal courts for a trial of that charge before this proceeding could ³⁷⁰ be inaugurated. There is nothing in this contention. For a full consideration of this identical question we refer to *Ex parte Tyler*, 107 Cal. 78. Neither is the accused entitled to a trial by jury. The statute (Code Civ. Proc., sec. 297) provides for a trial by the court, and the constitutionality of that section is beyond question. There are a

few other matters urged by the appellant why this judgment should be reversed, but, after careful consideration, we consider them of minor importance, and wholly insufficient as grounds for a retrial of the cause.

Judgment affirmed.

Harrison, J., Henshaw, J., McFarland, J., and Temple, J., concurred.

Rehearing denied.

ATTORNEYS—DISBARMENT.—Presenting an affidavit containing a statement known to be false in making or supporting a claim for pre-emption is good ground for the disbarment of an attorney: See monographic note to *In re Philbrook*, 45 Am. St. Rep. 82, on grounds of disbarment of attorneys and counselors at law. In this country, except when restrained by statute, a court may disbar an attorney by reason of his criminal act, without waiting for a criminal prosecution: Note to *In re Philbrook*, 45 Am. St. Rep. 80.

APPEAL—FINDINGS—EVIDENCE.—A finding of fact made by a jury or trial judge will not be disturbed by the appellate court if it is supported by competent evidence: *Edwards v. Reid*, 39 Neb. 645; 42 Am. St. Rep. 607. An appellate court will not disturb findings of the trial court, where there is evidence sufficient to justify them: *Devlin v. Quigg*, 44 Minn. 534; 20 Am. St. Rep. 592.

KELLOGG v. KING.

[114 CALIFORNIA, 878.]

INJUNCTION—NECESSITY OF SHOWING TITLE.—One who has, under a lease, an exclusive right of hunting upon a game preserve, may, by injunction, restrain acts or threatened acts of trespass thereon, without showing a title in fee in plaintiff's lessors. It is enough that they have a bona fide possession of the premises under claim and color of right, as possession is evidence of title, and a party may rely upon his possession as against a mere intruder.

LEASE—EFFECT OF RESERVATION UPON PRIVILEGE GRANTED.—A reservation of pasturage, in a lease, does not affect, or militate against, the exclusiveness of hunting privileges conferred by the lease.

INJUNCTION—IRREPARABLE DAMAGE—ABILITY TO RESPOND IN DAMAGES.—The remedy by injunction may be invoked to restrain acts, or threatened acts, of trespass in any instance where such acts are or may be an irreparable damage to the particular species of property involved. The question of the solvency or insolvency of the wrongdoer is an immaterial factor, and such acts may be enjoined, irrespective of the ability of the defendant to respond in damages.

INJUNCTION—TRESPASSERS HUNTING ON LEASED PREMISES.—One who has, under a lease, an exclusive right of hunting upon a game preserve has a property right of peculiar and exceptional character, and, if others invade the premises and shoot

and drive away the game, it is a case of irreparable damage from the destruction of the very substance of the property right which plaintiff holds under his lease, and justifies the issuance of an injunction without regard to the solvency or insolvency of the wrongdoers enjoined.

INJUNCTION—MULTIPLICITY OF ACTIONS.—One who has, under a lease, an exclusive right of hunting upon a game preserve, and who has no adequate remedy at law against trespassers who invade the premises and shoot and drive away the game, without bringing a separate action against each individual defendant, is entitled to an injunction, upon the ground that it will avoid a multiplicity of actions.

ANIMALS, WILD BY NATURE—PROTECTION OF PROPERTY IN.—In so far as the legislature has given private dominion to individuals over wild game, a person is as much to be protected in the enjoyment of his rights in this species of property as in any other under the law. Hence, under a statute making living animals, wild by nature, the subject of ownership while on the land of the person claiming them, wild birds, such as ducks, geese, rail, and snipe, may be protected, by the owner of property upon which they are found, from the acts of trespassers.

INJUNCTION—TRESPASSERS HUNTING ON LEASED PREMISES—PARTIES PLAINTIFF.—The trustee of a hunting club, being the trustee of an express trust, and who has leased, in his own name, from the owner and for such club, the exclusive right of hunting on a game preserve, may sue to enjoin those who trespass by hunting upon the leased premises, without joining with him those for whose benefit the action is prosecuted.

APPEAL—REVERSAL—FINDINGS—NEW TRIAL.—If a judgment is reversed upon findings which were against the plaintiff and appellant, there must be a new trial, as a judgment for him, by the appellate court, would be unsupported by the findings of fact, and that court has no power to make them.

Young & Powers, for the appellant.

L. G. Harrier and J. M. Gregory, for the respondents.

380 VAN FLEET, J. This is an action for an injunction to restrain the defendants, some forty in number, from threatened acts of trespass upon plaintiff's premises by entering thereon, and destroying his game preserve by shooting, killing, and driving away the wild game thereon.

The evidence, which was quite full, and wholly without conflict, tends to show, substantially, as alleged in the complaint, that plaintiff, as trustee of the Cordelia Shooting Club, an association of sportsmen, of which plaintiff is the president and executive officer ³⁸¹ rents under a written lease, at a yearly rental of twelve hundred dollars, a large body of unreclaimed swamp and overflowed land in Solano county for the purposes of a game preserve; that under his lease plaintiff has taken and now holds possession of said land, and has completely inclosed, by means of a substantial barb-wire fence and natural boundaries, consisting of wide and deep sloughs, the greater part of said land, some

three thousand acres in extent; that within such inclosure are numerous ponds, sloughs, and lagoons, and wide reaches of overflowed tule lands, which afford inviting and favorite feeding grounds for wild game fowl, such as ducks, geese, rail, and snipe, and where, more particularly during the months intervening the 1st of September and the 1st of March, those species of game birds are in the habit of returning annually and congregating in great numbers, and thereby affording valuable and very desirable hunting privileges.

That within such inclosure plaintiff has placed arks, and other buildings and structures suitable and necessary to a complete and convenient shooting resort for the use and enjoyment of the members of said club, and employs keepers to look after and protect the said premises; and for the purpose of further preserving said premises to the use and enjoyment of said club, and to warn all others than members thereof from invading and encroaching upon said preserve, plaintiff, soon after taking possession of said premises, did, in September, 1894, have posted and set up, and has since maintained throughout said inclosure in and about the ponds, sloughs, and other bird resorts therein, between four and five hundred notices stating that said premises were inclosed, and warning all persons from trespassing thereon, either for shooting or other purposes; that such notices are in large type and so conspicuously and numerous distributed over said inclosure as to necessarily arrest the attention of any person intruding thereon.

That these defendants, in pursuance of a concerted ³⁸² design and common purpose entered into by them to interfere with and defeat plaintiff's rights and those of said club in said premises, and to prevent their exclusive enjoyment thereof, did, during the months of September, October, and November, 1894, and during plaintiff's possession of said premises, on divers and numerous occasions, and in various numbers, invade and intrude upon said inclosure, both by day and by night, and shot, killed, and carried away large numbers of said game birds, and largely frightened away and dispersed such birds as they did not kill, shot into and broke down plaintiff's said notices, and threatened and intimidated his employes in charge of said preserve, and otherwise violated plaintiff's rights in various ways. That while upon said premises each of the defendants, in addition to the warning in said posted notices, was personally served with a notice in writing, signed by plaintiff as lessee, stating that said premises were leased and inclosed by him, and warning said de-

defendants to trespass no further thereon but to remove therefrom; but such notice and warning were entirely ignored by defendants and each of them, and a number of said defendants returned repeatedly to said premises after such warning. That the defendants threatened to continue and repeat their said acts of trespass, and to enter upon said premises and hunt and kill such game birds whenever they so desire, regardless of plaintiff's rights therein; that the effect of constant and indiscriminate shooting at said birds, such as is practiced and persisted in by the defendants, is and has been largely to frighten said birds and permanently drive them from said resort, and deter and prevent their return thereto, and thereby to wholly destroy the value of plaintiff's said premises as a game resort and preserve, and work irreparable injury thereto, which cannot be compensated in money damages.

That owing to the great number of defendants, and their constant, continuous, and repeated acts of trespass, the law furnishes plaintiff no adequate protection ³⁸³ through its ordinary processes, and he is compelled to resort to equity for relief.

Despite this showing, the learned judge of the superior court, in substantial effect, found all the material facts against the plaintiff and denied him any relief. From the judgment and an order denying him a new trial plaintiff appeals, contending that the findings are wholly without support in the evidence.

The respondents, however, notwithstanding the uncontradicted character of the evidence, urge that the judgment is right, and assign various reasons why it should not be disturbed. It is claimed by them that the evidence is insufficient to show ownership or title in the leased premises in plaintiff's lessors, and the finding is in accord with this claim. Aside from the fact that we think there is sufficient evidence in the record to establish prima facie ownership in the lessors, the fact is not essential to plaintiff's recovery. Title in fee is not necessary to a recovery for trespass, and, although title may be alleged, it is not required to be shown where, as here, the evidence shows bona fide possession of the invaded premises under claim and color of right. Possession is itself evidence of title: *Winans v. Christy*, 4 Cal. 70; 60 Am. Dec. 597; *Castro v. Gill*, 5 Cal. 40; and a party may rely upon his possession as against a mere trespasser: *Fitzgerald v. Urton*, 5 Cal. 308; *McCarron v. O'Connell*, 7 Cal. 152; *Merced Min. Co. v. Fremont*, 7 Cal. 317; 68 Am. Dec. 262; *Taylor v. Woodward*, 10 Cal. 91; *Weimer v. Lowery*, 11 Cal. 104.

It is also claimed by respondents that the evidence justifies the

finding that plaintiff acquired no exclusive right to the possession of the leased premises under his lease; that the only right granted thereunder was the privilege of hunting thereon, and this not an exclusive one. This claim, like the finding which upholds it, is not only directly against the evidence, but is evidently based upon a total misconstruction of the lease in question. By that instrument the owners of the land "lease and demise unto said party of the second ³⁸⁴ part, his heirs and assigns, all that certain tract of swamp and overflowed land situate," etc., "for the term of four years from the twenty-second day of July, 1893, at the yearly rent or sum of twelve hundred dollars." The lease provides that "the parties of the first part hereby reserve to themselves, their heirs and assigns, the right to pasture said lands, and the right of way over and upon said lands, and every part thereof, and the party of the second part covenants not to in any way disturb such rights reserved as aforesaid; and the said parties of the first part covenant that the said party of the second part, paying the said yearly rent and performing the covenants aforesaid, shall and may peaceably and quietly hold and enjoy the said demised premises for the term aforesaid, for the sole purpose of hunting game thereon, and the party of the second part hereby covenants, promises, and agrees that the total number of persons who may be directly or indirectly authorized by him to hunt over and upon said premises shall at no time during the term of such lease exceed forty." The party of the second part is described as "Charles W. Kellogg, of San Francisco, California, as trustee for the Cordelia Shooting Club of that city."

While admitting that if plaintiff had the exclusive right of possession he would be the "owner" for the purpose of prohibiting others from hunting on his land, respondents argue that no such right is given, because the lessors reserve to themselves the right of pasturage, and also restrict the number of persons plaintiff can admit to the hunting privileges; that by the reservation of the right of pasturage the lessors reserved to themselves "the right to open the grounds to the world," and, in restricting the number of hunters plaintiff can admit, "they reserved all hunting privileges over what forty men can do" to themselves. Manifestly, the paper is open to no such construction. The reservation of the pasturage in no way affects or militates against the exclusiveness of plaintiff's rights in the premises as a hunting preserve, which the lease ³⁸⁵ clearly contemplates; and the restriction of the number who shall be permitted to hunt obviously has in view the preservation of the premises as a resort for wild game,

and that its value in that respect may not be entirely destroyed during the lease by the admission of an unlimited number of hunters. There is nothing in the language to indicate an intention to reserve to the lessors any part of the hunting privileges during the term. Even if such were the terms of the lease, however, none of the defendants attempt to show that they held any privilege or license from the owners to hunt thereon.

It is further contended that the evidence does not make a case entitling plaintiff to an injunction, for the reasons, that it does not appear that any irreparable injury has been or will be worked by the acts or threatened acts of the defendants, and that it does not appear that plaintiff has not an adequate remedy at law, nor that defendants are unable to respond in damages.

The mere fact that one has a right of action at law will not prevent his right to equitable relief by way of injunction against a threatened trespass, if, under the circumstances, the legal remedy would fail of affording adequate relief against the impending wrong. It is well settled that the remedy by injunction may be invoked to restrain acts or threatened acts of trespass in any instance where such acts are or may be an irreparable damage to the particular species of property involved. And in such case the question of the solvency or insolvency of the wrongdoer is an immaterial factor. It is the nature of the injury, and not the incapacity of the party to respond in damages, which determines the right. Where the effect of the act complained of is or may be to largely impair or destroy the substance of the estate, by taking from it something which cannot be replaced, it may be enjoined, irrespective of the ability of the defendant to respond in damages.

These principles are upheld in the leading case of ³⁸⁶ *Merced Min. Co. v. Fremont*, 7 Cal. 317, 68 Am. Dec. 262, following the modern English doctrine first announced by Lord Thurlow in *Flamang's case*, cited in *Mitchell v. Dors*, 6 Ves. Jr. 147. Originally, the right to restrain by injunction mere acts of trespass seems to have been confined to instances where the injury was to the freehold, in the nature of waste, such as the taking of wood or timber, extracting the precious metals or other valuable minerals, and the like. But this limitation of the right appears to have been departed from in the later cases, and as stated by Mr. High: "The jurisdiction may now, however, be regarded as well established, although it is still sparingly exercised, being confined to cases where, from the peculiar nature of the property affected by the trespass, or from its frequent repetition, the injury sustained cannot be remedied by an action for damages, and

where it may, therefore, be properly termed irreparable. The foundation of the jurisdiction rests in the probability of irreparable injury, the inadequacy of pecuniary compensation, and the prevention of a multitude of suits; and where facts are not shown to bring the case within these conditions the relief will be refused. Equity will not, therefore, enjoin a mere trespass to realty, as such, in the absence of any element of irreparable injury. But where, owing to the peculiar character of the property in question, the trespass complained of cannot be adequately compensated in damages, and the remedy at law is plainly inadequate, equity may properly interfere by injunction": 1 High on Injunctions, sec. 697.

And Mr. Story, after stating the same fact as to the original lines of the jurisdiction, says: "It may be remarked, in conclusion, upon the subject of special injunctions, that courts of equity constantly decline to lay down any rule which shall limit their power and discretion as to the particular cases in which such injunctions shall be granted or withheld. And there is wisdom in this course; for it is impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights and redress wrongs, ³⁸⁷ The jurisdiction of these courts, thus operating by way of special injunction, is manifestly indispensable for the purpose of social justice in a great variety of cases, and therefore should be upheld by a steady confidence": Story's Equity Jurisprudence, secs. 856 b, 863, 929, 948. And see, also, Poughkeepsie Gas Co. v. Citizens' Gas Co., 89 N. Y. 493.

If these principles are applicable to this case, and we perceive no good reason why they are not, the objection under consideration is not tenable. The property right which is here the subject of injury is of a peculiar and exceptional character. The sole value of the invaded premises to the plaintiff is as a game preserve, by reason of its features as a resort for wild game. This feature of the property the evidence shows is being taken from it, and its value largely, if not wholly, destroyed by the acts of defendants. And it requires little, if any, argument to show that the injury thus committed is and will be irreparable, as being beyond any method of pecuniary estimation. As suggested by counsel, it is not so much the value of the birds killed which constitutes the injury to plaintiff. That could be estimated in dollars and cents. But it is the destruction of the hunting privilege, by driving away the birds and deterring their return—a thing which, once accomplished, cannot be restored, and which constitutes an injury that cannot be estimated in money damages. It

seems to us that this showing, if true, makes out a case of irreparable damage from the destruction of the very substance of the property right which plaintiff holds under his lease.

But there is, moreover, another ground upon which, under the evidence, plaintiff should be entitled to the equitable remedy sought—the avoidance of a multiplicity of actions. It is quite manifest that no adequate relief could be had at law by a plaintiff in such a case as is here disclosed without the bringing of a separate action against each individual defendant. “The necessity of preventing a multiplicity of suits,” says Mr. ³⁸⁸ High, “affords another exception to the rule, and will warrant the interposition of the strong arm of equity, even though there be a remedy at law”: High on Injunctions, sec. 700. And again says that author: “So a trespass of a continuing nature, whose constant recurrence renders the remedy at law inadequate, unless by a multiplicity of suits, affords sufficient ground for relief by injunction”: High on Injunctions, sec. 697.

The further objection that plaintiff had not capacity to bring the action is untenable. Under his lease plaintiff is a trustee of an express trust, and, as such entitled to sue without joining with him those for whose benefit the action is prosecuted: Code Civ. Proc., sec. 369; *Tyler v. Houghton*, 25 Cal. 27.

The remaining points made in support of the judgment are without merit, and need not be specially noticed. The conclusions of the court below would seem to proceed upon the theory that there is no such thing as an exclusive private ownership or proprietorship in wild game, beyond such as may be acquired by reducing it to actual possession by killing or capture; and that for this purpose it may be pursued and taken wherever it may be found. This view of the law is incorrect. The wild game of the state, it is true, belongs to the people in their sovereign capacity, and is not subject to private dominion to any greater extent than the people through the legislature may see fit to make it: *Ex parte Maier*, 103 Cal. 476; 42 Am. St. Rep. 129. But the legislature has seen fit to prescribe the limit where public proprietorship ends and that of the individual commences; and, when within the provisions of such statute, an individual is as much to be protected in the enjoyment of his rights in this species of property as in any other under the law. Section 656 of the Civil Code provides that: “Animals wild by nature are the subject of ownership while living only when on the land of the person claiming them, or when tamed or taken and held in the possession, or disabled and immediately pursued.” While these wild

birds, therefore, ³⁸⁹ are within the plaintiff's inclosure, he has under this statute such rights in them as entitle him to protect them from invasion by those not authorized to be there, and any person violating such rights is as much a trespasser as though entering unbidden the plaintiff's dwelling.

We think upon the evidence, standing uncontradicted, the plaintiff made a case entitling him to the relief asked, and, as the findings are against such evidence, they cannot stand.

Plaintiff asks us, in the event the judgment is reversed, to order a judgment in his favor, without the necessity of a new trial. This we are not at liberty to do. This court has no power to make findings of fact—that being the exclusive province of the trial court. Since the findings here are against the plaintiff, a judgment we should order in his favor would be exactly in the position of the present judgment—unsupported by the findings. It is only where the findings made by the lower court are such as to support a judgment for the appellant that this court, in reversing a judgment erroneously entered thereon, has jurisdiction to order a proper judgment to be entered. In the present case, therefore, there must be a new trial.

Judgment and order reversed, and cause remanded for a new trial.

Harrison, J., and Garoutte, J., concurred.

INJUNCTION—TRESPASS.—An injunction will be granted to restrain a trespass when the injury is irreparable, or where adequate relief cannot be granted at law, or where the trespass goes to the destruction of the property: Note to Carney v. Hadley, 37 Am. St. Rep. 108; note to Jerome v. Ross, 11 Am. Dec. 501. An injunction will be granted against a trespass producing mischief which reaches to the very substance and value of the estate, and goes to the destruction of it in the character in which it is enjoyed: White v. Flannigan, 1 Md. 525; 54 Am. Dec. 668, and note; note to Jerome v. Ross, 11 Am. Dec. 501. An injury is irreparable where the complainant cannot procure redress at law without incurring the expense of several actions, and the damages recoverable would be inadequate to recoup him: Note to Lewis v. North Kingstown, 27 Am. St. Rep. 727; or where a continuance of the injury would lessen the enjoyment of property by its owner: Troe v. Larson, 84 Iowa, 649; 35 Am. St. Rep. 336. In cases of numerous acts of trespass, equity will give relief by injunction where the injury arising from each act is trifling, and the damages recoverable therefor inadequate as compared with the expense necessary to prosecute separate actions at law therefor: Lembeck v. Nye, 47 Ohio St. 336; 21 Am. St. Rep. 828. An injunction will issue to enjoin a trespass where it is necessary to prevent a multiplicity of suits, or where the trespasser is insolvent: Note to Carney v. Hadley, 37 Am. St. Rep. 108; Troe v. Larson, 84 Iowa, 649; 35 Am. St. Rep. 336, note to Lewis v. North Kingstown, 27 Am. St. Rep. 727. While equity will not ordinarily try title to land, the defendant is not permitted to defeat a plaintiff's

right to an injunction to restrain a trespass by merely denying his title, where the case is urgent and the injury is likely to be irreparable. A temporary injunction may, therefore, be allowed until the right can be adjudicated, where the plaintiff makes a strong *prima facie* case: *Note to Jerome v. Ross*, 11 Am. Dec. 506.

HUNTING RIGHTS—OWNERSHIP OF GAME.—Every person has an equal right of taking, for his own use, all creatures fit for food that are wild by nature, so long as he does no injury to another's rights; but, as every person has the right of exclusive dominion as to lawful use of land owned by him, no other can hunt or sport upon his land but by his consent. He has the exclusive right of hunting and sporting upon his own land, whether it be upland or covered with water: *Sterling v. Jackson*, 69 Mich. 488; 13 Am. St. Rep. 405. The ownership of game is in the people of the state: *American Ex. Co. v. People*, 133 Ill. 649; 23 Am. St. Rep. 641.

THE TRUSTEE OF AN EXPRESS TRUST MAY PROSECUTE AN ACTION in behalf of the trust in his own name: *Harney v. Dutcher*, 15 Mo. 89; 55 Am. Dec. 131.

JURGENSON v. DILLER.

[114 CALIFORNIA, 491.]

MECHANICS' LIEN—MINE—LABORERS' LIEN—AGENT OF OWNER.—Under a statute giving any person performing labor on a mining claim a lien thereon for his work, whether done at the instance of the owner or his agent, and providing that any person having charge thereof shall be held to be the agent of the owner for the purposes of such lien, one who works at "drifting in a tunnel" for one whom he knows does not own the property, and who does not assume to act for the real owner, but who is working the mine without authority from the owner, is not entitled to a lien thereon upon any theory that his employer is an agent of the owner.

DEFINITIONS.—"DRIFTING IN A TUNNEL" means taking earth, gravel, or ore from ground made accessible by means of the tunnel. It is not, however, the same as "running a tunnel."

MECHANICS' LIEN—MINE—OWNER'S NOTICE OF NON-LIABILITY.—Though a statute provides that every building or other improvement constructed upon any lands, with the knowledge of the owner, shall be deemed to have been constructed at his instance, and that his interest shall be lienable, accordingly, unless he shall, within three days after obtaining knowledge of the construction, alteration, or repair, post a written notice that he will not be responsible for the same, a person who does work in a mine, by "drifting in a tunnel," at the request of one whom he knows not to be the owner, and who does not assume to act for the owner, is not entitled to a lien therefor, upon the owner's failure to post a notice of nonliability, as such work is not the construction, alteration, or repair of any building or improvement on or in a mine.

William J. Herrin and John Guidery, for the appellant.

Park Henshaw, for the respondent.

491 BRITT, C. Action to enforce an alleged lien for labor on certain mining claims, together called the John Dix mine.

Defendant became the owner by purchase at a sale of the ground on foreclosure of mortgage, and the sheriff's subsequent deed therefor executed March 4, 1888. One Dix had previously been the owner, and after said March 4th he asked and obtained leave of defendant to remain on the premises, promising to take care of the same and make no expense for defendant. Without authority from the latter, Dix proceeded to work the mine, and hired plaintiff for this purpose. Under such employment, plaintiff performed the labor ⁴⁹² in question between November 1, 1888, and September 15, 1890, for which a balance remains unpaid.

It is provided in section 1183 of the Code of Civil Procedure, among various other things, relating to the liens of mechanics and others on real property, that any person performing labor on a mining claim shall have a lien thereon for his work, whether done at the instance of the owner or his agent, "and every contractor, subcontractor, architect, builder, or other person having charge of any mining . . . shall be held to be the agent of the owner for the purposes of this chapter." It is argued that under this section Dix was a person in charge of the mining, and hence was the agent of defendant in employing the plaintiff. But the presumption raised by the statute may be repelled: *Donohoe v. Trinity Min. Co.*, 113 Cal. 119. The evidence here tended to show that when plaintiff did the work in question he knew that Dix did not own the property, and was not working the mine as defendant's representative; that Dix employed plaintiff on his own account, paid him such wages as were paid at all, and at no time assumed to act on defendant's behalf. Obviously, plaintiff had no just reason to expect payment from defendant, and cannot charge a lien upon his mine on any theory of Dix's agency.

Section 1192 of the Code of Civil Procedure provides that every building or other improvement mentioned in section 1183, constructed upon any lands with the knowledge of the owner, shall be held to have been constructed at his instance, and his interest in the land shall be lienable accordingly, unless he shall, within three days after obtaining knowledge of the construction, alteration, or repair, post a written notice that he will not be responsible for the same, etc. Plaintiff urges that his claim of lien should be upheld because, he says, defendant having the knowledge mentioned in this section yet failed to post such notice. That the notice was not posted is undisputed; and plaintiff testified at the trial that on a single occasion in the year ⁴⁹³ 1888, defendant was at the mine, and then saw him, plaintiff, and an-

other man working there—"drifting in a tunnel." It was said by the court in *Williams v. Mining Assn.*, 66 Cal. 200, that the language of said section 1192, "which treats of buildings and improvements, and of knowledge of the construction, etc., would hardly cover a case like the one now before us." That action, like the present, was prosecuted for the enforcement of a lien for work done on or in a mine, and though the observation of the court we have quoted was unnecessary to the decision there, we think it correctly stated the law. "Drifting in a tunnel," the only work in which, so far as appears, defendant knew plaintiff to be engaged, means, as we understand the mining phrase, taking earth, gravel, or ore, from ground made accessible by means of the tunnel; is not the same as "running a tunnel"; and is not the construction, alteration, or repair of any building or improvement on or in a mine—the knowledge of which must be brought home to the owner before any duty becomes incumbent upon him under said section 1192. This construction of the statute is not unjust; it is equitable to require the owner, who sees going forward an unauthorized building or other beneficial improvement upon his property, to give notice that he will not be responsible therefor; *Avery v. Clark*, 87 Cal. 628; 22 Am. St. Rep. 272; but this consideration fails when the work consists in a subtractive process—the removal of the very corpus of the property; as well require one who sees a trespasser cutting his timber to post notice of his nonliability, under penalty of having his land subjected to a lien for the labor. The judgment and order denying plaintiff's motion for a new trial should be affirmed.

Belcher, C., and Searls, C., concurred.

For the reasons given in the foregoing opinion the judgment and order denying plaintiff's motion for a new trial are affirmed.

Harrison, J., Garoutte, J., Van Fleet, J.

Hearing in Bank denied.

A MECHANIC CANNOT ENFORCE HIS LIEN under a contract made with one having no title or interest in the land, or with one having mere possession, but no right to or in the realty: *Monroe v. West*, 12 Iowa, 119; 79 Am. Dec. 524. Such a lien cannot be enforced when the contract under which it arises is made with another than the ostensible owner of the property at the time, and without his consent or authority: *Galbreath v. Davidson*, 25 Ark. 490; 99 Am. Dec. 233. That labor is performed "by the consent of the owner of a building" is not established by proving his knowledge that such labor was being performed, where it does not appear that he knew who was doing the work, nor under what contract, nor that any lien was or might be claimed, and he does not in words express his consent: *Saunders v. Bennett*, 160 Mass. 48; 39 Am. St. Rep. 456. Un-

der specific statutes, the interest of the owner in fee may be charged with a mechanic's lien, if he fails to give notice that he is not responsible in cases where notice is required: See monographic note to *Loonle v. Hogan*, 61 Am. Dec. 700, on who has such ownership in, or relation to, property that he can bind it by a mechanic's lien.

GASTON v. GASTON.

[114 CALIFORNIA, 542.]

DIVORCE—ALIMONY—JURISDICTION.—THE PROVISION FOR SUPPORT, in an action for a divorce brought by the wife, is ordinarily an incident of the judgment of divorce, and jurisdiction of the court to make such provision is not dependent upon the averments in the complaint as to the husband's resources.

DIVORCE—ALIMONY—SECURITY FOR MAINTENANCE—LIEN ON REAL ESTATE.—A statute authorizing the court, in a divorce proceeding, to require the husband to give reasonable security for providing maintenance, and giving the court power to enforce its order, should not be so construed as to abridge the equitable power of the court to make the maintenance a lien or charge upon the real estate of the husband.

AN ACTION FOR DIVORCE is treated as a case in equity.

DIVORCE—EXTREME CRUELTY—PERMANENT ALIMONY—LIEN ON REAL ESTATE.—The court is authorized, in a decree of divorce upon the ground of extreme cruelty, to assign community property to the wife, absolutely, and this includes the power to charge a lien, in favor of the wife, upon land of the husband, which was a part of the community, to secure the payment of permanent alimony awarded by the court.

DIVORCE—LIEN ON REAL ESTATE TO SECURE MAINTENANCE—LIMIT AS TO TIME.—A lien charged by a judgment of divorce, in favor of the wife, upon land which was a part of the community property, but which has been set apart to the husband, to secure installments of alimony awarded as they fall due is not affected by a general statute making a judgment lien expire in two years from the time the judgment is docketed.

DIVORCE—DECREE FOR FUTURE MAINTENANCE—EXISTENCE OF PROPERTY.—It is not essential to a decree for future maintenance, in a suit by the wife for divorce, that the husband, at the time of the decree, should own either separate or community property, out of which the decree may be enforced.

DIVORCE—EXECUTION ON LAND FOR ALIMONY—LIMIT AS TO TIME.—As a court has power, in an action for divorce brought by the wife, to make suitable allowance for her support during life, it may take the form of pecuniary payments, at successive monthly intervals. Hence, as the right to execution for these does not accrue until they respectively fall due, the husband's land, set apart to him out of the community property, and which is charged with a lien for the payment of such maintenance, may be sold to satisfy the lien for any unpaid installments accruing after the expiration of five years from the entry of judgment, notwithstanding a statute prescribing the period of five years from the entry of judgments, in general, as the limit within which execution may issue.

Appeal from an order denying a motion to set aside an order of sale of defendant's premises.

H. V. Morehouse, for the appellant.

John E. Richards and C. D. Wright, for the respondent.

⁵⁴⁴ BRITT, C. On November 22, 1884, plaintiff obtained a decree in the court below dissolving the bonds of matrimony previously subsisting between herself and defendant; awarding to her the custody of their minor child; setting over to her a specified portion of the community ⁵⁴⁵ property; and requiring defendant to pay the sum of forty-five dollars per month "during her lifetime, or during the time that she shall remain unmarried, as permanent alimony for her maintenance and support." It also declared a certain tract of land situated in the county, and which was part of the community property set over to the defendant, to be charged with a lien in favor of plaintiff for securing such payments, and directed the issuance of an order of sale of such land in case the defendant should fail to make the said payments as required. The ground of the action was extreme cruelty practiced by defendant upon plaintiff; the complaint contained no allegations of defendant's ability to pay alimony, etc., though it alleged the existence of several parcels of community property. Defendant did not answer the complaint, but he appeared by attorney at the trial. He regularly paid the monthly alimony awarded to plaintiff until October, 1894, when he refused to make further payment. Plaintiff then obtained from the court an order for the sale of defendant's land as provided in the decree; this was on November 16, 1894. A few days later the defendant moved the court to vacate said order of November 16th; the court refused; and this appeal is from the order denying his motion.

It is argued that the portion of the judgment requiring the payment of forty-five dollars per month for the support of plaintiff is void, because no statement of the husband's ability was contained in the complaint. The provision for support in such cases is ordinarily an incident of the judgment of divorce; the jurisdiction of the court (which is the extent of our concern at present) to make such provision is not dependent upon averments in the complaint of the husband's resources—any more than its power to dispose of the children depends upon an allegation of the relative fitness of the parents for their custody: Civ. Code, secs. 138, 139; *Ex parte Gordan*, 95 Cal. 374; 2 Bishop on Marriage, Divorce, and Separation, 1067, et seq.

⁵⁴⁶ The statute provides that: "The court may require the husband to give reasonable security for providing maintenance, . . . and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case": Civ. Code, sec. 140. Appellant claims that the effect of this section is to render void the portion of the judgment imposing a lien on his land; that the power of the court was limited to exacting security of him. We think the law is otherwise; with us an action for divorce is treated as a case in equity: *Wadsworth v. Wadsworth*, 81 Cal. 187; 15 Am. St. Rep. 38; and the statute ought not to be construed as abridging the power exercised by courts having cognizance of matrimonial causes—commonly, though not always, as a branch of their chancery jurisdiction—to declare a lien for securing the award of support to the wife in such cases. Said the supreme court of Ohio, in a judgment like the present, except that it omitted the provision for a lien: "That it is within the legitimate power of the court to make such decree a charge upon real estate we have no doubt, and it has been the practice so to do in cases where it was deemed proper": *Olin v. Hungerford*, 10 Ohio, 268. And such is the current of authority with but little dissent: *Wightman v. Wightman*, 45 Ill. 167; *O'Callaghan v. O'Callaghan*, 69 Ill. 552; *Holmes v. Holmes*, 29 N. J. Eq. 9, 12. Many other cases are collected in the reporter's note to *Stoy v. Stoy*, 41 N. J. Eq. 370. Moreover, the divorce being upon the ground of extreme cruelty, the court was authorized to assign the community property to the parties in such proportion as, under the circumstances, seemed just: Civ. Code, sec. 146; under this section, it had the power to assign to the wife the absolute property in the land in question, and this included power to charge a lien on the same: *Foster v. Foster*, 56 Vt. 540; *Blankenship v. Blankenship*, 19 Kan. 159. These considerations sufficiently dispose also of the further view advanced by appellant that the lien expired, under ⁵⁴⁷ section 671 of the Code of Civil Procedure, in two years after the entry of the judgment. The lien does not derive its force from that section.

It is also insisted that permanent alimony could not be allowed to the wife because—it is said—the husband then had neither separate nor community property to which resort could be had to enforce payment thereof: Civ. Code, sec. 141. We are not convinced that there was no such property; it was not essential, however, to warrant the decree for future maintenance that he should then have owned property of either class: *Ex parte Spencer*, 83 Cal. 460; 17 Am. St. Rep. 266; *Eidenmuller v. Eidenmuller*, 37 Cal. 364.

The statute limits the right to have execution on a judgment to the period of five years from the date of entry (Code Civ. Proc., sec. 681), and that period having expired in this instance, it is contended that "the judgment ceased to be of binding force, and process could not issue under it." But the court had power to make suitable allowance for support of the wife during her life: Civ. Code, sec. 139; and the allowance might take the form of pecuniary payments at successive monthly intervals: *Ex parte Spencer*, 83 Cal. 460; 17 Am. St. Rep. 266; the right to execution for these does not accrue until they respectively fall due. The case is within the principle of *De Uprey v. De Uprey*, 23 Cal. 352.

The order should be affirmed.

Vanclief, C., and Searles, C., concurred.

For the reasons given in the foregoing opinion the order is affirmed.

McFarland, J., Garoutte, J.,

Van Fleet, J., Harrison, J.,

Henshaw, J.

Rehearing denied.

DIVORCE—ALIMONY—LIEN ON LAND TO ENFORCE PAYMENT.—When a divorce is granted for the offense of the husband, the court may, under the California statute, and independently of the property then in esse, compel him to pay out of his future earnings a suitable monthly allowance for the support of the wife during life, or for a shorter period: *Ex parte Spencer*, 83 Cal. 460; 17 Am. St. Rep. 266, and note showing that the court may, in its discretion, allow permanent alimony, either in a gross sum or in periodical payments. A gross sum may also be decreed in addition to periodical installments as permanent alimony: See monographic note to *Methvin v. Methvin*, 60 Am. Dec. 669, on alimony and its allowance. A decree for alimony to be paid by installments is said to be in the nature of a personal charge upon the husband, rather than upon his estate, and is not a lien on his real estate unless made a charge thereon by the decree itself: See note to *Hamlin v. Bevans*, 28 Am. Dec. 626. While it has been considered objectionable, in some cases, to allow alimony by vesting the fee of real estate in the wife (*Russell v. Russell*, 4 G. Greene, 26, 61 Am. Dec. 112), other cases hold that a part of the lands of the husband may be given in fee to the wife for alimony: Note to *Russell v. Russell*, 61 Am. Dec. 117. Thus, under a statute declaring that on the granting of a divorce, the court may set apart such portion of the husband's property for the support of the wife and children as shall be deemed just and equitable, the court may decree that the title to a portion of the husband's separate estate, real or personal, or both, be vested in the wife: *Powell v. Campbell*, 20 Nev. 232; 19 Am. St. Rep. 350. A judgment for alimony in favor of a woman makes her a judgment creditor of her former husband, and, as such, she is entitled to avail herself of all the remedies given by the statute to judgment creditors: *Wetmore v. Wetmore*, 149 N. Y. 520; 52 Am. St. Rep. 752. Hence, executions may issue to enforce the payment of alimony awarded upon decrees of divorce, which may be levied like executions in ordinary actions upon personal property or real estate: Note to *Livermore v. Routelle*, 71 Am. Dec. 711.

GLAS v. GLAS.

[114 CALIFORNIA, 566.]

MORTGAGE TO WIFE FROM HUSBAND—HUSBAND'S DECLARATION OF HOMESTEAD.—If a husband executes a mortgage to his wife, he cannot afterward defeat it as a lien, or prevent its foreclosure, by filing a declaration of homestead upon the mortgaged premises.

MORTGAGES — DEFAULT — INTEREST — DELAY — OPTION TO FORECLOSE—WAIVER.—A mortgagee, having an option, by the terms of the mortgage, to foreclose immediately upon default in the payment of any installment of interest payable annually, does not, by a delay of eight months, before making a demand and bringing an action, after an installment has become due, waive the default in the payment of interest, or his right of option to foreclose for such default.

MORTGAGES—CERTIFICATE OF RECORD—SEAL.—A certificate of the record of a mortgage by the recorder, indorsed upon the back of the original instrument, is sufficiently attested by his official signature. It need not be attested by his seal.

Robert L. Hargrove, for the appellant.

George E. Church, for the respondent.

567 HAYNES, C. This action is prosecuted to foreclose a mortgage executed by the defendant to plaintiff.

The plaintiff had judgment, and this appeal is from the judgment and from an order denying defendant's motion for a new trial.

After the execution of the note and mortgage, the defendant filed a declaration of homestead upon the mortgaged premises, and appellant's principal contention is, that the plaintiff, who is the wife of the defendant, cannot foreclose the mortgage because of the declaration of homestead so filed by the husband.

1. This contention can be best stated in the pathetic language of his brief: "Can respondent, by aid of the judicial arm, invade the home and fireside, destroy the homestead and the sanctum of virtue and truth, in an action by her against her husband to foreclose a mortgage, when the husband has no other suitable place of abode? Can the homestead be abandoned in this manner? Will equity permit the wife to destroy the home provided for her by her husband, and destroy his means of support and cast him out to the world in his dotage, simply to satisfy her avariciousness, or a demand for her pound of flesh?"

Terrible as the consequences may appear to be, we are constrained to hold that the husband cannot defeat the mortgage as a lien, nor its foreclosure, by subsequently filing a declaration of homestead upon the mortgaged premises. Section 1241 of the

Civil Code provides: "The homestead is subject to execution or ⁵⁶⁸ forced sale in satisfaction of judgments obtained: . . . 4. On debts secured by mortgages on the premises executed and recorded before the declaration of homestead was filed for record." That the parties to the note and mortgage are husband and wife does not affect the rights of the plaintiff. Section 158 of the Civil Code provides: "Either husband or wife may enter into any engagement or transaction with the other, or with any other person respecting property, which either might if unmarried."

Appellant's contention would nullify the provisions of the foregoing section, and would enable the husband to obtain his wife's money upon the faith of the security given by the mortgage, and yet defeat the security thus given by his separate and independent act without her knowledge, consent, or concurrence.

2. The note secured by the mortgage was dated August 25, 1892, and made payable three years after date, and this action was commenced before the expiration of the time above stated. The note, however, contained a provision for annual payment of interest, and another provision "that, if not so paid when it became due, it should be added to the principal, and become a part thereof, and bear interest at the same rate as said principal sum." The note, however, contained this further stipulation: "But if default be made in the payment of interest as above prescribed, then this note shall immediately become due at the option of the holder thereof"; and the mortgage contained the provision "that in case of default in payment of any installment of the interest, then the whole sum of interest and principal should be due at the option of the said party of the second part, or assigns, and suit may be immediately brought, etc." This suit was brought eight months after the delinquent installment of interest became due, and it is contended by appellant that this delay in making demand and bringing the action was a waiver of the default in the payment of interest. This contention ⁵⁶⁹ cannot be sustained. The cases cited by the appellant to this point do not sustain his contention. In *Campbell v. West*, 86 Cal. 197, it was held that the plaintiff having failed to exercise the option upon the first default, he was not bound to waive its exercise at any subsequent default; and that was really the only question in the case, as the installment of interest upon which the plaintiff exercised his option fell due on Saturday, and on the following Monday the plaintiff notified the defendant of his option to consider the whole amount of principal and interest due. In the other case cited by appellant, namely, *Hewitt v.*

Dean, 91 Cal. 5, 10, it was said: "Although the plaintiff might have dealt with the defendants in such a way that he would be estopped from asserting his right of option, or by some act of his waive such right, yet mere forbearance or inaction would not cause such waiver. His leniency toward the defendants by forbearing to make an election within a reasonable time could not impair his right, or be regarded by them as a waiver thereof."

3. Upon the trial, the mortgage, together with the indorsements thereon, showing the date of its filing for record, and the volume and page where it was recorded, was received in evidence over an objection made by counsel for defendant; and afterward, on a motion for nonsuit, one of the grounds specified was, that plaintiff failed to prove that said mortgage had been recorded. This objection was not made at the time of the introduction of the mortgage in evidence, and it is now contended that the indorsement upon the back of the mortgage that it was filed and recorded, though signed by the recorder, was not evidence in the absence of the seal of that officer. There is no statutory requirement that the certificate of the recorder of the receipt of the mortgage for record, and that it had been recorded, indorsed upon the original mortgage, should be attested by his seal. It is only certified copies that must be so attested.

570 Searles, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

Harrison, J., Garoutte, J., Van Fleet, J.

SEAL—CERTIFICATE OF ACKNOWLEDGMENT.—A seal is not essential to the validity of a certificate of acknowledgment, unless required by an express statute: See monographic note to *Livingston v. Kettelle*, 41 Am. Dec. 174, on acknowledgments of deeds.

BRADBURY v. DAVENPORT.

[114 CALIFORNIA, 593.]

MORTGAGES—RELEASE OF RIGHT OF REDEMPTION.—A mortgagor cannot, at the time the mortgage is made, preclude himself from redeeming, even by a stipulation to that effect in the mortgage; but he may subsequently make a valid release of his equity of redemption to the mortgagee.

MORTGAGES.—A RELEASE OF THE RIGHT OF REDEMPTION must appear by a writing importing, in terms, to be a transfer of the mortgagor's interest or by facts operating to estop him from asserting any interest in the premises. The burden is upon the creditor to show that the right of redemption was given

up deliberately, and for an adequate consideration, as any marked undervaluation of the property, in the price paid, will vitiate the proceeding.

EXECUTORS AND ADMINISTRATORS—PLEADING VALUE OF AN EQUITY IN MORTGAGED PROPERTY COVERED BY A DEED.—If a mortgagee claims absolute title to mortgaged premises by virtue of a deed placed in escrow, to be delivered to him upon the default of the mortgagor, and which was delivered to him, in satisfaction of the debt, after the mortgagor's death, and the administrator of the deceased seeks to subject the property to administration as assets of the estate, an allegation in his complaint that the equity in the property is of the value of four thousand dollars, though subject to a demurrer for uncertainty and ambiguity, will, as against a general demurrer, be construed as an allegation that the interest of the estate in the property described in the deed is of the value of four thousand dollars over and above the indebtedness of the estate to the mortgagee.

ESCROW—DELIVERY OF DEED AFTER DEATH—INTERPOSITION OF EQUITY.—Conceding that a depositary may, upon the happening of the condition, deliver a deed held by him in escrow, notwithstanding the death of one of the parties to the escrow agreement, the transaction is not placed beyond the control of a court of equity, if the circumstances of the case require its interposition.

EXECUTORS AND ADMINISTRATORS—SUBJECTING MORTGAGED PROPERTY COVERED BY DEED TO ADMINISTRATION—PLEADING.—If a mortgagee claims absolute title to mortgaged property, by virtue of a deed placed in escrow to be delivered to him upon the default of the mortgagor, and which was delivered to him, in satisfaction of the debt, after the mortgagor's death, the administrator of the deceased mortgagor, in proceedings to have the deed set aside as void, or to have the deed declared a mortgage, and to subject the property to administration as assets of the estate, need not aver, in his complaint, a tender or offer to pay the mortgage debt, as this would not affect the cause of action to have the deed set aside, and it would be inequitable to require him to make a tender of the amount due, which could not be raised upon the premises, whatever their value, before a determination that the deed was only a mortgage.

EXECUTORS AND ADMINISTRATORS—SUBJECTING MORTGAGED PROPERTY COVERED BY DEED TO ADMINISTRATION—PLEADING—CAUSE OF ACTION.—If a mortgagee claims absolute title to mortgaged property by virtue of a deed, and the administrator of the deceased mortgagor seeks to have the deed set aside as void, or to have it declared a mortgage, and to subject the property to administration as assets of the estate, a complaint by him, as against a general demurrer, states a cause of action, where it is alleged, in substance, that the mortgagor, while sick and financially embarrassed, was persuaded by the mortgagee to sign an agreement and to place a deed in escrow with the cashier of a bank, whereby it was provided that, in default of payment of the mortgage before a given date, the deed should be delivered to the mortgagee, in cancellation and satisfaction of the note secured by the mortgage; that the cashier did deliver the deed to the mortgagee after knowledge of the mortgagor's death, and after notice to him from the administrator not to deliver it; that the deed was recorded by the mortgagee; that it constitutes a cloud upon his title, and his right to subject the property to administration; that the equity in the property is of the value of four thousand dollars; that the es-

tate is largely indebted; and that it is necessary to sell the interest of the estate in the property for the purpose of paying such indebtedness.

Withington & Carter, for the appellant.

Haines & Ward, for the respondent, Davenport.

⁵⁹⁶ HAYNES, C. This appeal is from a judgment rendered against the plaintiff upon demurrer to the complaint.

The complaint, after alleging the appointment of the plaintiff as administrator of Daniel Keniston, deceased, and describing the property involved in the controversy herein, alleged in substance as follows: That on January 1, 1891, Keniston executed a mortgage to the defendant Davenport upon certain of the real estate described in the complaint to secure the sum of four thousand dollars, with interest at ten and one-half per cent per annum, ⁵⁹⁷ payable in two years from said last-mentioned date, which mortgage was duly recorded; and defendant Davenport claimed that there was due thereon of principal and interest to March 1, 1895, the sum of three thousand nine hundred and thirty-three dollars and eighty-seven cents.

The remainder of the complaint (except paragraph 4, which need not be noticed) is as follows: "That on or about said first day of March, 1895, the said Daniel Keniston, being then sick in body and embarrassed financially, and being persuaded thereto by the representations of said defendant Davenport, was induced to sign, and did sign, a certain agreement with said Davenport, and to execute a deed to lots 4 and 5 of the premises, above described, to said J. N. Davenport, which he, the said Keniston, handed, together with said agreement, to the defendant J. H. Anderson, cashier of the Bank of Escondido. That by the terms of said agreement, upon the payment to said cashier of a sum of money, not expressed in said agreement, before July 1, 1895, the said cashier was to discharge said mortgage and return the note secured thereby to said Keniston, and that in case said Keniston should not pay said sum of three thousand nine hundred and thirty-three dollars and eighty-seven cents, and interest to July 1st, before said July 1, 1895, the said cashier should deliver said deed to said Davenport and the note to said Keniston, and the delivery of said deed should be in full cancellation and satisfaction of said note.

"3. That the said Daniel Keniston from the time of the execution of said agreement continued sick and unable properly to attend to his business, and from and after the twenty-ninth day of June until the ninth day of July, 1895, the said date of his

death, was unconscious, and that subsequent to the death of said Daniel Keniston, and after plaintiff had applied for administration in behalf of himself and the heirs of said Keniston, he notified the defendant Anderson not to deliver said deed to said Davenport, but that he, the said Anderson, ⁵⁹⁸ in violation of the trust reposed in him, and well knowing that said Keniston was dead, and after said notice, upon the demand of said Davenport, upon the twenty-fourth day of July, 1895, delivered said deed to said Davenport, and the said Davenport caused the same to be recorded, and claims to be the owner of said property. That no demand had been made by said Davenport before said last date for said deed.

"5. That said deed constitutes a cloud upon the title of plaintiff, and his right to subject said property to administration. That the equity in said property is of great value, namely: The sum of four thousand dollars, and that the estate of said Daniel Keniston is largely indebted, and that it is necessary to sell the interest of the estate in said premises in order to pay said indebtedness."

The prayer of the complaint is, that said deed from Daniel Keniston to the defendant Davenport be decreed to be void and of no effect, or that the same is a mortgage to secure any sum which may be found due from said intestate to said defendant Davenport, and that said property be further decreed to be assets of the estate and subject to administration.

The demurrer to the complaint is as follows: "That said complaint does not state facts sufficient to constitute a cause of action in this, to wit: "1. That it shows on its face that this defendant is the owner of lots four (4) and five (5) in section four (4), township twelve (12) south, range two (2) west, San Bernardino meridian; 2. That the complaint contains no offer or tender, or any allegation of offer or tender, to pay the overdue mortgage indebtedness to this defendant therein alleged to be subsisting."

This demurrer was sustained, and, the plaintiff declining to amend his complaint, judgment was rendered "that the complaint herein be, and the same is hereby, dismissed on the merits," and for costs.

Appellant insists that said contract or agreement deposited with Anderson with the deed is void, because it ⁵⁹⁹ is an agreement for forfeiture of the property subject to the lien in case the debtor does not pay before July 1st; and, in support of this proposition, he cites section 2889 of the Civil Code, which is as follows: "All contracts for the forfeiture of property subject to lien

in satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption from a lien, are void."

Aside from the provision of said section of the Civil Code, it is well settled that the mortgagor is not allowed to renounce beforehand his privilege of redemption; that while generally anyone may renounce any privilege or surrender any right he had, that an exception is made in favor of debtors who have mortgaged their property, for the reason that their necessities often drive them to make ruinous concessions; that when one borrows money upon the security of his property, he is not allowed by any form of words to preclude himself from redeeming (Jones on Mortgages, secs. 251, 1045), though the doctrine "once a mortgage, always a mortgage" does not apply to subsequent contracts: *Watson v. Edwards*, 105 Cal. 70, 75.

In *Peugh v. Davis*, 96 U. S. 332, it was held that an equity of redemption is so inseparably connected with a mortgage that it cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage, though a subsequent release of the equity of redemption may undoubtedly be made to the mortgagee. As to such release, the court, by Field, justice, said: "It must appear by a writing importing in terms a transfer of the mortgagor's interest, or such facts must be shown as will operate to estop him from asserting any interest in the premises. The release must also be for a consideration which would be deemed reasonable if the transaction were between other parties dealing in similar property in its vicinity. Any marked undervaluation of the property in the price paid will vitiate the proceeding."

In relation to such subsequent agreement, Jones, in his ⁶⁰⁰valuable work on Mortgages, section 251, says: "A subsequent agreement that what was originally a mortgage shall be regarded as an absolute conveyance is open to the same objection [that is, the objection to such agreement in the mortgage itself], and will not be sustained unless fairly made, and no undue advantage is taken by the creditor. The burden is, therefore, upon the creditor to show that the right of redemption was given up deliberately and for an adequate consideration."

In support of this proposition the author cites, among many other cases, *Villa v. Rodriguez*, 12 Wall. 323, from which we quote the following passage: "The law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern

are applied as those which govern where a sale by a cestui que trust to his trustee is drawn in question. To give validity to such a sale by a mortgagor it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears and poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instrument employed is immaterial. That the mortgagor knowingly surrendered and never intended to redeem is of no consequence. If there is vice in the transaction, the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals, and the protection due to those whose property is thus involved, require that such should be the law."

Respondent contends, however, that this case is conclusively settled by this court in *McDonald v. Huff*, 77 ⁶⁰¹ Cal. 279. But that case is clearly distinguishable from this. In that case an unsecured debt, as well as a debt secured by a mortgage, was to be satisfied by the deed deposited in escrow, if such debts were not otherwise paid within the time limited by the agreement, so that a price in addition to the amount of the mortgage lien was paid for the property, and there is no indication, either in the statement of facts or in the opinion of the court, but that the price thus paid was the full value of the property conveyed; while in the case at bar the plaintiff, while not disputing respondent's right to a lien as security for the amount of the mortgage debt and interest, alleges that the equity of the estate in said premises is of the value of four thousand dollars. In the absence of a special demurrer, we must hold this to be an allegation that at the commencement of this action said premises were worth four thousand dollars more than the amount secured by the mortgage, with interest to that date.

Respondent also contends that the deed to him took effect when delivered, as of the date of the escrow, and that the agreement was, therefore, fully executed before this action was begun. But that does not conclude the plaintiff. In *Russell v. Southard*, 12 How. 139, it was held that, though a mortgagee in possession may take a release from the mortgagor, the transaction is to be care-

fully scrutinized, and if any unconscientious advantage was taken, the release will be set aside.

Conceding that the depositary may, upon the happening of the condition, deliver the deed held by him in escrow, notwithstanding the death of one of the parties to the escrow agreement, the transaction is not placed beyond the control of a court of equity if the circumstances of the case require its interposition.

It is said, however, by respondent, that the term "equity," when applied to mortgages in this state, describes nothing; and quotes Pomeroy's Equity Jurisprudence, section 1188, to the effect that it is an entire misuse of language to apply the name "equity of redemption" ⁶⁰² to the legal estate of the mortgagor. *Sichler v. Look*, 93 Cal. 600, is also cited, where it is said in substance that the clause usually inserted in decrees of foreclosure, "that the defendant be forever barred and foreclosed of and from all equity of redemption," etc., does not add to the effect of a sale under the decree beyond what it would have had if the provision had been omitted. But the learned justice who wrote the opinion refers to the matter as one of common practice, and says: "Its insertion is due to the conservatism of the profession, which hesitates to adopt a reform in procedure, and prefers to adhere to the forms which were used under a different system."

If the allegation contained in said fifth paragraph had been specially demurred to upon the ground of uncertainty or ambiguity, such demurrer should have been sustained; but we think, when tested by a general demurrer, that the allegation is a sufficient statement that the interest of the estate in the property described in the deed is of the value of four thousand dollars over and above the indebtedness of the estate to the defendant. It is alleged that the said deed constitutes a cloud upon the title of plaintiff and his right to subject said property to administration. The "equity," therefore, must refer to the interest which the estate would have had in the land subject to the mortgage; and, as the demurrer concedes the truth of this allegation, a cause of action was stated entitling the plaintiff to relief upon that ground, if no other.

Respondent contends, however, that the complaint is fatally defective because it contains no offer or tender, or any allegation of offer or tender, to pay the overdue mortgage indebtedness. They treat this as an action to quiet title, or as an action to redeem. Strictly speaking, it is neither. It alleges that a mortgage was given, that at the date of the deed and agreement a subsisting debt secured by the mortgage was due, unpaid, and enforce-

able under the mortgage, which was then and still would have been, a valid lien upon the premises, alleges ⁶⁰³ facts which show the invalidity of the deed, and prays that the said deed be canceled, or that it be declared a mortgage to secure any sum that may be found due from the intestate to defendant Davenport.

Plaintiff treats the lien as still subsisting. A bill in equity to redeem from a subsisting and enforceable mortgage lien would not lie, as the lien could be discharged by payment; but the defendant claims to have an absolute title to the land, and that the mortgage, which formerly subsisted, has been paid and discharged by the conveyance of March 1, 1895. If the decree prayed for in a given case would leave the defendant without remedy for the recovery of the money which would have been secured by the mortgage if a deed had not been subsequently given, it is clear that a court of equity would not grant it unless the plaintiff had tendered or offered to pay the money which he alleged the deed was given to secure, whether the debt was barred by the statute of limitations or not. But the decree here sought can have no such effect. The suit is brought, not to deprive the defendant of any of its just rights, but to determine the validity of the transaction by which the defendant claims what amounts to a forfeiture of the mortgaged property, and not to deprive him of a remedy whereby he may collect his debt. To impose upon the plaintiff the condition that he shall first tender payment would give the defendant a benefit or advantage of great value from what is, upon the facts alleged, a transaction from which he should not be permitted to derive any benefit or advantage, that is, he could stand upon the apparent title conveyed by the deed without foreclosure, for all time, knowing that his debtor cannot quiet his title against him without payment of the debt and interest, though barred by the statute, with the power of alienation at any time to an innocent purchaser; advantages which he did not and could not have had under the mortgage.

Nor is it true that the debtor who has given a deed absolute in form as security for the payment of his debt ⁶⁰⁴ must, under all circumstances, tender payment before he can litigate the character of the instrument; as, for example, where the debt is not due, and the grantee asserts an absolute title, or is attempting to sell and convey to a stranger. A court of equity will not tie its hands by an unbending rule which would require it to impose inequitable terms, or do any injustice, in a given case falling within a general class though having peculiar or distinguishing features. There are sufficient facts appearing in the complaint,

though not clearly stated, to show that the imposition of the condition of plaintiff's right to maintain this action, namely, that he must tender payment of the mortgage debt to the defendant, would result in a denial of justice.

Keniston died July 9th, plaintiff was appointed administrator July 23d, and this action was commenced July 30th, the deed to defendant Davenport having been delivered on the 24th.

It is alleged that the estate is largely indebted, and that a sale of the interest of the estate in the premises described in the deed is necessary in order to pay said indebtedness. Under such circumstances, it would be inequitable to require a tender of the amount due as a condition upon the performance of which alone the action could be maintained, and a compliance with such condition would appear, from the facts stated, to be impossible. Certainly, the money could not be raised upon the premises embraced in the deed, whatever its value, until it should be determined that the deed was itself only a mortgage.

We think the court erred in sustaining the demurrer, and that the judgment should be reversed, with leave to the plaintiff to amend his complaint if so advised.

Searls, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion, the judgment is reversed, with leave to the plaintiff to amend his complaint if so advised.

McFarland, J., Temple, J., Henshaw, J.

Contracts between Mortgagor and Mortgagee to Waive or Release Equity of Redemption.

Preliminary Observations.—It is well understood that, at common law, a mortgage of land was at first an estate upon condition, and that, if the mortgagor did not perform the condition upon the day stipulated, he lost his estate forever. But, notwithstanding this forfeiture of his estate at law, courts of equity allowed him to redeem it, within a reasonable time, upon payment of the debt and all proper charges, with interest. The right to reclaim his estate was called the "equity of redemption," which was only an abbreviation of "right in equity to have a redemption." At common law, the legal estate vested in the mortgagee and was forfeited upon default; but, as equity regarded a mortgage of land as a mere security for a debt or obligation, and declared it unreasonable that the mortgagee should, by the failure of the debtor to meet his obligation upon payday, be entitled to keep as his own what was intended as a pledge, it interposed to prevent the hardship and injustice which resulted at common law from the failure of the mortgagor to comply strictly with the conditions of his mortgage, and established the equity of redemption. The equity of redemption is a creature of the courts of

chancery, and is impliedly reserved by the mortgagor. This reserved estate belongs to the mortgagor, is regarded as an estate distinct from the right vested in the mortgagee, and is indefinite in its duration: *Beverly v. Barnitz*, 55 Kan. 466; 49 Am. St. Rep. 257. It is clear, therefore, that a mortgage at law is widely different in its nature from a mortgage in equity. Under the common law and equity combined, two different kinds of interests or estates, the legal and the equitable, are simultaneously held in the mortgaged premises by the two parties. The mortgagee is the legal owner, and, after a default, is entitled to possession of the land. On the other hand, the estate of the mortgagor, after default, is purely an equitable one, a right to redeem the land. Under the common law, the mortgagee is entitled to the immediate possession of the mortgaged property as an incident to the title when not restrained by the terms of the mortgage, and, upon default, he is always entitled to the possession, and may recover it by an action at law; but under the rule of equity the mortgagor is entitled to possession until foreclosure. This double mode of dealing with mortgages, the legal, the only one recognized and administered by courts of law, and the equitable, prevailing in the court of chancery, exists in England to-day and also in some of the states of our Union.

The equitable conception of a mortgage, that it is a mere security for a debt, has been, however, generally adopted in the United States. There is no longer any double ownership nor an equitable estate in the land. There is one legal estate only, and that belongs to the mortgagor until it is cut off by foreclosure and sale. The mortgagee has no estate in the land, and is simply a creditor holding a lien upon the mortgaged premises as security for his debt, which lien he must enforce by a foreclosure and sale. On the other hand, the mortgagor is the owner of the entire legal estate, subject to the lien and encumbrance of the mortgage, until his title is divested by a foreclosure and sale. The term "equity of redemption" is, therefore, in this condition of the law, and when used to designate the mortgagor's interest, "a complete misnomer, productive only of confused and mistaken notions": *Pomeroy's Equity Jurisprudence*, sec. 74, 1118. In speaking of the abandonment of the legal theory of mortgages and of the adoption of the equitable theory in this country, the learned author just cited says: "The mortgagee's interest being a mere lien, it is wholly destroyed, and the mortgagor's estate is left free and unencumbered, by a payment of the debt secured by it at any time before the premises are actually sold under a decree of foreclosure; the estate does not then revert in the mortgagor, since it has never gone out of him. On the other hand, the mortgagor's interest, instead of being an equitable estate, or right in equity to redeem the land from the mortgagee's ownership, is, for all purposes, under all circumstances, and between all parties, the legal estate, with all the incidents and qualities of legal ownership, but at the same time encumbered by, or subject to, the lien of the mortgage, and liable, therefore, to be cut off and divested by a sale under a decree of foreclosure if the debt is not paid according to the terms of the mort-

gage. It is an entire misuse of language to apply the name 'equity of redemption' to this legal estate of the mortgagor; and the continued employment of the phrase in the legal nomenclature of the states which have adopted this theory of the mortgage is to be regretted, since it is the occasion of constant misapprehension and confusion of thought": Pomeroy's Equity Jurisprudence, sec. 1188. On the other hand, Allen, J., in *Odell v. Montross*, 68 N. Y. 499, 503, says: "The estate remaining in the mortgagor, after the law day has passed, before foreclosure, is popularly but erroneously called an equity of redemption, retaining the name it had when the legal estate was in the mortgagee, and the right to redeem existed only in equity. Although a misnomer, it does not mislead." "The statutory right of redeeming after foreclosure or execution sale, given by the legislation of certain states, forms no part of equity jurisprudence": Pomeroy's Equity Jurisprudence, sec. 1219, note.

Contemporaneous Agreements.—"This court," said the lord chancellor, in *Toomes v. Conset*, 3 Atk. 261, "will not suffer, in a deed of mortgage, any agreement in it to prevail, that the estate become an absolute purchase in the mortgagee upon any event whatsoever; and the reason is, because it puts the borrower too much in the power of the lender, who, being distressed at the time, is too inclinable to submit to any terms proposed on the part of the lender." It is not our purpose, in this note, to show what constitutes a mortgage; or when a deed absolute in terms will be construed to be a mortgage; or when a transaction will be construed to be a mortgage rather than a conditional sale in order to save forfeiture. The subject as to when a deed absolute in form will be treated in equity as a mortgage is discussed in the monographic note to *Hutzler v. Phillips*, 4 Am. St. Rep. 696, 707, on what constitutes an equitable mortgage. That the inclination of courts has always been to lean against conditional sales, see *Locke v. Palmer*, 26 Ala. 312. In discussing the validity of contracts to waive or release the equity of redemption, the instrument dealt with is assumed to be a mortgage, as the equity of redemption applies only to such an instrument. An "Agreement to turn a mortgage into an absolute deed is one that finds no favor in equity": *Macauley v. Smith*, 132 N. Y. 524, 531; and it is almost a universal rule that a deed, though absolute in form, is, in fact, a mortgage, when given to secure the payment of money, although the parties may have agreed that, upon default in payment, the deed should become absolute: *State Bank v. Mathews*, 45 Neb. 659; 50 Am. St. Rep. 565. A deed absolute in terms, but given simply as security for the payment of money, is, according to the authorities, and whatever may be its form or the name given it by the parties, a mortgage, with all the incidents of that instrument, including the right of redemption: *Peugh v. Davis*, 96 U. S. 332. The rights and obligations of the parties to such an instrument are the same as if the deed had been subject to a defeasance expressed in the body thereof, or executed simultaneously with it: *Odell v. Montross*, 68 N. Y. 499; *Cotterell v. Long*, 20 Ohio, 464; *Clark v. Henry*, 2 Cow. 824. The right of redemption, therefore, attaches to a conveyance

of real estate, intended merely as a security for a debt, though it is absolute on its face, and this right cannot be waived or released by agreement at the date of the execution of the instrument: *Henry v. Clark*, 7 Johns. Ch. 40; *Wing v. Cooper*, 37 Vt. 169. Such an instrument being a mortgage, the rule as to mortgages applies, namely, that the parties cannot, even by express stipulation therein, cut off the right of redemption; and a deed, though absolute in form, if given as security for the payment of money, will hereafter be included in the term "mortgage."

With respect to the invalidity of any contemporaneous agreement, even of the most formal character, to withdraw from a mortgage the rights which are incident thereto, or to change the obligations of the parties thereunder in any manner whatsoever, the law is thus laid down in *Pomeroy's Equity Jurisprudence*, section 1193: "In general, all persons able to contract are permitted to determine and control their own legal relations by any agreements which are not illegal, or opposed to good morals or to public policy; but the mortgage forms a marked exception to this principle. The doctrine has been finally established from an early day that when the character of a mortgage has attached at the commencement of a transaction, so that the instrument, whatever be its form, is regarded in equity as a mortgage, that character of mortgage must and will always continue, if the instrument is, in its essence, a mortgage, the parties cannot, by any stipulations, however express and positive, render it anything but a mortgage, or deprive it of the essential attributes belonging to a mortgage in equity. The debtor or mortgagor cannot, in the inception of the instrument, as a part of, or collateral to, its execution, in any manner deprive himself of his equitable right to come in, after a default in paying the money at the stipulated time, and to pay the debt and interest, and thereby to redeem the land from the lien and encumbrance of the mortgage; the equitable right of redemption, after a default, is preserved, remains in full force, and will be protected and enforced by a court of equity, no matter what stipulations the parties may have made in the original transaction purporting to cut off this right. The doctrine is universal in its application, and underlies many special rules of equity. It extends to stipulations limiting the time of redemption, or the parties who may redeem. Notwithstanding all such stipulations, the right to redeem is general." The law as thus announced is supported by the following authorities: *Toomes v. Conset*, 3 Atk. 261; *Goodman v. Grierson*, 2 Ball & B. 274, 278; *East India Co. v. Atkins*, 1 Comyn, 347, 349; *Spurgeon v. Collier*, 1 Eden, 55; 60; *Cowdry v. Day*, 1 Giff. 316; *In re Edwards' Estate*, 11 Ir. Ch. 367; *Floyer v. Lavington*, 1 P. Wms. 268; *Seton v. Slade*, 7 Ves. 265, 273; *Jennings v. Ward*, 2 Vern. 520; *Robinson v. Farrelly*, 16 Ala. 472; *Parmer v. Parmer*, 74 Ala. 285; *Stoutz v. Rouse*, 84 Ala. 309; *McMillan v. Jewett*, 85 Ala. 476; *Nelson v. Kelly*, 91 Ala. 569; *Quartermous v. Kennedy*, 29 Ark. 544; *Green v. Butler*, 26 Cal. 595, 602; *Pritchard v. Elton*, 38 Conn. 434; *Wynkoop v. Cowing*, 21 Ill. 570; *Willets v. Burgess*, 34 Ill. 494; *Tennery v. Nicholson*, 87 Ill. 464; *Clark v. Fin-*

lon, 90 Ill. 245; Bearss v. Ford, 108 Ill. 16; Jackson v. Lynch, 129 Ill. 72; Turple v. Lowe, 114 Ind. 37; Brush v. Peterson, 54 Iowa, 243; Baxter v. Child, 39 Me. 110; Reed v. Reed, 75 Me. 264; Batty v. Snook, 5 Mich. 231; Bayley v. Bayley, 5 Gray, 505, 510; Youle v. Richards, 1 N. J. Eq. 534; 23 Am. Dec. 722; Vanderhaize v. Hugues, 13 N. J. Eq. 244; Remsen v. Hay, 2 Edw. Ch. 535; Henry v. Clark, 7 Johns. Ch. 40; Stover v. Bounds, 1 Ohio St. 107; Johnston v. Gray, 16 Serg. & R. 361; 16 Am. Dec. 577; Gillis v. Martin, 2 Dev. Eq. 470; 25 Am. Dec. 729; Caldwell v. Bowen, 4 Sneed, 415, 418; Baxter v. Willey, 9 Vt. 276; 31 Am. Dec. 623; Wing v. Cooper, 37 Vt. 169.

Thus, any clause introduced into a mortgage deed to limit the period of redemption is, in equity, totally disregarded: Goodman v. Grierson, 2 Ball & B. 274, 278. No clause in a mortgage can confine the equity of redemption to the lifetime of the mortgagor, or to him and the heirs male, or heirs only of his body: Floyer v. Lavington, 1 P. Wms. 268; Price v. Perrie, Freem. 258; and a stipulation whereby a mortgagor's equity of redemption is to be cut off upon failure to perform the condition by a particular time is void: Quartermous v. Kennedy, 29 Ark. 544. So, where the owner of a certificate of entry of land from the United States assigns such certificate as security for a debt, with a condition of defeasance, on the payment of the debt, and the assignee sells the certificate to a person who has notice of the terms on which it was first assigned, the right of the original assignor to redeem is not affected by a provision in the condition of defeasance, that his right to redeem is limited to a fixed time after the transactoin. "Once a mortgage, always a mortgage": Stover v. Bounds, 1 Ohio St. 107. A restriction of the right of redemption to one year is void: Youle v. Richards, 1 N. J. Eq. 534; 23 Am. Dec. 722. Even the statute of limitations will not prevent the mortgagor, or his representatives, from redeeming under an absolute deed made to secure the payment of a note, unless such statute is pleaded: Brush v. Peterson, 54 Iowa, 243; and, although a deed, absolute in form, contains a defeasance, that is, an agreement to reconvey upon payment of the sum which the deed is given to secure, whereby the time of payment of the debt is made the essence of the contract, so as to permit, by the terms of the defeasance, a declaration of forfeiture in case payment is not made within the time prescribed, the right to redeem is not affected thereby: Jackson v. Lynch, 129 Ill. 72. The right in equity to redeem is not affected by a provision in a mortgage, though it is a deed of conveyance absolute in terms, that the mortgagee shall hold the land free from the right of redemption, or that title shall vest in the mortgagee, if the debt is not paid at maturity: Baxter v. Child, 39 Me. 110; Nelson v. Kelly, 91 Ala. 569; Vanderhaize v. Hugues, 13 N. J. Eq. 244; Willets v. Burgess, 34 Ill. 494; Tennery v. Nicholson, 87 Ill. 464; Bailey v. Bailey, 5 Gray, 505; Clark v. Finlon, 90 Ill. 245. A restriction of the right of redemption to the mortgagor personally is inconsistent with the nature of a mortgage, and is void: Johnston v. Gray, 16 Serg. & R. 361; 16 Am. Dec. 577. The reason and policy of the law, which render voidable

any stipulation disannexing the equity of redemption from a mortgage, apply with equal force to prohibit the waiving of the debtor's statutory right of redemption: *Parmer v. Parmer*, 74 Ala. 285.

A mortgagor may, therefore, redeem his mortgage, even though he has covenanted or taken an oath not to redeem: *East India Co. v. Atkyns*, 1 Comyn, 347, 349; *Vernon v. Bethell*, 2 Eden, 110; *Price v. Perrie*, *Freem. Ch.* 258; *Orby v. Trigg*, 9 Mod. 2; *Seton v. Slade*, 7 Ves. 265, 273; *Bonham v. Newcomb*, 1 Vern. 214. A stipulation in a mortgage, by which the mortgagor "expressly waives, releases, and relinquishes whatever statutory right he may have to redeem the mortgaged premises in the event of a sale being made, and whatever equitable right he may have to avoid or set aside the sale in the event of the mortgagee becoming the purchaser, does not take away or affect the right to file a bill in equity for an account and redemption: *Fields v. Helms*, 82 Ala. 449.

Subsequent Agreements.—While a mortgagor cannot, by a contemporaneous agreement, expressed in the mortgage or otherwise, waive or release his equity of redemption, there is no law to prevent a mortgagor, by a new, independent, and fresh contract, from selling or releasing his equity of redemption to the mortgagee, thereby giving the latter absolute ownership of the property, after a default in complying with a condition. The law only prohibits a mortgagee from availing himself of a stipulation contained in the mortgage, or in a separate instrument made at the time, or of some covenant or agreement forming part of the original transaction, and by which he attempts, upon the happening of some event or condition, to render the estate irredeemable. The doctrine, "once a mortgage, always a mortgage," does not, however, refer to a future contract between the mortgagor and mortgagee in respect to the estate between the parties, and the mortgagee may always purchase the mortgagor's right of redemption, and thus acquire an absolute title. Hence, a subsequent release or waiver of the equity of redemption will be sustained, if supported by a sufficient consideration, in the absence of fraud, oppression and undue advantage: *Spurgeon v. Collier*, 1 Eden, 55, 60; *Villa v. Rodriguez*, 12 Wall. 323, 339; *Parmer v. Parmer*, 74 Ala. 285; *Stoutz v. Rouse*, 84 Ala. 309; *McMillan v. Jewett*, 85 Ala. 476; *McMillan v. Richards*, 9 Cal. 365; 70 Am. Dec. 655; *Green v. Butler*, 26 Cal. 595, 602; *Phelan v. De Martin*, 85 Cal. 365; *Watson v. Edwards*, 105 Cal. 70, 75; *Wynkoop v. Cowing*, 21 Ill. 570; *Ennor v. Thompson*, 46 Ill. 214; *West v. Reed*, 55 Ill. 242; *Seymour v. Mackay*, 126 Ill. 341; *Scanlan v. Scanlan*, 33 Ill. App. 202; *Linnell v. Lyford*, 72 Me. 280; *Scheckell v. Hopkins*, 2 Md. Ch. 89; *Hicks v. Hicks*, 5 Gill & J. 75; *Baughner v. Merryman*, 32 Md. 185; *Batty v. Snook*, 5 Mich. 231; *Trull v. Skinner*, 17 Pick. 213; *Hoover v. Johnson*, 47 Minn. 434; *Youle v. Richards*, 1 N. J. Eq. 534; 23 Am. Dec. 722; *Remsen v. Hay*, 2 Edw. Ch. 535; *Shaw v. Walbridge*, 33 Ohio St. 1; *Hall v. Hall*, 41 S. C. 163; 44 Am. St. Rep. 696, and note; *Hyndman v. Hyndman*, 19 Vt. 9; 46 Am. Dec. 171; *Shouler v. Bonander*, 80 Mich. 531.

Whenever the relation of mortgagor and mortgagee is once shown

to exist, the court views with distrust and disfavor any arrangement between them, by which it is proposed to transfer the equity of redemption to the mortgagee, and the parties will be held to their original relation, unless the transaction appears to be perfectly fair, and no advantage is taken by the mortgagee of the mortgagor by reason of his encumbrance. But a sale of the equity of redemption to a mortgagee is valid where the transaction is fair, untainted by any advantage taken by the mortgagee of the necessities of the mortgagor, to influence him to part with his estate for less than its real value: *Sheckel v. Hopkins*, 2 Md. Ch. 89; *Remsen v. Hay*, 2 Edw. Ch. 535; *Russell v. Southard*, 12 How. 139; *Stoutz v. Rouse*, 84 Ala. 309; *Parmer v. Parmer*, 74 Ala. 285; *West v. Reed*, 55 Ill. 242; *Pritchard v. Elton*, 38 Conn. 434. If a deed and defeasance are in separate instruments, thus constituting a mortgage, a purchase of the equity of redemption by the mortgagee, from the mortgagor, for its full value, a surrender of the defeasance to the mortgagee to be canceled, and the retention of it by the mortgagee is, in law, a cancellation of the defeasance, though it is not actually destroyed: *Green v. Butler*, 26 Cal. 595, showing under what circumstances a court of equity will not compel a conveyance. So, if a mortgage is made by a deed and a separate defeasance, the mortgagor's surrender of the defeasance, and his acceptance of the note and discharge of the debt from the mortgagee, all done with the intent to make the deed absolute, is, as between the mortgagor and mortgagee, a valid transaction, if it is fair, honest, and without fraud: *Watson v. Edwards*, 105 Cal. 70. If a mortgagor, by a subsequent agreement, conveys the premises absolutely to the mortgagee, in payment of the mortgage debt, for the purpose of avoiding the expense of a foreclosure suit, and reserves to himself the right to redeem within two years, in like manner, and upon the same terms and conditions, as if the property had been sold under a decree in chancery to satisfy the mortgage, the agreement will be sustained, if no fraud or unconscionable advantage is alleged or proved, and no great disparity appears between the value of the land and the amount of the mortgage debt. Such a transaction clearly extinguishes the mortgage debt: *Stoutz v. Rouse*, 84 Ala. 309. "Why," said the court in this case, "may not the mortgagor and mortgagee provide by a fair contract, without resort to the courts, for doing precisely what the law would do for them? Shall the law prohibit the parties from contracting bona fide, at an agreed price, to do what it will compel by legal process? We think not, unless the relation of the parties is used to acquire some undue influence by which the creditor unfairly oppresses the debtor, or the sale made is based on a grossly inadequate consideration, for the legal effect of the transaction is that of a sale with the privilege of repurchase within two years, and not of a mortgage, or security for a debt. This is not an unfair sale of the equity of redemption, nor an unreasonable fettering of it within the meaning of the law. It merely converts it by contract into the statutory right of redemption, in order to save the expenses of foreclosure incident to a suit in chancery. The law highly favors the

compromise of lawsuits, whether pending or threatened, upon the soundest principles of public policy. That is all that has been done in this case. There is no fraud alleged or proved, and the mere fact that the mortgagor was in bad health does not show undue influence or unconscionable advantage taken of him by the mortgagee": *Stoutz v. Rouse*, 84 Ala. 309, 312.

If, by subsequent negotiations, on a statement of accounts, between the mortgagor and the mortgagee, after the execution of a mortgage which was, in form, an absolute deed, the conveyance is reacknowledged as of the latter date, and the mortgagor accepts leases of the property at an annual rent, and of other property belonging to the mortgagee, with the privilege of removal for a term of years, and the right to purchase any part of the property, at any time during the term, at a stipulated price, the equity of redemption is released and extinguished, and nothing is left to the mortgagee but the right to repurchase on the terms specified: *McMillan v. Jewett*, 85 Ala. 476. In this case the court said: "If the deed was intended to continue to operate as a mortgage, why was a separate lease to each piece of property made and accepted, reserving an independent and distinct right to purchase either piece? Why was the property conveyed thereby leased, in connection with the store, with the same rights of renewal and purchase? Why was the deed reacknowledged and delivered to defendants, if it was not intended to give it effect which it did not previously possess? The evidence fails to show any fraud, undue influence, or oppression; and the weight of the evidence is, that the property was estimated at a fair value. The conclusion from the facts and circumstances is, that the settlement was a finality, by which the indebtedness of complainant to defendants was satisfied and extinguished by the transfer of the real estate, and that the deed was intended thereafter to be absolute in legal effect, as well as in form. By the transaction, and the terms and purport of the leases, the complainant acquired only the right of repurchase": *McMillan v. Jewett*, 85 Ala. 476, 480.

A conveyance of the mortgaged premises by the mortgagor to the mortgagee, operates as a bar to the equity of redemption only when it clearly and unequivocally appears that both parties so intended that it should; otherwise, it will be regarded as a mere change in the form of the security: *Ennor v. Thompson*, 46 Ill. 214. But, where there has been a bona fide agreement between a mortgagor and a mortgagee that the entire estate in the mortgaged premises shall vest in the mortgagee, mere inadequacy of consideration does not, of itself, deprive the agreement of its binding effect. Notwithstanding the original transaction between the parties was not, in form, a mortgage, but an absolute deed, with a bond to reconvey upon the payment of the money at a specified time, it is not essential to the proper extinguishment of the right of redemption, by an arrangement between the parties themselves, that there should be an instrument operating as a technical conveyance of the mortgagor's estate in the land. If such transactions occur between them as would render it inequitable for the grantor to be permitted to redeem, this would, of itself, without a formal, technical release, operate as a

cancellation of the instrument of defeasance, and give to the deed the effect of an original, absolute conveyance as between the parties: *West v. Reed*, 55 Ill. 242; *Seymour v. Mackay*, 126 Ill. 341. It may here be remarked that "reason and justice are controlling guides in equity where no positive rule of law intervenes." So, if a deed, absolute in form, is given as a security for a debt, and a contract is given by the grantee to reconvey, upon payment, but the debtor, not being able to pay at the time appointed, surrenders the contract in discharge of the debt, and takes a lease of the premises, he has no estate left in the land, which is subject to levy and sale under execution: *Seymour v. Mackay*, 126 Ill. 341. The surrender and cancellation of the instrument of defeasance, executed by the grantee in a deed, if bona fide, is binding upon the parties where the rights of third persons have not intervened: *Youle v. Richards*, 1 N. J. Eq. 534; 23 Am. Dec. 722; *Trull v. Skinner*, 17 Pick. 213.

In *Pritchard v. Elton*, 38 Conn. 434, a note and mortgage were given as security for a loan of money. The mortgagor agreed with the mortgagee that, if the note was not paid according to its tenor, he would execute to the mortgagee a quitclaim deed of the premises. The note was not paid, and the mortgagor, acting in good faith toward the mortgagee, but without the latter's knowledge, executed the deed, had it recorded, and died insolvent. The mortgagee, fearing that the deed might be in fraud of the mortgagor's creditors, and that it would affect his title under the mortgage, refused to accept it, and, after the death of the mortgagor, released to his heirs whatever interest in the premises had passed to him by virtue of the deed. The mortgagee, having obtained a decree of foreclosure against the administrators of the mortgagor, but without making the heirs of the latter parties, sold the premises, upon the failure to redeem, in good faith, at a fair price, at a loss to himself of over two thousand dollars, and conveyed them by warranty deed. Upon a bill to redeem, brought by the heirs of the mortgagor, it was held that they were not entitled to relief. In this case, the court said: "It is obvious that very slight, if any, blame can attach to Mr. Elton [the mortgagee], and that the heirs of Mr. Pritchard [the mortgagor], if permitted now to redeem, would do so: 1. Against the express contract of their ancestor, in whose place they stand; 2. Against the renunciation by their ancestor by quitclaim deed of all right to redeem; and 3. Against the equities of the case, growing out of the sale of the property made by Mr. Elton fairly and in good faith. The legal title is in the present occupants of the property under Mr. Elton's deed, and this legal title we think ought to prevail against the claims of the petitioners, standing as they do in the place of Mr. Pritchard, with no higher equity than he would have had, if living: *Pritchard v. Elton*, 38 Conn. 434, 437.

If it is proved that a fair purchase of the equity of redemption of the mortgaged property was made by the mortgagee, at a fair price, a court of equity will refuse to grant relief to the mortgagor on a bill to redeem: *Shekell v. Hopkins*, 2 Md. Ch. 89. A debtor executed a deed of his real estate to his creditor, and the latter gave a title bond, conditioned for the reconveyance of the land, if the

grantor should, within a certain time, pay the amount of the indebtedness, and interest thereon, and the taxes on the land. Otherwise, the grantee was to be put in full possession. The grantee died, leaving no debts unpaid, and his heirs, all being of age, divided his property among themselves without administration. Under these circumstances, it was held that, if the heirs of the grantee, by conveying the land, treated the transaction as a sale and conveyance, they, or their assignee, could not afterward treat it as a mortgage; and that, if the grantor delivered up the title bond to the heirs of the grantee, in consideration of the conveyance by them of a portion of the land to the son of the grantor, this was a confirmation of the original transaction as a sale, and the heirs, or their assignee, could not afterward, by foreclosure, treat it as a mortgage: *Shubert v. Stanley*, 52 Ind. 46.

Proof—Relief from Unfairness.—Equity looks with a jealous eye upon sales of the equity of redemption to the mortgagee, and requires them to be established by the clearest and most convincing proof: *Locke v. Palmer*, 26 Ala. 312; *Hyndman v. Hyndman*, 19 Vt. 9; 46 Am. Dec. 171; *Shaw v. Walbridge*, 33 Ohio St. 1. A release or waiver of the equity of redemption must appear by a writing importing in terms to be a transfer of the mortgagor's interest, or such facts must be shown as will operate to estop him from asserting any interest in the premises: *Clark v. Condit*, 18 N. J. Eq. 358; *Peugh v. Davis*, 96 U. S. 332. But, while a release or transfer of the equity of redemption, under a formal mortgage, must be in writing, and contain words of grant or transfer, no writing is necessary, when the original conveyance is in form an absolute deed, the right of redemption being created by parol agreement: *McMillan v. Jewett*, 85 Ala. 476. Where the grantor claims that a deed absolute upon its face was a mortgage, it is competent for the grantee, in a proceeding by the mortgagor to establish that claim, to show that, although the instrument was originally a mortgage, the equity of redemption had been released by a parol agreement: *Shaw v. Walbridge*, 33 Ohio St. 1. The consideration must also be for a consideration which would be deemed reasonable if the transaction were between other parties dealing in similar property in its vicinity: *Peugh v. Davis*, 96 U. S. 332. Any arrangement between the mortgagor and the mortgagee whereby the creditor secures the property for himself at less than its value, through an advantage which his position as mortgagee enables him to take of the necessities of the mortgagor, is liable to be set aside or adjudged void: *Niggeler v. Maurin*, 34 Minn. 118; and equity will not hesitate to relieve against a sale of the equity of redemption to the mortgagee, where the consideration is grossly inadequate: *McKinstry v. Conly*, 21 Ala. 678; *Brown v. Gaffney*, 28 Ill. 149; *Russell v. Southard*, 12 How. 139; *Stoutz v. Rouse*, 84 Ala. 309. The mortgagor is entitled to every favorable consideration on account of the unequal relations of the parties: *Hyndman v. Hyndman*, 19 Vt. 9; 46 Am. Dec. 171; and courts of equity will not permit a mortgagee to take advantage of his position so as to wrest from the mortgagor his equity, by an unconscionable bargain: *Shaw v. Walbridge*, 33 Ohio St. 1. If,

therefore, a mortgagee avails himself of the advantages afforded by his possession of the property, his position as creditor, and the embarrassed condition and physical debility of the mortgagor, to obtain a release of the equity of redemption, the mortgagor may have the transaction set aside in a court of equity: *Thompson v. Lee*, 31 Ala. 292. So, if the mortgagee purchases the equity of redemption for a grossly inadequate price, under circumstances showing that the mortgagor was induced to make the sale by threats from the mortgagee, a court of equity will allow a redemption: *Brown v. Gaffney*, 28 Ill. 149.

If a mortgagee takes from his mortgagor a conveyance of the mortgaged premises, without paying anything more for the land than the satisfaction of the old debt secured by the mortgage, the burden is on the mortgagee, when the transaction is attacked for fraud, to show that it was fair, and that the conveyance was of the equity of redemption, voluntarily and intelligently given upon a contract of sale entirely disconnected from the mortgage contract. Especially is this so where the mortgagor is a very old, feeble, and illiterate lady: *Hall v. Hall*, 41 S. C. 163; 44 Am. St. Rep. 696, and note showing that a mortgagee may purchase from his mortgagor as freely as from any third person. In determining whether a transaction was intended to operate as a release of the equity of redemption, the fact that the value of the property, at the time of such transaction, was greatly in excess of the amount paid, and of that originally secured, as well as the fact that the mortgagor retained possession, and subsequently inclosed and cultivated the land, are strong circumstances tending to show that a release was not intended: *Peugh v. Davis*, 96 U. S. 332. If a deed, absolute in form, is made as security for a loan, papers afterward executed, and which refer to the transaction as one of purchase, will be considered in connection with the deed, but they are no more conclusive, in equity, as evidence of an actual sale, than the original deed would be: *Peugh v. Davis*, 96 U. S. 332. An omission of a covenant, in a mortgage, for redemption may be shown by parol: *Joynes v. Statham*, 3 Atk. 388.

If a portion of the mortgaged property has been sold with the mortgagor's consent, and the proceeds applied toward the satisfaction of the debt, he may file a bill to redeem the residue: *Locke v. Palmer*, 26 Ala. 312. If the mortgagee has apparently destroyed the equity of redemption by conveying an indefeasible title to the premises to a bona fide purchaser, the mortgagee will be treated in equity as a constructive trustee for the balance in his hands after deducting from the price received from the sale of the land the amount for which the mortgagee held it as security: *Linnell v. Lyford*, 72 Me. 280.

If a mortgagor assigns the lease of a farm to secure the payment of a debt due to the mortgagee, and the parties afterward enter into an agreement, by which the mortgagor, in consideration of a sum of money expressed, but not, in fact, paid, agrees to give up to the mortgagee one-half of the farm, and the mortgagee enters into possession of the premises, and surrenders the lease to the landlord, and

takes a new lease for an extended term of years, the mortgagor is entitled to redeem the whole premises, and, on such redemption, to have the entire benefit of the new lease: *Holridge v. Gillespie*, 2 Johns. Ch. 30. A mortgagor gave an absolute deed of certain premises to secure an indebtedness. Subsequently, the mortgagee paid to the mortgagor the sum of fifty dollars, with the intent on the part of both parties that the money should be received in full settlement of all claims of the mortgagor to the premises, or to a reconveyance thereof. The mortgagor acknowledged the receipt of the money "in full satisfaction for all claims and demands whatsoever as to the conveyance of property, or otherwise, up to this date." In an action by the mortgagor to redeem, it was held that neither the written receipt nor the payment operated to change the deed from a mortgage to an absolute conveyance; that no agreement could be "spelled" out of the instrument, which could be specifically performed; that the instrument could not be aided by parol proof, so as to make it a perfect contract to release or convey lands; that the payment and receipt of the money did not operate as an estoppel or take the case out of the statute of frauds; and that, therefore, the right of redemption was not extinguished, and the entire estate acquired, by the payment of the fifty dollars, and the written acknowledgment of its payment: *Odell v. Montross*, 68 N. Y. 499. In this case, the court said: "The rights of the mortgagor and his estate can only be foreclosed by due process of law, or a release by deed in proper form, or a conveyance sufficient to pass the title to an estate in fee. The defendant has not purchased the equity of redemption, or acquired the estate of the plaintiff by any proper release or conveyance. No injustice will be done the defendant by the result to which this conclusion leads. He will receive his money and interest, and will be fully indemnified, and he is not entitled to speculate in his dealings with his mortgage debtor": *Odell v. Montross*, 68 N. Y. 499, 507. Compare *Mills v. Mills*, 26 Conn. 213.

The time of redemption, under a valid statutory foreclosure of a mortgage, cannot be extended to await the determination of a suit by a second mortgagee for an accounting for use or rent of the premises, had or received by the first mortgagee pending the time of redemption. The amount due must be paid or tendered within the time fixed by the statute, or, if an extension has been agreed on by the parties, within the time stipulated: *Hoover v. Joanson*, 47 Minn. 434.

If the surrender and cancellation of an instrument of defeasance, executed by the grantee in a deed, is procured by fraudulent representations made to the mortgagor's agent, the mortgagor's equity of redemption is not impaired thereby, and he may, nevertheless, have the aid of the court to enforce it: *Youle v. Richards*, 1 N. J. Eq. 534; 23 Am. Dec. 722.

EQUITY.—A court of equity in administering justice adapts itself to the peculiar circumstances of each case brought before it: *Higginbottom v. Short*, 25 Miss. 160; 57 Am. Dec. 198; and the right to have equity cases dealt with by equitable methods is as sacred as the right of trial by jury: *Brown v. Buck*, 75 Mich. 274; 13 Am. St. Rep. 438.

CASES
IN THE
SUPREME COURT
OF
COLORADO.

JOHNSON v. JOHNSON.

[22 COLORADO, 20.]

MARRIAGE AND DIVORCE—CONTESTED ISSUES—PRACTICE.—Under a statute providing that in all divorce cases where the defendant shall appear and deny the charges alleged, they shall be tried, by a jury, a verdict by a jury in a contested case is absolutely essential as a prerequisite for a decree of divorce; and the rule which prevents appellate courts from overthrowing verdicts based upon a conflict of evidence applies with particular force to divorce proceedings.

MARRIAGE AND DIVORCE.—DESERTION, WITHIN THE MEANING OF THE LAWS, consists in the actual ceasing of cohabitation, and the intent in the mind of the offending party to desert the other.

MARRIAGE AND DIVORCE—DESERTION—EVIDENCE OF INTENT.—Intent to desert within the meaning of divorce laws is always largely a matter of inference and presumption; and the subsequent conduct of the parties frequently makes plain the intent with which a previous act was performed. Evidence of such conduct is admissible to ascertain the intent.

MARRIAGE AND DIVORCE—ALIMONY—PLEADING.—After the issues in a divorce case have been found in favor of plaintiff, she may file a supplemental petition relating exclusively to property rights and the question of permanent alimony.

MARRIAGE AND DIVORCE—ALIMONY—LIEN.—Alimony awarded in a divorce case may be decreed to be a lien upon the real estate of the defendant, but not upon his personal property.

Taylor & Laws, and T. A. McMorris, for the plaintiff in error.

J. K. Vanatta, J. M. Dorr, and V. A. Elliott, for the defendant in error.

23 HAYT, C. J. There are sixteen assignments of error in the record. About one-half of this number refer to rulings of the

trial court upon the charge of nonsupport contained in the complaint.

The statute in force at the time this case was tried provides that the marriage relation may be dissolved for the following, among other causes: Desertion, nonsupport. In this case, the jury resolved the issues made by the pleadings upon each of the above grounds in favor of the plaintiff. Desertion being established, unless overthrown, the judgment of divorce must stand, and, therefore, a consideration of the charge of nonsupport becomes unnecessary.

The statute provides that in all cases for a divorce, where the defendant shall appear and deny the charges alleged, the same shall be tried by a jury. By this statute, the verdict of a jury in a contested case is absolutely essential as a prerequisite for a decree of divorce. The rule, therefore, which prevents appellate courts from overthrowing verdicts based upon a conflict of evidence, applies with particular force to divorce proceedings under this statute.

A reference to the pleadings discloses that each party charges the other with desertion, alleging that the same had continued for more than one year. It is apparent from this, and also from the evidence, that the parties had been separated for more than one year immediately preceding the institution of the divorce proceedings. The plaintiff alleges that this separation was the fault of the defendant, while the defendant charges that it resulted entirely from the plaintiff's conduct. The issue thus raised having been resolved by the jury and district court in favor of the plaintiff upon conflicting evidence, it is not the province of this court to ²⁴ weigh the evidence for the purpose of substituting its judgment for that of the court and jury below.

A careful reading of the evidence, however, convinces us that the verdict of the jury is right, and if we were at liberty to ignore the verdict, the result would not be other or different from that reached in the district court.

It has been held that desertion consists in the actual ceasing of cohabitation, and the intent in the mind of the offending party to desert the other: *Stein v. Stein*, 5 Colo. 55. It cannot be denied that there is evidence in this record going to show the existence of both of these conditions in this case. It is contended, however, that improper evidence was admitted for the purpose of showing the intent with which the defendant left the plaintiff. The particular evidence objected to is not pointed out by the assignments of error, but we infer from the argument that it con-

sists of evidence of matters occurring subsequent to the separation. It frequently happens that the intent can only be shown by the subsequent conduct of the party to be charged. Intent is always largely a matter of inference and presumption, and the subsequent conduct of parties frequently makes plain the intent with which a previous act was performed.

That causes arise for the dissolution of the marriage relation is to be regretted in all cases; but where, as here, the parties have lived together as husband and wife for nearly thirty years, each enjoying the love and confidence of the other for a quarter of a century of that time, a separation in their declining years seems particularly distressing. Courts may regret, but they cannot prevent, this result. So, also, the task of making some just and equitable distribution of the estate, representing the accumulation of years of toil and deprivation, in which both have shared, is one that the courts would gladly avoid, if such a course were not inconsistent with duty.

It is apparent that the real contention between these parties is with reference to the distribution of the estate; and, where the issue is made, it must be resolved upon the same equitable ²⁵ principles as govern in other cases. It is not reasonable to suppose that absolute justice will be administered in all instances. The best that can be hoped for is, that those principles which have stood the test of reason and judicial scrutiny will control. It is doubtless true that no two judges, acting independently upon the same state of facts, would distribute an estate between husband and wife exactly alike. Such exactitude is never required nor expected; but where the trial judge has given the matter due consideration in the light of correct legal and equitable principles, appellate courts will not undertake to disturb the judgment, unless the decision is manifestly unjust or unreasonable.

In this case, widely different estimates were placed upon the value of defendant's property by the different witnesses.

On the one hand, there is evidence in the record which would have justified the district judge in increasing plaintiff's allowance, while, on the other, there is testimony which, if standing alone, goes to show that the amount awarded as permanent alimony is excessive; but, when all the evidence is considered, the result reached seems to be fair and just. Certainly, nothing has been shown that would justify this court in setting aside the findings in this particular.

Objection is, however, based upon the ruling of the trial court allowing the plaintiff to file a supplemental petition. This sup-

plemental petition relates solely and exclusively to property rights and the question of permanent alimony, matters which were presented in the original petition, but in a general way only.

It was eminently fit and proper, although not absolutely necessary, that such a pleading should be filed in order that the issue might be made more specific than in the original pleading.

The course pursued is not only free from objection, but it is in accordance with the better practice, and may be followed with advantage in other cases: 2 Bishop on Marriage, Divorce, and Separation, secs. 1066-1073.

The district court gave the plaintiff a lien for the amount ²⁰ allowed as alimony upon all the property, both real and personal, of the defendant. Error is particularly assigned upon this part of the decree. In some of the states, a decree for alimony is made by statute a lien upon real estate, and in some it has been held that the courts have power to create such a lien in the absence of expressed statutory authority therefor, although this latter proposition is denied in other states; but we know of no authority which permits the court to make a decree for alimony a lien upon the personal property of the defendant. The decided cases seem to deny the power of the courts to do this: 2 Bishop on Marriage, Divorce, and Separation, sec. 1100.

We are referred to our statute in support of this part of the decree.

"When a divorce shall be decreed, it shall and may be lawful for the court to make such order touching the alimony and maintenance of the wife, the care and custody of the children, or any of them, as from the circumstances of the parties and the nature of the case shall be fit, reasonable, and just; and, in case the wife be complainant, to order the defendant to give reasonable security for such alimony and maintenance, or may enforce the payment of such alimony and maintenance in any other manner consistent with the rules and practice of the court, and may also grant alimony pendente lite; and the court may, on application, from time to time, make such alterations in the allowance of alimony and maintenance as shall appear reasonable and proper."

We do not find in the foregoing statute authority to make the decree a lien upon personal property. It provides: 1. Where the wife is a complainant, the court may require the defendant to give reasonable security; 2. To enforce the payment in any other manner consistent with the rulings and practice of the court. No attempt was made in this case to require the defendant to give security as provided by this statute, and we need, therefore,

only consider the second authorization. This gives us no new remedy, but provides simply that the old remedies may be applied.

Decreeing a lien upon personal property is not one of the ²⁷ methods for collecting alimony provided by this statute, and it is inconsistent with the rules and practice in force in this state. This portion of the divorce act was under consideration by the supreme court of Illinois in the case of *Sapp v. Wightman*, 103 Ill. 150, and it was held that the words, "or in any other manner consistent with the rules and practice of the court," mean "no more than that resort may be had to the known modes, under the rules and practice of the court of chancery, of enforcing obedience to writs, orders, and decrees, as sequestration, attachment for contempt, etc., or the statutory method of creating a lien on lands within the court's jurisdiction."

In the case of *Yelton v. Handley*, 28 Ill. App. 640, it was held that a court of equity has no power to make a decree for alimony a lien upon personal property. This is the only case that we have been able to find in which the question has been raised in any appellate court. Our statute appears to have been taken from Illinois, and the decisions of that state should be given great weight, although not rendered until after the adoption of the statute in this state. In Illinois, as we have seen, it has been held that the power of the court to make a decree for alimony a lien upon real estate is expressly upheld, and the power to make a lien upon personal property is as expressly denied: *Wightman v. Wightman*, 45 Ill. 167; *Yelton v. Handley*, 28 Ill. App. 640; *Sapp v. Wightman*, 103 Ill. 150.

There seems to be no reason for extending this rule, and in practice we think that liens of this character upon personal property would lead to great inconvenience. Such a decree is unusual, and as the usual remedies for the enforcement of a decree for alimony are complete and adequate, there is no reason for resorting to a doubtful remedy.

In so far as the decree attempts to make the allowance for alimony a lien upon the personal property of the defendant, it is hereby modified, and with this modification the judgment is affirmed. Costs in this court will not be awarded to either party.

Judgment accordingly.

MARRIAGE AND DIVORCE.—DESERTION is the voluntary separation of one spouse from another without justification, and with an intention of not returning: *Williams v. Williams*, 130 N. Y. 193; 27 Am. St. Rep. 517, and note. Under the Illinois statute, the desertion which will justify a divorce must be without any reason-

able cause, and the reasonable cause which will justify desertion must be such as would entitle the party deserted to a divorce: *Fritz v. Fritz*, 138 Ill. 436; 32 Am. St. Rep. 156, and note. See, also, the extended note to *McVickar v. McVickar*, 19 Am. St. Rep. 433.

MARRIAGE AND DIVORCE—DESERTION—EVIDENCE.—Where no cause is assigned or explanation offered for desertion of a husband by his wife, who is suing for divorce, it is legally inferred that she is guilty of willful desertion: *Conant v. Conant*, 10 Cal. 249; 70 Am. Dec. 717.

MARRIAGE AND DIVORCE—ALIMONY—LIEN.—If, in a final decree of divorce, a wife is awarded a gross sum as alimony, such sum is a lien upon the husband's real property, if, by the statute of the state, every final determination of the rights of the parties is declared to be a judgment and every judgment to be a lien upon the land and tenements of the debtor in the county wherein the judgment is entered: *Conrad v. Everich*, 50 Ohio St. 476; 40 Am. St. Rep. 679, and note.

COUNTY COMMISSIONERS OF PITKIN COUNTY v. BALL.

[22 COLORADO, 125.]

COUNTIES—LIABILITY FOR WRONGFUL ACT OF OFFICERS.—A county is not liable for the tortious acts of its officers, or for acts clearly beyond their power.

R. G. Withers, for the plaintiff in error.

126 CAMPBELL, J. This action is not one for damages against the county for casting a cloud on plaintiff's title, but is for a fixed sum which the plaintiff alleges she was compelled to pay to Mitchell, the grantee of the defendant, in order to clear her title from a cloud before she could complete a sale. This money was paid to Mitchell. The county received none of it.

The wrong committed by the county, through its officers, was in assessing untaxable property, levying an illegal tax, and selling the property for failure to pay the same. If the county is liable at all to a landowner, under these circumstances, the extent of the liability would not be whatever sum Mitchell should exact, or the plaintiff be willing to pay, or what these persons should mutually agree upon, to have the cloud removed. But for such tortious acts of its officers, or for acts clearly beyond their power, the county, in the absence of a statute, is not liable: *County Commrs. v. Bish*, 18 Colo. 474, and cases cited; *Mechem on Public Officers*, sec. 850; 1 *Beach on Public Corporations*, c. 20, secs. 258-263.

In the absence of direct statutory authority therefor, we know of no law that would make the county liable for money ¹²⁷ paid by a landholder to one who holds a recorded tax deed for the

land, in order to clear his title. If the board of county commissioners fraudulently, or with intent to damage the plaintiff, wrongfully conveyed to Mitchell the plaintiff's land, of which the county held a tax deed issued under a void tax sale, even if this occasioned a cloud upon the title, the county cannot be held in damages therefor, whatever may be the liability of the officers in their individual capacity, as to which we express no opinion.

The circumstance that the county promised to pay, if the county attorney should so advise, is not important, for the liability of the county for an illegal demand preferred against it is not made legal merely because the county attorney advises that the claim be paid. If the plaintiff has a remedy for the recovery of the money paid to Mitchell, she has mistaken it in the present action.

The judgment is reversed, and the court below ordered to dismiss the complaint.

COUNTIES—LIABILITY FOR WRONGFUL ACTS OF OFFICERS.—In the absence of a statute imposing liability, a county is not liable for injuries resulting from the negligence of its officers or agents: *Helgel v. Wichita County*, 84 Tex. 392; 31 Am. St. Rep. 63, and note. Between a county and its officers, the principles of respondeat superior do not apply, because the relation of master and servant does not exist: *Fry v. County of Albemarle*, 86 Va. 195; 19 Am. St. Rep. 879, and note. This subject is fully discussed in the extended note to *Gilman v. County of Contra Costa*, 68 Am. Dec. 205.

FRANKLIN MINING COMPANY v. O'BRIEN.

[22 COLORADO, 129.]

COTENANCY—PURCHASE OF OUTSTANDING TITLE OF MINING CLAIM.—The rule that the purchase of an outstanding title by a tenant in common inures to the benefit of all of the cotenants applies to the purchase by a cotenant in a mining claim of an interest in a senior conflicting claim.

CORPORATIONS—NOTICE—WHAT IS NOT.—A corporation is not affected with notice or knowledge of facts merely because some of its promoters who organized the corporation had knowledge of such facts, or merely because some of its stockholders had such notice.

CORPORATIONS—NOTICE TO OFFICER—EFFECT ON CORPORATION.—A corporation is not charged with notice of facts known or acquired by its officer or agent in a transaction in which he acts for himself.

CORPORATIONS—NOTICE OF EQUITABLE TITLE.—Although the holders of the legal title convey to a corporation of which they were the promoters and continue to be its directors and only stockholders, neither they nor the corporation can thereby defeat an equitable title out against them of which they had knowledge at the time of the conveyance. The corporation stands charged with the same equities and knowledge as its grantors.

Wolcott & Vaile, and Thomas, Bryant & Lee, for the appellant.

Riddell, Starkweather & Dixon and C. Reed, for the appellee.

130 CAMPBELL, J. The appellee, O'Brien, who was plaintiff below, is the owner of an undivided one-fifth of the Franklin mining claim; the appellant, the Franklin Mining Company, the defendant below, is the owner of the remaining undivided four-fifths thereof, the sole owner of the Dr. Franklin mining claim, and the owner of an undivided one-half of the Steele mining claim, all situate in the Aspen mining district, Colorado.

The complaint in this case contains two causes of action, but, as plaintiff bases his rights upon the second and upon his replication, the first cause of action, which is in the ordinary form for the recovery of the possession of real property, will not be further noticed.

The second cause of action in substance alleges that the plaintiff is the owner of an undivided one-fifth of the Franklin lode and the defendant is the owner of the other four-fifths therein, and they, as tenants in common, are the owners, and in the actual possession, of said claim; and that whilst they were so in possession and working and developing the mine, the defendant, on the first day of April, 1887, disregarding the plaintiff's rights, ousted him from possession of the premises in controversy and wrongfully assumed and exercised the sole and exclusive ownership thereof; that from the territory in question the defendant has extracted **131** and converted to its own use valuable ores, and has refused to account to the plaintiff for his share thereof.

A decree is sought, adjudging the plaintiff to be the owner of the undivided one-fifth of the mining claim; an accounting is asked for, as well as a temporary injunction restraining the working of the mine, and general relief is prayed.

To this complaint an answer was filed, containing eight separate and distinct defenses, the affirmative ones of which were substantially denied by the replication. The pleadings are very voluminous—unnecessarily so—and tend rather to obscure than to elucidate the real controversy in the case. No attempt will be made even to summarize all of these separate defenses; and while it is, among other things, contended that in the replication there is a material departure from the complaint, we are satisfied that the pleadings, as well as the evidence, fairly present for determination the legal propositions necessary for the appellee to maintain in order to justify the judgment below.

It will, however, tend to explain this controversy to state generally that the defenses set up in the answer, so far as we deem them material, are: 1. That the defendant is, in law and in fact, the owner, and entitled to the exclusive possession, of that portion of the territory which is in conflict between these three claims, by virtue of its ownership of the Dr. Franklin lode and of an undivided one-half interest in the Steele lode, each of which we shall assume, what we consider to be admitted, to be a senior and prior location to the Franklin; 2. And as strengthening and fortifying this superior right, that in a certain adverse suit duly pending in the district court of Pitkin county between the then owners of the Franklin and the Dr. Franklin claims, a judgment was duly rendered establishing the priority of the Dr. Franklin over the Franklin claim, and that the defendant, having bought into the latter after this suit was instituted, took subject to the determination of that action.

Assuming the priority, as locations, of these two claims over the Franklin lode, the replication is, that the plaintiff ¹³² and defendant's grantors were tenants in common, and in actual possession, of the Franklin lode, and that arising therefrom the relations of trust were such that said grantors could not buy in and set up as against their cotenant a superior, outstanding and adverse title; that the judgment making the Dr. Franklin superior to the Franklin was rendered by consent, and for the benefit, of all the several owners of the latter; and that the defendant company, in law, is charged with full notice of the equities belonging to plaintiff. Other issues, if any, raised by the pleadings, we do not consider important.

Upon trial to the court without a jury, the finding was, that the allegations of the second cause of action and the matters set forth in plaintiff's replication were established, and a decree was thereupon entered, adjudging plaintiff to be the owner of an undivided one-fifth interest of the territory in conflict between the Franklin and the Dr. Franklin lodes, and an undivided one-tenth interest in the territory in conflict between the Steele and the Franklin lodes. From that decree the defendant is prosecuting its appeal to this court.

The evidence tended to show, and is sufficient to uphold, the finding of the trial court that the plaintiff and the grantors of the defendant were tenants in common, and, as such, in actual possession of the Franklin lode, though they did not hold under the same instrument, or from the same grantor. The only unity in their ownership was that of possession. Whilst so in posses-

sion, plaintiff's cotenants bought all of the Dr. Franklin and one-half of the Steele mining claims, and would not, upon his offer so to do, permit their cotenant to contribute his portion of the purchase money, but instead refused to allow him so to do, and they now claim the exclusive ownership of the territory in conflict between these claims.

It is probably true as to some of the fractional interests, if the time when these superior rights were acquired is to be determined from the dates of the deeds of conveyance, that they were purchased by plaintiff's cotenants before they ¹³³ acquired their interest in the junior Franklin lode; but as the record shows that such interests were conveyed in accordance with a parol agreement made prior to that time, and which was after the cotenancy in the Franklin existed, it is only just and fair that the date of the acquisition of such superior interest is to be determined by reference to the time when the original agreement was made, and not when the conveyances were actually executed.

Hence, it follows that as the interests were acquired, or contracted for, while the relation of cotenancy in the Franklin lode existed, the purchasers should in equity be considered as tenants in common with the plaintiff.

This brief statement of the pleadings and the evidence will sufficiently indicate, generally, the nature of this cause; but to make clear all the different questions involved, greater particularity in the statement will be observed in the appropriate place in the opinion.

To obtain a reversal of this judgment and decree, the appellant relies upon the following general propositions: 1. That the appellee, O'Brien, is not and never was a cotenant with the appellant, nor with any of appellant's grantors, of the land in controversy; 2. That if the Franklin claim, as such, should be held to include the ground in controversy, nevertheless the purchase by appellant's grantors of the superior and paramount title of the Steele and the Dr. Franklin did not inure to the benefit of the appellee so as to give the latter an interest with the appellant in the lands held under such superior and paramount title; 3. If the principle invoked by the appellee is applicable in any way to the facts of this case, his right would, in any event, be limited to a share in the individual purchases of the senior titles made by D. R. C. Brown; 4. That the defendant company, formed after these various transactions occurred, took relieved of all equities that may have existed as between its grantors and plaintiff; 5.

That the plaintiff has failed to establish the existence of any such mining claim known as the "Franklin lode."

¹³⁴ These general propositions, together with such subordinate matters as naturally arise in connection therewith, and the facts which the evidence and pleadings disclose, will be treated in the order followed by counsel in their able and exhaustive arguments which have materially assisted us in our examination of the complicated case presented in the record.

The general rule, as stated by Mr. Freeman, is: "A cotenant cannot take advantage of any defect in the common title by purchasing an outstanding title or encumbrance and asserting it against his companions in interest. The purchase is, notwithstanding his designs to the contrary, for the common benefit of all the cotenants. The legal title acquired by him is held in trust for the others, if they choose, within a reasonable time, to claim the benefit of the purchase, by contributing, or offering to contribute, their proportion of the purchase money": Freeman on Cotenancy and Partition, sec. 154.

In support of the first proposition, the argument is, that each of these three mining claims is a separate and distinct thing in law; that the first of the three embraced every part of the ground within its exterior boundaries, the second only that portion within its exterior boundaries not in conflict with the first, and the third only that territory within its exterior boundaries not in conflict with either the first or second. So that when the appellee or appellant, or any of its grantors, bought an interest in the Franklin lode, it being the third in order of priority, neither purchaser got any interest in any ground in conflict, but only what was outside of the boundaries of the two senior locations; and that when the appellant, or its grantors, whilst they were cotenants with the appellee of this nonconflicting ground, bought an interest in either of the senior conflicting locations which, in law, absorbed the conflicting territory, there was not thus acquired an outstanding title or interest in the land in controversy in this case, by a tenant in common in the Franklin lode, nor was there a purchase of any outstanding or adverse ¹³⁵ title relating to it, but a purchase merely of a title to an entirely distinct and independent entity. To put it in another form, it is contended that the owners of the Franklin are tenants in common only as to the nonconflicting territory, but not as to the ground in controversy.

If this contention be true, or the distinction logical, the entire

case of the plaintiff falls, for he must recover, if at all, only upon the theory of a trust relation between the defendant's grantors and himself as tenants in common of the disputed ground, and because of their having done something to his prejudice in reference to the common property.

But this reasoning, while specious, and, in one view of the case, sound, is not applicable to the rights of the parties in this case. The rule that the appellee invokes, as was said by Mr. Justice Miller in the case of *Rothwell v. Dewees*, 2 Black, 613, is "based on a community of interest in a common title, which created such a relation of trust and confidence between the parties that it would be inequitable to permit one of them to do anything to the prejudice of the other, in reference to the property so situated."

Unquestionably, plaintiff and defendant's grantors were tenants in common of all the ground properly included in the Franklin location. It is true, also, that each one of these mining claims is, in law, a different thing from either of the others. Buying a title, therefore, in one of the senior claims, is not literally buying in an outstanding title of the Franklin claim; but to permit a tenant in common of the Franklin claim to buy in the title of a senior conflicting mining location, and assert it against his cotenant in the junior claim, would certainly prejudice his cotenant; for, if this could be done, the title of the latter as to the conflicting ground would thus be as effectually extinguished as if the patent to the junior location itself were obtained, with hostile intent, by the tenant and successfully asserted against the cotenant.

The reason for the application of the rule in the one case is as forcible as in the other, and to draw any such distinction ¹³⁶ as is here claimed with respect to cotenancy in mining claims would be to sacrifice substance for shadow, and enable gross wrongs to be perpetrated, contrary to the principle which gives life to the rule.

But it is further urged, and in support of the second proposition, that the general rule, in any event, is confined to joint tenants, tenants by entireties, and coparceners strictly, and to tenants in common only when they take from the same grantor and by the same instrument, or by operation of law, or when the duty is the result of an express contract between them to that effect. The expression of this exception is found in section 155 of *Freeman on Cotenancy and Partition*, and is as follows:

"As the rule forbidding the acquisition of adverse titles by a cotenant from being asserted against his companions is always

said to be based upon considerations of mutual trust and confidence supposed to be existing between the parties, the question naturally arises whether the rule is applicable where the reasons on which it is based are absent. Joint tenants, tenants by entirety, and coparceners always hold by and under the same title. . . . Tenants in common, on the other hand, may claim under separate conveyances, and through different grantors. Their only unity is that of right to the possession of the common subject of ownership. As their connection is not necessarily so intimate as that of other cotenants, it may well be doubted whether they should always be subject to the restraints imposed upon the others. There are many cases in which the rule in regard to the acquisition of an adverse title by a cotenant is spoken of in general terms as applying to tenants in common, irrespective of their special and actual relations to one another. But an examination of the decisions clearly shows that tenants in common are not necessarily prohibited from asserting an adverse title. If their interests accrue at different times, and under different instruments, and neither has superior means of information respecting the state of the title, then either, unless he employs his cotenancy to secure an advantage, ¹³⁷ may acquire and assert a superior outstanding title, especially where the cotenants are not in joint possession of the premises."

All the authorities upon this question are based upon the case of *Keech v. Sandford*, reported in volume 1 of *White and Tudor's Leading Cases in Equity*, at page 48, while the leading case in this country is *Van Horne v. Fonda*, 5 Johns. Ch. 388. Undoubtedly, this exception to, or limitation upon, the general rule has been recognized, if the doctrine itself has not been expressly adjudicated in the following, among other cases: *Matthews v. Bliss*, 22 Pick. 48; notes to *Keech v. Sandford*, 1 *White and Tudor's Lead. Cas. Eq.* 48; *Roberts v. Thorn*, 25 Tex. 728; 78 Am. Dec. 552; *Rippetoe v. Dwyer*, 49 Tex. 498; *King v. Rowan*, 10 Heisk. 675; *Frentz v. Klotsch*, 28 Wis. 312; *Myers v. Reed*, 17 Fed. Rep. 401; *Turner v. Sawyer*, 150 U. S. 578; *Stevens v. Reynolds*, 143 Ind. 467; 52 Am. St. Rep. 422. Also, Mr. Freeman's work on *Cotenancy and Partition*, secs. 154, 155.

On the contrary, are the following, some expressly repudiating the exception, others tacitly recognizing that no such distinction in cotenancies exists: *Rothwell v. Dewees*, 2 Black, 613; *Smiley v. Dixon*, 1 Penr. & W. 441; *Bracken v. Cooper*, 80 Ill. 221; *Motague v. Selb*, 106 Ill. 49; *Venable v. Beauchamp*, 3 Dana, 321; 28 Am. Dec. 74; *Brown v. Homan*, 1 Neb. 448; *Jones v. Stanton*,

11 Mo. 433; Picot v. Page, 26 Mo. 398; Titsworth v. Stout, 49 Ill. 78; 95 Am. Dec. 577; Keller v. Auble, 58 Pa. St. 410; 98 Am. Dec. 297; Boskowitz v. Davis, 12 Nev. 446; Tiedeman on Real Property, sec. 252. See, also, notes to Venable v. Beauchamp, 28 Am. Dec. 74, which were prepared by Mr. Freeman, the author of the work on Cotenancy and Partition, in which he seems to question the correctness of the doctrine stated by him in section 155 of the first volume of his treatise. The list might be extended much further, but the doctrine will be found fully discussed in the foregoing citations.

There are, we think, cases where the rule will not apply to tenants in common, but we need not attempt to specify what those cases are, for the case at bar falls within this ¹³⁸ exception, which is apparent upon a consideration of the evidence pertinent to the amended fifth defense of the answer. To give in detail the facts and circumstances disclosed by the evidence under this defense would serve no useful purpose; and we content ourselves with merely a statement of the conclusions therefrom reached by us after a careful examination, and these conclusions pertain both to the second and third propositions.

Before and during the month of August, 1886, D. R. C. Brown, for himself and Mr. Cowenhoven, and Eben Smith, for himself and others connected with him, owned, at Aspen, in the vicinity of this ground in conflict, certain mining claims. Brown then owned, also, as we have seen, five-sixths of the Franklin, one-half of the Steele and one-sixth of the Dr. Franklin claims. An adverse suit was then pending between the owners of the Franklin and the Dr. Franklin claims, which was being pressed for trial by the latter. The attorneys of the Franklin advised their clients to settle the suit, and on August 2d, toward that end, an agreement for the purchase, at a consideration of nine thousand dollars, of the five-sixths interest of the Dr. Franklin held antagonistically to the Franklin, was made by Brown and Smith, and on August 3d the deed of conveyance therefor was taken by T. G. Lyster as trustee for Brown, Smith, and their associates. Thereupon, by consent, a judgment was rendered in the suit establishing the priority of the Dr. Franklin location.

Before this agreement of purchase was made, some sort of an arrangement was entered into between Brown and Smith, representing respectively themselves and their associates, whereby the aforesaid properties owned by Brown and Smith, together with the interests which Brown then owned in the three claims involved here, were to be consolidated and worked as one prop-

erty, the title to which was to be taken ultimately in the name of a corporation thereafter to be organized, whose capital stock was to be entirely owned by this syndicate, in such proportion or shares as their agreement called for.

¹³⁹ In pursuance of this object, and as a part of the scheme—it being supposed that all antagonisms between the Franklin and the Dr. Franklin would be allayed thereby—this purchase was made, the conveyance above mentioned executed, and this judgment entered, and subsequently, and in furtherance of this design, a conveyance from Lyster, as trustee, was made to Mof-fat, as trustee, who, in turn, on February 28, 1887, conveyed to the defendant company—the two latter transfers being evidenced by one instrument—one-half of the Steele, five-sixths of the Franklin, and all of the Dr. Franklin claims.

There is no question that such, in brief, was the general scope of this plan, and though every detail was not worked out at the time when the Dr. Franklin was purchased, yet before the conveyance to the defendant company was made, the agreement in all its details was perfected, and the general scheme thus accomplished.

When this judgment was entered, neither Brown nor O'Brien was a party to the adverse suit, but the two together then owned the whole of the Franklin claim. O'Brien was absent from the state and not represented by counsel when the settlement was perfected, and the judgment rendered. Before this, however, in a conversation with Smith, he was given to understand that during his absence from the state his interests in this suit would be attended to by Smith, if the occasion required, as Smith was then, as he said, about to negotiate for an interest in this same property, which, it appears, as already stated, he afterward secured.

The relation of cotenancy between Brown and O'Brien was then unquestionably in existence as to the Franklin claim, and they were in such possession thereof as the nature of the property admitted. In equity, this relation extended to Smith and his associates, for, by the scheme of consolidation, Brown and Smith were, in equity, cotenants of the same property of which O'Brien was part owner, and so the act of Brown affecting this Franklin claim under the ¹⁴⁰ scheme of consolidation equally affects all his associates, for the same trust relation attaches to all for whom Brown was then acting. The fact that Lyster, as trustee, took title to the Dr. Franklin one day before he took the title to one-half of the Steele and four-fifths of the Franklin, and that Mof-

fat, as trustee, and the defendant company, as the legal owner, took title to all these three properties in one and the same deed, cannot be successfully urged here to defeat the application of this equitable rule, for, aside from the fact that the time when the parol agreement for the purchase, and not the date of the instruments of conveyance, must govern, the order of priority of the different steps by which these properties were acquired, and this scheme of consolidation thereby perfected, is immaterial, so long as the very parties whose trust relations called for the exercise of good faith toward O'Brien were the active and prime movers in all these transactions: *Venable v. Beauchamp*, 3 Dana, 321; 28 Am. Dec. 74.

If the facts do not bring this case literally within the application of the general rule, the conduct of the parties in connection with the adverse suit, together with this trust relation, brings the case within the exception, and certainly estops them from asserting this superior title against O'Brien. We are of opinion that when these superior titles were brought, the purchasers themselves supposed that O'Brien had an interest therein, and that they intended him to have the benefit thereof in such proportion as his ownership in the Franklin equitably entitled him, and their subsequent acts and conduct corroborate this conclusion. It was only when the property became valuable and was a producing mine that the attempt to exclude O'Brien was made. The securing of the Dr. Franklin claim by Smith and Brown was the result, in part at least, of Brown's co-ownership with O'Brien of the Franklin, which enabled him to use the pendency of the adverse suit against his adversary as an aid in securing the superior title. To permit Brown, while the relation of cotenancy existed, and while he and his cotenant were in possession, so to use this relation as to get for himself that ¹⁴¹ which he might employ to his cotenant's injury, cannot be tolerated by a court of equity: *Lee v. Fox*, 6 Dana, 171, 180.

Our conclusion is, that Smith and Brown, in acquiring title to the Dr. Franklin claim, employed the relation of cotenancy in securing the same. As to the Steele title, Brown acquired this when he was unquestionably a tenant in common with appellee, and, for the reasons above given, he should be held as a trustee as to the same, for O'Brien's benefit in such proportion as the latter's interests in the Franklin entitle him: *Duff v. Wilson*, 72 Pa. St. 442; *Dickey's Appeal*, 73 Pa. St. 218; *Flagg v. Mann*, 2 Sum. 520.

We have thus far considered the case as though it were between

the original parties to these transactions; but the defendant insists that its rights and liabilities are different from those of its grantors. The general rule undoubtedly is, that a corporation is not affected with notice or knowledge of facts merely because some of its promoters who organized the corporation had knowledge of such facts, or merely because some of its stockholders had notice; and a corporation is not charged with notice of facts known or acquired by its officer or agent in a transaction in which he acts for himself, and not for the corporation. To this effect we are referred to the case of Davis etc. Wagon Wheel Co. v. Davis etc. Iron Wagon Co., 20 Fed. Rep. 699. Many other cases holding the same doctrine might be cited.

Upon this principle, the defendant contends that even if its grantors knew of plaintiff's equities, the conveyance by them to it of this superior title vested the same in the defendant discharged of all previously existing equities.

This principle might be applicable here were it not for certain facts which, we understand, are virtually uncontroverted. The grantors of defendant, representing themselves and their associates, who were its promoters and organizers, and who now constitute its directors and are its only stockholders, we have held to be charged with plaintiff's equities. The ownership of this conflicting territory is now in precisely the same ¹⁴² persons that it was before the corporation acquired title, and that ownership is now represented by certificates of stock, whereas formerly it was evidenced by deeds of conveyance. In conveying to this defendant, it is true that these promoters dealt in their own interests, but they conveyed to a corporation whose entire capital stock they also owned. The consideration for the transfer passed from the same parties in their capacity as shareholders of the corporation to themselves as individuals. The grantors acted not solely for themselves as individuals, but also for the corporation whose capital stock they owned, and the transaction should be regarded as one in which the same parties are grantors and grantees. We are of the opinion, therefore, that the same equities exist against this defendant as against its stockholders who were its grantors.

The point made, that the plaintiff should not recover because no proof was made of the validity of the Franklin lode, we do not think tenable. By all the parties to this suit before its institution, the Franklin was treated as a valid claim, and throughout the trial the same assumption was indulged. The evidence may not be very direct as to this, but, in any event, the appel-

lant is not authorized to urge this objection under any of the assignments of error.

Upon the whole case, our conclusion is, that the findings and decree of the district court are right, and, accordingly, the decree is affirmed.

COTENANCY—PURCHASE OF OUTSTANDING TITLE BY ONE COTENANT.—A tenant in possession of the common property cannot purchase an outstanding title to the prejudice of the rights of his cotenants: *Carpenter v. Carpenter*, 131 N. Y. 101; 27 Am. St. Rep. 569, and note. A conveyance to one of several cotenants inures to the benefit of all who come in under the same title and are holding in common: *Tanney v. Tanney*, 159 Pa. St. 277; 39 Am. St. Rep. 678, and note; *Ramberg v. Wahlstrom*, 140 Ill. 182; 33 Am. St. Rep. 227, and note. See, also, the extended note to *Venable v. Beauchamp*, 28 Am. Dec. 83-86.

CORPORATIONS—KNOWLEDGE OF STOCKHOLDERS AS NOTICE TO.—To render the knowledge of individual corporators the knowledge of the corporation, it must be the knowledge of all the corporators: *Mercantile Nat. Bank v. Parsons*, 54 Minn. 56; 40 Am. St. Rep. 298, and note. See, also, the extended note to *Bank v. Whitehead*, 36 Am. Dec. 199.

CORPORATIONS—KNOWLEDGE OF OFFICER AS NOTICE TO CORPORATION.—Knowledge which comes to the officer of a corporation through his private transactions and beyond the range of his official duties is not notice to the corporation: *Kearney Bank v. Froman*, 129 Mo. 427; 50 Am. St. Rep. 456, and note. To the same effect see *Merchants' Nat. Bank v. Lovitt*, 114 Mo. 519; 35 Am. St. Rep. 770, and note. See, also, the extended note to *Bank v. Whitehead*, 36 Am. Dec. 189.

JARVIS v. STATE BANK.

[22 COLORADO, 399.]

IRRIGATION.—RIGHT OF WAY FOR AN IRRIGATION DITCH ON PUBLIC LANDS vests only upon completion of the work of construction and the application of the water to a beneficial use, although it attaches as fast as the ditch is constructed.

MECHANICS' LIENS—PRIORITY OVER MORTGAGE.—A mechanic's lien may attach to a flume constructed for a ditch company, which, though a part of a general system of canals, is an entire structure, entirely disconnected at both ends from other portions or canals theretofore constructed, and such lien is superior to a prior mortgage executed by the ditch company covering all its rights and interests in the property whether the right of way for the canal has become vested in such company and become subject to the lien of the mortgage before the construction of the flume or not.

MECHANICS' LIENS ATTACH TO WHATEVER INTEREST THE OWNER HAD when the work was begun and to another or greater interest whenever acquired before the lien is enforced.

MECHANICS' LIENS—RIGHT OF SUBCONTRACTOR TO—WAIVER.—A waiver by a contractor of the right to file a mechanic's lien does not extend to or include a subcontractor, in the absence of proof of any express or implied intent on the part of either of them to waive such right, as to the subcontractor.

MECHANICS' LIENS—PRIORITY OVER MORTGAGE.—A mortgage attaches to subsequently acquired property in the condition in which it comes into the mortgagor's hands, and a mechanic's lien for work done and materials furnished on such after-acquired property takes precedence of the mortgage.

MECHANICS' LIENS—RIGHT OF SUBCONTRACTOR TO.—Although the contractor fails to perform his agreement, subcontractors may be entitled to a mechanic's lien for what work done and materials furnished are reasonably worth, after deducting any claim for damages for such nonperformance by the contractor.

In 1889, the Bijou Reservoir and Canal Company incorporated under the general laws of Colorado for the purpose of building an irrigating canal, and in July duly filed, in the office of the county clerk of certain counties, its map and survey, showing the general route of its canal and statement required by the statutes of such state. Thereafter it proceeded with the construction of its canal. In August of the same year the corporation borrowed forty thousand dollars of the Jarvis-Conklin Mortgage Trust Company, evidenced by bonds of the mortgagor, and, to secure their payment, executed a deed of trust to S. M. Jarvis, trustee. This deed included all the property which the mortgagor then had or might thereafter acquire in its canals, ditches, flumes, rights of way, reservoirs, etc., then constructed or to be thereafter constructed. In February, 1890, the said mortgagor entered into a contract with one A. S. Baker, for the completion of its canal and the building of a certain flume. This contract provided that the contractor, party of the second part, "hereby agrees to waive and release, and hereby does waive and release, to said company, all rights and claims of liens in any manner growing out of this agreement, or in any manner accruing against said canal company, and every part thereof, and said contractor further agrees to warrant and defend said company against any and all liens and claims against the property of said company accruing or to accrue in favor of all contractors or subcontractors, materialmen and laborers, for work, and for materials furnished to, in, or through the said contractor, for the use and benefit of said construction." This contract also provided: "And the said company, party of the first part, hereby agrees to pay, or cause to be paid, to the said contractor in full for the work hereinbefore provided to be done, the whole sum of fifteen thousand five hundred dollars, the said sum to be paid at the times and in the manner following, that is to say: 1. All bills for lumber, hardware, and other material and supplies, together with freight added, upon presentation of original bills of purchase and freight bills, the same to be charged to said contractor on account of the aforesaid contract price; 2. All labor

bills upon presentation of certified payroll with checks drawn to the order of payee, for which receipt in full shall be indorsed upon said payroll at the time of payment; such payments to be made on the first day of each month on account of work done during the month next preceding; such amounts also to be charged to contractor on account of contract price; 3. The balance of said contract price shall be paid to said contractor upon completion and acceptance of work by the said company, and the full discharge of all claims by any and every person whomsoever on account of doing work or furnishing material for the use and benefit of said construction and contract." Said Baker sublet to his brother, F. E. Baker, who complied with the contract, built the flume, and the work was accepted by said mortgagor. This flume was built on public land. The Clark-Brown Mercantile Company furnished lumber and material to the subcontractor for this flume, and the subcontractor duly filed mechanics' liens against the property upon default in the payment of the amounts due for the work done and materials furnished. The mortgagor made default in payment of its indebtedness to the mortgagee, which duly foreclosed its trust deed and sold all of the property of the mortgagor, including said flume. This property was purchased at the foreclosure sale by one Beardsley, acting as agent for the mortgagee. F. E. Baker assigned his mechanics' liens and claims to the State Bank, which, together with said mercantile company, subsequent to said foreclosure, brought separate suits to foreclose their mechanics' liens. These suits were consolidated for trial, and all of the defendants defaulted, except said mortgagee, and said Beardsley. Plaintiffs obtained judgment for the amount of their lien claims, and this judgment was made a lien upon that part of the canal upon which the work was done, prior and superior to the trust deed or the rights of Beardsley. The defendants appealed.

Teller, Orahood & Morgan and Beardsley & Gregory, for the appellants.

Rogers, Shafroth & Walling and W. A. Hill, for the appellees.

J. W. McCreery and I. J. Bloomfield, amici curiae.

313 CAMPBELL, J. From the foregoing statement, it will be seen that the controversy here is between a purchaser under the foreclosure of a trust deed containing a provision covering subsequently acquired property, and those claiming liens under the mechanics' lien statute of the state, whose rights accrued after the recording of the prior trust deed, on account of labor per-

formed and materials furnished, which were wrought into, and thus combined brought into being, such property. The contractor makes no defense, and the only question involved is the relative priority of the trust deed and of the mechanics' liens.

The first position of the appellants is, that the right of way upon which this flume was built became vested in the canal company when the latter filed its map, etc., in July, 1889. This right of way, it is said, was in esse, and covered by the trust deed long before the lien of the appellees attached. The argument is, that under the act of Congress of July 26, 1866 (U. S. Rev. Stats., secs. 2339, 2340), this right of way, being over government land, was confirmed to the canal company "as the same is recognized and acknowledged by the local customs laws," etc: Citing *Jennison v. Kirk*, 98 U. S. 453; *Broder v. Water Co.*, 101 U. S. 274, and other similar cases.

By section 1720 of the General Statutes of 1883, as amended in 1887 (see Session Laws 1887, p. 314), relating to the rights of those who build ditches and canals and appropriate waters of natural streams for purposes of irrigation, it is provided ³¹⁴ that the "priority of right of way, and water accordingly, shall date from the day named as the day of commencing work, otherwise, only from the date of the filing of the same"; that is, from the day of filing the map, statement, etc. Hence, it is said, this right of way became vested as against the government, the owner of the servient land, from the day when the map, etc., were filed.

This we regard as not a correct construction of the statute. The priority given, both as to the right of way and the water, is as against other claimants of ditches and canals and appropriators of water from the same source of supply. The language is general, and is as applicable to a private individual as to the federal government over whose lands the ditch is built. But we apprehend it would not be contended that a right of way over the lands of a private individual, acquired by a canal owner for conveying water in his canal, became vested and fixed from the time of beginning work on the canal, but only from the time the right of way itself was purchased or conveyed. So, also, where the right of way comes by operation of the grant contained in this act of Congress. It becomes vested only upon a compliance on the part of the canal owner with the local laws, customs, etc., and ownership is acquired as the work progresses, and the priority to the water, as well as the right of way, becomes vested only upon the completion of the work of construction, and the application of the water to a beneficial use.

Then; it is true, the right in both cases relates back as of the date when the work was begun, but this is only as against other appropriators of water from the same stream; provided, also, the filing of the statement be made in the office of the state engineer, which was not done, as well as in the office of the county clerk and recorder, which latter was done. Hence, we conclude that the right of way of this canal did not become vested before the canal was finished, though it attached as fast as the ditch was constructed. The most that can be claimed, which we might concede, is that the acquisition of the right of way and the attaching of the mechanics' ³¹⁵ lien are contemporaneous: *Garland v. Bear Lake etc. Co.*, 9 Utah, 350.

If, however, it could be held that this right of way became vested when the canal company filed its map and statement, under the evidence, and in accordance with the findings of the court, this flume was an entire structure and improvement, and when completed, though part of the general system of canals, was entirely disconnected and separate at both ends from other portions of the canal which had theretofore been constructed. This being true, in accordance with the provisions of section 2148 of the General Statutes of 1883, even though such right of way was included in the prior mortgage and the mortgage attached to the same before the appellees' lien attached, nevertheless the liens of the latter, as to the flume itself, have priority. Such legislation as this has repeatedly been held constitutional: See *Phillips on Mechanics' Liens*, 3d ed., sec. 238; *Brooks v. Railway Co.*, 101 U. S. 443; *Newark etc. Co. v. Morrison*, 13 N. J. Eq. 133; *Creer v. Cache etc. Canal Co. (Idaho)*, Dec. 17, 1894, 38 Pac. Rep. 653.

As we understand the claim of appellants, it is that the right asserted is founded upon the provisions of section 1720 of the General Statutes of 1883, and the amendments thereto. This contention assumes the validity of the statute, as to which we express no opinion, for that question is not before us. But if the right does so depend, a compliance with the provisions of the statute must be shown. The record, however, contains no evidence that the filings required were made with the state engineer. Such compliance not being shown, the right, if it rests upon the statute, is not established.

The next contention of the appellants, in a measure inconsistent, it may be said, with the first, is that the canal company did not own the land, or any interest therein, when the appellees began to do work and furnish materials for the flume thereupon built. A sufficient answer to this is, that the statute

gives a lien upon whatever interest the owner had when the work was begun, and to another or greater interest whenever acquired before the lien is enforced; and any person ³¹⁶ having an assignable, transferable, or conveyable interest or claim in or to any land, etc., shall be deemed an owner. Certainly the canal company had a possessory right or interest in this land at the time of the beginning of the work which was the subject of transfer; and whatever right it did have, inchoate and equitable, became absolute by the subsequent doing of this very work, and the furnishing of these materials, by the appellees: *Garland v. Bear Lake etc. Co.*, 9 Utah, 350.

The third contention is, that A. S. Baker, the contractor of the canal company, by express contract with the owner to that effect, waived his right to file a lien under the mechanics' lien act, and that the subcontractors are bound to know the terms of this contract, and they can claim no lien because their contractor waived it. To this effect we are cited, among others, to the following cases: *Bowen v. Aubrey*, 22 Cal. 566; *Dersheimer v. Maloney*, 143 Pa. St. 532; *Tebay v. Kirkpatrick*, 146 Pa. St. 120; *Phillips on Mechanics' Liens*, 3d ed., secs. 58, 62, 117. Other cases holding the same doctrine are: *Nice v. Walker*, 153 Pa. St. 123; 34 Am. St. Rep. 688; *Schroeder v. Galland*, 134 Pa. St. 277; 19 Am. St. Rep. 691; *McElroy v. Braden*, 152 Pa. St. 78.

Under the lien law of this state, which, as it is claimed, gives to a subcontractor an independent and distinct lien, irrespective of the right of the contractor thereto—being, as it is argued, a creature of the statute, and not of contract—there may be a question whether or not a contractor may, merely by his contract with the owner waiving his right to a lien, cut off the right of a subcontractor thereto. There are decisions holding—at least intimating—that the statutory rights of a subcontractor cannot thus be destroyed: *Clough v. McDonald*, 18 Kan. 114; *Chicago Lumber Co. v. Woodside*, 71 Iowa, 359; *Lonkey v. Cook*, 15 Nev. 58; *Gull River etc. Co. v. Keefe*, 6 Dak. 160; *Albright v. Smith*, 2 S. Dak. 577; *Laird v. Moonan*, 32 Minn. 358; *Hall v. Mullanphy etc. Mill Co.*, 16 Mo. App. 454.

But we have not such a case before us, notwithstanding the insistence of the appellants to the contrary, and we express ³¹⁷ no opinion as to the power of a contractor, under our statute, to waive a subcontractor's right to file a lien. The contract here between the owner and the contractor must be taken in its entirety. While the owner is not here insisting that the subcontractor has no right to file a lien, the purchaser at the sale under

the prior trust deed is in a position to question and attack the validity of the liens of appellees.

The waiver of this statutory right must clearly appear, either by express agreement to that effect, or by necessary implication from the language of the contract: *Evans v. Grogan*, 153 Pa. St. 121; *Taylor v. Williams*, (Pa. April 11, 1892), 23 Atl. Rep. 1134. If there is any doubt about the meaning of the contract, the construction which the parties thereto themselves put upon it may be resorted to by the court, and of this the prior mortgagee or purchaser at the sale under the encumbrance cannot complain. These different provisions of the contract quoted in the statement, taken together, show that the right to file a lien, certainly by the subcontractor, was not waived or lost. The most that can be said is, that by implication from the language used the contractor himself agreed not to file a lien for himself, and the first sentence of the first provision quoted, if it stood alone, might be so construed; but it is immediately followed by an agreement upon the part of the contractor to warrant and defend the owner against all liens that may accrue in favor of subcontractors and materialmen, thus recognizing that such liens of subcontractors might accrue and be filed, and be binding against the owner, and thus indicating that the limitation as to filing liens was intended to apply, if to anyone, only to the contractor. That the owner so considered is evident from the precaution which it took to insert in the contract as a security against liens that no payments could be required of it until all bills for labor done and materials furnished for the canal should be presented to it by the contractor on the first of the month succeeding that in which the work was done and materials furnished, duly receipted and paid, and that the amounts ³¹⁸ thereof should be charged against the contractor upon his account with the owner.

If the contractor waived the lien as to subcontractors, why the necessity of requiring receipted bills from them before the owner paid the contractor? As if to make still more emphatic this understanding, and still further to protect the owner against liens that might be filed by the subcontractors, a bond, saving harmless the owner from all labor bills, was given to it by the contractor. It is clear to us that it never was intended, either by the contractor or the owner, that the subcontractors might not file a lien as security for the payment of their claims.

Conceding that the flume and the right of way are property acquired subsequent to the execution of the trust deed, it is further contended that as soon as they came into being the lien of

the mortgage attached to them free from the lien of these subcontractors. That subsequently acquired property may become subject to the lien of a mortgage, if apt words covering it are inserted in that instrument, is well settled, especially in the federal courts; and such lien attaches when the property comes into being, and, in general, is superior to any subsequent encumbrance: See Jones on Mortgages, 5th ed., sec. 149, and cases cited.

It is, however, equally well settled that "the mortgage attaches to the property in the condition in which it comes into the mortgagor's hands." "Thus a mechanic's lien for work done and materials furnished on such after-acquired property takes precedence of the mortgage": 1 Jones on Mortgages, sec. 158; Phillips on Mechanics' Liens, sec. 242; Williamson v. New Jersey Southern R. R. Co., 28 N. J. Eq. 277; 29 N. J. Eq. 311; United States v. New Orleans R. R. Co., 12 Wall. 362; Hall v. Mullanphy etc. Mill. Co., 16 Mo. App. 454.

This flume and the right of way, as has been said, were brought into being—were created—by the work which was done and the materials which were furnished by the appellees, for which they now claim these liens. At the very moment these improvements—this property—thus came into ³¹⁹ the hands of the Canal Company, the mortgagor, the right of the appellees to file liens attached, and, subject thereto, the property passed under the provisions of the mortgage. Most inequitable would it be to hold that the property, which owes its very existence to the labor done and materials furnished for which liens are claimed, should pass under the control of the mortgage, free from these liens.

The evidence is, and the trial court must have so found, that this flume was an entire and independent improvement, and, in addition to the reasons which have already been given, if the improvement was a separate and entire structure, the lien of the appellees as to the flume itself would, under our statute above referred to, take precedence of the prior trust deed, and it might be removed from the land after a sale upon an execution.

The only other point pressed in argument is, that as the contractor failed to perform his contract, no right to a lien, either of the contractor or subcontractor, exists. To this it is sufficient to say that the assumption is not borne out by the evidence, but is contrary thereto. But, if true, the subcontractors, under the facts of the case, are entitled to what the work done and the materials furnished are reasonably worth, after deducting any claims for damages for the alleged nonperformance by the contractor, and we must uphold the findings of the trial court in

this particular: *Morehouse v. Moulding*, 74 Ill. 322; *Wright v. Roberts*, 43 Hun. 413; *Whittier v. Blakely*, 13 Or. 546.

Upon the whole case, we think the judgment should be affirmed, and it is so ordered.

MECHANICS' LIENS—PRIORITY OVER MORTGAGES.—A lien for labor or material is paramount to the lien of a mortgage executed after the building was commenced, but before such labor or material was furnished: *Haxtun Steam etc. Co. v. Gordon*, 3 N. Dak. 246; 33 Am. St. Rep. 776, and note. A lien or mortgage existing at "the inception" of a mechanic's lien is protected, but a contract lien created after "the inception" of the mechanic's lien is subordinate thereto: *Oriental Hotel Co. v. Griffiths*, 88 Tex. 574; 53 Am. St. Rep. 790, and note.

MECHANICS' LIENS—TO WHAT INTEREST ATTACH.—A mechanic's lien on an equitable estate attaches to an after-acquired legal title the moment it vests in the same person: *Lyon v. McGuffey*, 4 Pa. St. 126; 45 Am. Dec. 675, and extended note. When the lessor, being the owner of an entire estate subject only to a lease, buys the leasehold, the entire estate becomes liable for the lien: *Evans v. Young*, 10 Colo. 316; 3 Am. St. Rep. 583, and note. See, especially, the note to *Paulsen v. Manske*, 9 Am. St. Rep. 537, 538.

MECHANICS' LIENS—RIGHT OF SUBCONTRACTORS TO.—A subcontractor's right to file a lien cannot be destroyed except by an express covenant against liens by either the contractor or the subcontractor, or a covenant so clearly implied that a mechanic or materialman cannot fail to understand it: *Creswell Iron Works v. O'Brien*, 156 Pa. St. 172; 36 Am. St. Rep. 30, and note.

MECHANIC'S LIEN—WAIVER BY CONTRACTOR—EFFECT ON SUBCONTRACTOR.—A building contract, under which the contractor agrees to keep the lot and building free from mechanics' liens, and any and all manner of charges, precludes the principal contractor, subcontractor, or any other person from filing and foreclosing any lien or charge against the building: *Fidelity etc. Life Assn. v. Jackson*, 163 Pa. St. 208; 43 Am. St. Rep. 789, and note. A subcontractor or materialman has no right to a mechanic's lien, when the principal contractor has stipulated with the owner in writing that no liens shall be filed against the property: *Waters v. Wolf*, 162 Pa. St. 153; 42 Am. St. Rep. 815, and note. See further on this subject the extended note to *Benedict v. Hood*, 19 Am. St. Rep. 699.

PIPE v. JORDAN.

[22 COLORADO, 392.]

LIS PENDENS OPERATES AS NOTICE ONLY during the pendency of the suit in which it is filed.

LIS PENDENS—PURCHASER WITHOUT NOTICE.—One who purchases after the dismissal of an action without prejudice, and before it is revived or a new action commenced, is not charged with the notice of lis pendens filed in the action previously dismissed.

LIS PENDENS—BENEFIT OF, HOW LOST.—By unreasonable delay in the prosecution of a case in which a lis pendens is filed, or in reviving it after its dismissal, the benefit of the lis pendens is lost.

Teller, Orahood & Morgan, for the appellant.

Thomas, Hartzell, Bryant & Lee, for the appellees.

302 GODDARD, J. This is an action brought by Helen B. Pipe against Mary Jordan and Lafayette A. Melburn, to recover possession of **303** lots Nos. 18, 19, and 20, in block 145, Clement's addition to the city of Denver, Arapahoe county, Colorado. The complaint is an ordinary one in ejectment, alleging ownership in fee simple in plaintiff, the right to possession and ouster by defendants. The defendants answer by general denial, and as an affirmative defense allege that the defendant Melburn is the owner in fee of the premises, and that Mary Jordan is in possession as his tenant. Both plaintiff and defendants claim title through Orson Brooks, deceased, who was formerly seised in fee simple of the premises, the plaintiff's claim being that Orson Brooks died seised of the property in question, and that she is his daughter and sole heir. The defendants claim: 1. That during his lifetime Brooks conveyed the premises in question by warranty deed to Netta C. Weir; that by various mesne conveyances this title was vested in the defendant Melburn. 2. That by will he demised all his estate, including these lots, to his wife, Nancy Brooks; that this will was duly probated in the probate courts of Los Angeles county, California, and Arapahoe county, Colorado; that by divers mesne conveyances the title of Nancy Brooks became vested in the defendant Melburn. The plaintiff contends that the probate courts aforesaid were without jurisdiction and that the will was never legally probated. 3. That the deed from Orson Brooks to Netta C. Weir, although in form an absolute warranty deed, was in fact only a mortgage. The facts, as they appear from the pleadings and evidence, are substantially as follows:

Helen B. Pipe, the plaintiff, is the daughter of Orson Brooks,

deceased. For some time prior to his death, which occurred on the twentieth day of August, 1886, he resided in Los Angeles county, California. On the thirtieth day of July, 1885, he made his will, by which he gave and bequeathed all of his estate, real and personal, to his wife, Nancy Brooks. This will was admitted to probate in Los Angeles county, California, and, upon a certified copy of the proceedings in that matter, the will was admitted to probate in Arapahoe county, Colorado. The plaintiff attacks the regularity of ³⁹⁴ these proceedings, but since we think the case must be determined in favor of the defendants, without regard to the title deraigned through Nancy Brooks, it is unnecessary to further consider this branch of the controversy.

On June 14, 1886, Orson Brooks, by what purports to be a warranty deed, for the expressed consideration of nine thousand dollars, conveyed the title to the lots in question to Netta C. Weir. This deed was recorded in Arapahoe county on the twenty-eighth day of August, 1886.

On April 16, 1887, Sanford C. Hinsdale, as the duly authorized attorney in fact of Netta C. Weir, conveyed the property by warranty deed to Henry C. Brooks, for the consideration of eleven thousand dollars. On March 7, 1888, Henry C. Brooks conveyed the property by warranty deed to Emma L. Arkins for fourteen thousand dollars. On February 23, 1889, Emma L. Arkins, for the consideration of twenty thousand dollars, conveyed the property to Lafayette A. Melburn.

It appears by the oral testimony that some time prior to the purchase of the property by Henry C. Brooks (who is in no way related to the Orson Brooks family), the plaintiff, Helen B. Pipe, had instituted an action in the district court of Arapahoe county for the purpose of having the deed from Orson Brooks to Netta C. Weir declared a mortgage, and that a *lis pendens* in connection therewith had been recorded. Hinsdale testifies that pending the negotiations with Henry C. Brooks he informed him that there was a cloud upon the title. On June 12, 1887, this suit was dismissed, "without prejudice to the right of plaintiff to bring a new action in this behalf." It is contended by counsel for appellant that the grantees in the foregoing deeds had actual and constructive notice that the conveyance by Orson Brooks to Netta C. Weir was in fact a mortgage. But it does not appear from the evidence that Mrs. Arkins or the defendant Melburn had any notice, except such as was furnished by the recorder *lis pendens*; and what that disclosed we are not advised, since it does not appear in the record. We think, therefore, that this contention of

counsel is untenable. We are at a loss to ³⁹⁵ perceive wherein the mere filing of the *lis pendens* of record is of any importance in this case. The office it had to perform was to give constructive notice of the former suit to all purchasers *pendente lite*, and thereby bind them by any decree that might be rendered therein. In other words, its purpose was to prevent any alienation of the subject matter in litigation, pending the action, that could prejudice the plaintiff's rights, or impair or defeat any interest she should establish as against the defendants in the suit, and does not constitute such notice of plaintiff's equity as would affect the conscience of a purchaser. The former suit, therefore, having been dismissed and no final decree rendered therein, and the present suit being in no sense a revival or continuation of the former one, there can be no application of the doctrine of *lis pendens*, or of the rule that a *lis pendens* is preserved in cases reinstated within a reasonable time after dismissal without prejudice. But even if, by any process of reasoning, the present ejectment suit against the present defendants could be held to be a restoration or reinstatement of the former suit, wherein equitable relief only was sought against different defendants, we still think that, under the circumstances, and by the most liberal application of that rule, the *lis pendens* cannot be preserved as against these defendants.

The rule announced in some of the adjudicated cases is, that if a suit be discontinued or dismissed for any cause not on the merits, although a new action can be brought, a purchaser during the pendency of the former suit would not be affected thereby (*Herrington v. McCollum*, 73 Ill. 476; *Watson v. Wilson*, 2 Dana, 406; 26 Am. Dec. 459; *Herrington v. Herrington*, 27 Mo. 560), and especially one who purchases after the dismissal and before the revival of the action: *Herrington v. McCollum*, 73 Ill. 476; *Ludlow v. Kidd*, 3 Ohio, 541.

All the authorities agree that by unreasonable delay in the prosecution of a cause, or in reviving an action after dismissal, the benefit of a *lis pendens* will be lost. Among them, see *Hayes v. Nourse*, 114 N. Y. 595; 11 Am. St. Rep. 700; *Trimble v. Boothby*, 14 ³⁹⁶ Ohio, 109; 45 Am. Dec. 526; *Shiveley v. Jones*, 6 B. Mon. 274; *Bybee v. Summers*, 4 Or. 354; *Hammond v. Paxton*, 58 Mich. 393; *Durand v. Lord*, 115 Ill. 610.

Under the rule announced in these cases, even if the present action, as before said, can be considered a revival of the original suit, the delay of plaintiff from the time of dismissal of the former action until the commencement of the present one—April 25,

1890—would prevent her from enforcing the principle of *lis pendens*, especially against the defendant Melburn, who became a purchaser intervening the dismissal of the former and the commencement of the present suit.

The decision in *Cheever v. Minton*, 12 Colo. 557; 13 Am. St. Rep. 258, is in analogy with this view. It was there held that a purchaser after a decree, whether on the merits or of dismissal, and before proceedings in error or on appeal, is not a purchaser *pendente lite*. The equitable considerations that controlled the decision in that case are equally applicable to the facts of this case. After instituting a proper action to determine the character of the deed in question, and procuring its dismissal, the plaintiff saw fit to allow the proceeding to rest until purchasers for value acquired the apparent title to the property, under an implied acquiescence on her part. Under these circumstances, she is estopped from asserting the rule *lis pendens* against such purchasers. But another, and we think a conclusive, answer to plaintiff's case is, that the present action in ejectment is not a reinstatement or renewal of the former suit in equity, but is a new and independent action at law, and one which, aside from all other considerations, cannot be maintained by plaintiff, for the reason that the legal title to the lots in question is admitted to be in defendant Melburn.

Under either of these views, the judgment of the court below is correct, and must be affirmed.

LIS PENDENS.—The doctrine of *lis pendens* is, that any interest acquired in the subject matter of a suit while it is pending will be regarded as a nullity as to the plaintiff's title, which may be established by a judgment or decree in the suit: *Shelton v. Johnson*, 4 Sneed, 672; 70 Am. Dec. 265. See, also, the extended note to *Newman v. Chapman*, 14 Am. Dec. 774.

LIS PENDENS—EFFECT OF LACHES.—A delay or lapse of time in the prosecution of a suit will not create any estoppel against the right to enforce the rules of *lis pendens*, unless the complainant has been so negligent in its prosecution as to induce the belief that such prosecution had been abandoned: *Norris v. Ile*, 152 Ill. 190; 43 Am. St. Rep. 233, and note. See, also, the extended note to *Newman v. Chapman*, 14 Am. Dec. 777.

SMITH v. SMITH.

[22 COLORADO, 480.]

HUSBAND AND WIFE—GIFTS OR CONVEYANCES IN FRAUD OF WIFE.—A husband has power to dispose absolutely of all of his property during his lifetime, independently of the concurrence, and exonerated from any claim, of his wife, provided the transaction is not merely colorable, but bona fide and unattended with circumstances indicative of fraud upon the rights of his wife.

HUSBAND AND WIFE—GIFTS OR CONVEYANCES IN FRAUD OF WIFE.—If a transaction by which a husband disposes of all of his property is colorable only, and resorted to for the purpose of defeating his wife's rights as his heir, but reserving the benefit of such property to himself for life, it is a fraud upon the rights of the wife, from which she is entitled to relief after his death.

ACTIONS—CONSOLIDATION OF.—Separate actions can be consolidated into one only when both actions are pending between the same plaintiff and the same defendants for causes of action which might have been joined.

D. Mitchell and N. M. Laws, for the appellants.

V. D. Markham and Bartels & Blood, for the appellee.

483 HAYT, C. J. The record in this case discloses that the real estate deeded to his children, the issue by a former wife, was all the real estate owned by Horace G. Smith, Sr.; that aside from this he had no other property or choses in action, except a few hundred dollars in cash deposited to his credit in a bank, and that a few hours before his death he executed a check for this to one of his sons. As a result of these transactions, he left his widow absolutely penniless at his death. She was then old and infirm, and has since been dependent upon the charity of friends for her support. Appellants contend that, under the statutes of this state, the obligation of the husband to provide for his wife upon his decease is simply a moral obligation, and one that cannot be enforced by the courts.

Wherever the common law has prevailed, it has from the earliest times required the husband to support the wife so long as the marriage relation existed between them and she remained true to her marital vows. Moreover, it imposes the duty upon the husband having property to provide for the support and comfort of his widow after his demise.

The obligation in this latter respect is to a large extent mutual, and the books are full of authorities to the effect that where either husband or wife attempts secretly to convey property on the eve of marriage, such conveyances would be **484** set aside for the benefit of the defrauded party. So, also, where the hus-

band has attempted to convey real estate in fraud of his wife's right of dower, the courts have never been called upon in vain to protect such rights. Although in this state dower and the tenancy by curtesy are abolished, the statute provides that whenever either party shall die intestate possessed of real estate, if such intestate leave a husband or wife and children, one-half of such estate shall descend to such surviving husband or wife: *Mills' Annotated Statutes*, sec. 1524. It is also provided that if any decedent leaves a widow, residing in this state, she shall be entitled to certain personal property, particularly describing the same, and that she may have the same set apart for her, not subject to the payment of his debts: *Mills' Annotated Statutes*, sec. 1534. It is further provided that when an inventory shall have been made of such personal estate, the widow may relinquish her rights to all property allowed to her, and that in lieu thereof she may claim the value of such property in money or other personal property, at her election: *Mills' Annotated Statutes*, sec. 1535. It is also provided: "In case any married man shall hereafter deprive his wife of over one-half his property, by will, it shall be optional with such married woman, after the death of her husband, to accept the condition of such will or one-half of his whole estate, both real and personal": *Mills' Annotated Statutes*, sec. 3011.

It is the obvious intent and purpose of the foregoing acts to provide the widow with the necessary means for her support in case of the death of the husband, whenever his property is sufficient for that purpose. Under these statutes, appellee contends that where the husband during coverture secretly makes conveyance of all his property and keeps the knowledge thereof from his wife, thereafter retaining control and management of the same, that such conveyance should be treated and considered as testamentary in character and not as a deed, and, in so far as the wife is deprived thereby of more than one-half the real property, it should be held void as to her. To this proposition the zeal and ability of ⁴⁸⁵ counsel have been largely directed, and our attention has been called to the numerous authorities upon either side of the controversy; some of them directly in point and others bearing more or less upon the question presented. Our examination of the cases cited, however, does not disclose one showing a parallel to the heartlessness and inhumanity manifested by the deceased. In many of the cases, the husband has attempted to convey his personal property by a gift, to the exclusion of his widow, leaving for her reliance such interest as she might be

entitled to in his real estate under the law. In other instances, the husband has attempted to convey his real estate, leaving his personal property to be shared by his widow and other heirs, but this decedent has attempted to strip his widow, at his death, of all his property, both real and personal.

As to whether such a transaction should be upheld the authorities are not uniform, and to reconcile them would be impossible. In *Stewart v. Stewart*, 5 Conn. 316, the husband executed a deed conveying all his real estate to his children, placing the conveyance in the hands of a third person, to be delivered to them upon his death, on the happening of which event, two years after the execution of the deed, it was delivered pursuant to the trust, and the court held: 1. That the instrument was strictly a deed, and not a testamentary disposition; 2. That it was not fraudulent in relation to the widow's right of dower. The case is the strongest we have found in favor of appellants' position. The action was, however, at law and not in equity, and the court, in the course of the opinion, mentions the fact that that may be a fraud in equity which is not at law.

The case of *Small v. Small*, 56 Kan. 1, 54 Am. St. Rep. 581, is strongly relied upon by appellants. It is held in that case that, subject to certain limitations and against any claim of the widow made after death, a married man in Illinois or Kansas may, during coverture, give away to his children the bulk of his property, although the well-known effect of the gift will be to deprive the widow of a ⁴⁸⁶ fair share of the property, which would otherwise have fallen to her.

In the course of the opinion, the Kansas court quotes with approval the following language from the case of *Williams v. Williams*, 40 Fed. Rep. 521: "The main question is simply this: Can a married man give away his property, during coverture, for the purpose of preventing his wife from acquiring an interest therein after his death? The law seems to be that if such gift is bona fide, and accompanied by delivery, the widow cannot reach the property after the donor's death. . . . Neither the wife nor children have any tangible interest in the property of the husband or father during his lifetime, except so far as he is liable for their support, and hence, he can sell it or give it away without let or hindrance from them. Of course, the sale or gift must be absolute and bona fide, and not colorable only. And if the sale or gift would bind the grantor it would bind his heirs."

The writer of the foregoing seems to have understood that a colorable sale could be set aside. Set aside by whom? If made

for the purpose of defrauding an heir, it could only be set aside at the suit of the party defrauded, while the grantor, being a party to the fraud, would be refused relief by the courts. Hence, it does not necessarily follow, as stated by him, that all sales or gifts which are binding upon the grantor are likewise binding upon his heirs.

As our statutes are borrowed from Illinois, decisions in that state are entitled to great weight. The case of *Padfield v. Padfield* was before the supreme court of Illinois three times: 68 Ill. 210; 72 Ill. 322; 78 Ill. 16. The conclusion of the court is, we think, fairly expressed in the following from Kerr on Fraud and Mistake, which is quoted with approval in the last opinion: "There can be no doubt of the power of a husband to dispose absolutely of his property during his life, independently of the concurrence, and exonerated from the claim, of his wife, provided the transaction is not merely colorable, and be unattended with circumstances indicative of fraud upon the rights of the wife. If ⁴⁸⁷ the disposition of the husband be bona fide, and no right is reserved to him, though made to defeat the right of the wife, it will be good against her": Kerr on Fraud and Mistake, 220.

Accepting this as a correct statement of the law, we think the case made by the pleadings and proofs before us brings the present case within the exception. For here, as we have shown, the transaction was merely colorable and made under circumstances strongly indicative of fraud upon the rights of the wife. The proof shows that these three several deeds were held from record for the period of four years after their execution. If one of these deeds had been withheld from record for that length of time, this would be a suspicious circumstance, while the fact that all were thus withheld leads very strongly to the conclusion that they were so withheld as a result of an understanding between the grantor and the three grantees, and that these grantees were guilty of collusion in the matter for the purpose of preventing information of the transfer from reaching the wife of the grantor, and to permit the grantor in the mean time to continue to exercise exclusive dominion and control over the property.

In the case of *Youngs v. Carter*, 10 Hun, 194, the facts were that Daniel Youngs, a widower, was engaged to be married to the plaintiff in August, but, in consequence of his sickness, the marriage was put off until September. In the interim, he, without the knowledge of the plaintiff, conveyed nearly the whole of his real estate to two daughters by a former marriage and took

back from them a lease for his life. The plaintiff did not learn of this conveyance until after marriage, and then immediately brought suit to have the same set aside. The court held that the conveyance was a fraud upon the inchoate right of the wife to dower, and adjudged her entitled to dower in the land so conveyed. In the course of the opinion, which is an instructive one, the court advances the following argument: "When the conveyance in controversy was executed, the relation of the grantor to the plaintiff was of a strictly confidential nature, ⁴⁸⁸ and a natural expectation inspired as well as implied by it was, that upon its consummation she should succeed to all the legal rights of a wife in the property owned by him. She acquired by means of it an equitable claim upon him to that extent. But, at the same time, it was not so entirely controlling as to prevent him from discharging such other equitable obligations as he might have previously incurred to his children. It simply restrained him from disposing of his property, fraudulently, for the purpose of preventing it from becoming subservient to the rights which the laws of the state secured to a wife."

This principle is announced and carried to its logical result in the case of *Manikee v. Beard*, 85 Ky. 20, where the husband, in contemplation of death, gave to his children the whole of his personal estate, with the fraudulent intent to deprive his wife of the interest therein to which she would be entitled as his widow, and the court did not hesitate to set aside the gift at the suit of the widow. This case is a much stronger one in favor of the widow than that case, for the reason that there the gift was of personal property only, over which the owner has, by the commercial law, greater freedom than over his real estate, and her dower interest remained in the lands left by the husband at his demise, and this dower interest was sufficient to support her. Here, by the fraudulent conduct of the husband, the wife was stripped of all her rights as heir to his personal estate and to his real estate as well.

It is not necessary in this case, and it is not our intention to say anything that will prevent the husband, during his lifetime, from selling his personal property, or transferring his real estate for such consideration as he may be willing to accept, or without consideration, provided always that the transaction shall be absolute and bona fide, and not colorable merely, but what we do say is, where, as here, the complaint charges, and the evidence shows, that the transaction complained of is colorable only and resorted to by the husband for the purpose of defeating his wife's right as his heir, he ⁴⁸⁹ hoping thereby to obtain the full benefit

of the property to the last hour of his life, and at the same time being able to deprive her of all interest therein as his heir, is as much of a fraud on the part of the husband as it is for a debtor, having in contemplation the incurring of an indebtedness, to put his property beyond his control, and the courts have universally declared the latter to be in violation of the statute of frauds. The same principle should govern in this case. The transaction is shown to have had its inception in a desire on the part of both the grantor and grantees to deprive the wife and stepmother of the benefits conferred upon her as an heir of her husband under our statutes, and the action of the district court in characterizing the transaction a fraud upon the rights of the wife as an heir is founded upon the plainest principles of justice and equity and must be sustained.

We have thus far considered the cause as made by the pleadings and evidence. We are satisfied, however, that a great injustice was done the defendants by the order of consolidation, made by the district court, as thereby they were prevented from fully presenting their defenses. The cases were consolidated upon the motion of the plaintiff and against the objection of the defendants and each of them, and, by reason of such consolidation, each defendant was deprived of the evidence of the defendants in the other suits, i. e., of the evidence of his codefendants after the consolidation. The ruling excluding these witnesses is based upon section 4816 of Mills' Annotated Statutes, which provides, among other things, "That no party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein, of his own motion, or in his own behalf, when any adverse party sues or defends as the trustee or conservator of an idiot, heir, of any deceased person," etc.

The argument of appellee in support of the ruling of the court below proceeds upon the basis that after the consolidation there was but one suit, to which all the defendants were parties. If the suits were properly consolidated, the exclusion ⁴⁹⁰ of the witnesses must be upheld, but, if the order of consolidation was not proper, the subsequent exclusion of the witnesses was also erroneous. The code provides, at section 20, that, "whenever two or more actions are pending at one time between the same parties, and in the same court, upon causes of action which might have been joined, the court may order the actions to be consolidated into one."

At least one of the essential conditions to consolidation under

this provision was lacking in these suits, namely, they were not between the same parties. It is urged, however, by appellees that courts have the inherent right, independent of statute, to consolidate suits at law and actions in equity, where the interest of the parties and the public may be subserved by such consolidation. An examination of the authorities leads to the conclusion that, in the absence of legislation, the power of consolidation of actions has been exercised with the greatest freedom according to the will of the particular judge before whom the actions may have been pending, without any definite rule having been established for the guidance of the courts with reference thereto.

The provisions of our code with reference to consolidation are similar to those to be found in many of the other code states: See 4 Ency. of Pl. & Pr. 676. No case has been cited, and we know of none, where a consolidation has been permitted under such a statute unless all the prescribed conditions existed, and in a number of states the code provision has been referred to as controlling. In the case of *Mayor v. Coffin*, 90 N. Y. 312, the court says: "The order of consolidation must be reversed because the special term had no power to make it. The authority to consolidate actions is given by section 817 of the code, and permits it only where both actions are pending between the same plaintiff and the same defendants for causes of action which might have been joined": See, also, *Kipp v. Delamater*, 58 How. Pr. 183; *Blesch v. Chicago etc. Ry. Co.*, 44 Wis. 593.

For error in ordering the consolidation and in depriving ⁴⁹¹ each of the defendants of the evidence of the others, the judgment must be reversed and the cause remanded.

HUSBAND AND WIFE—CONVEYANCES IN FRAUD OF WIFE.—Colorable transfers made by a husband are void as against the rights of the wife: Extended note to *Lines v. Lines*, 24 Am. St. Rep. 492. Conveyances of real estate made by a husband during coverture for the purpose of defeating the wife's marital rights are fraudulent and void as against her: *Walker v. Walker*, 66 N. H. 390; 49 Am. St. Rep. 616, and note.

ACTIONS—CONSOLIDATION OF.—It is a common practice to consolidate actions pending in the same court that might have been brought in one action: *Bullard v. Thorpe*, 66 Vt. 599; 44 Am. St. Rep. 867, and note. This subject will be found further discussed in the extended note to *Logan v. Mechanics' Bank*, 58 Am. Dec. 508.

FARMERS' INDEPENDENT DITCH COMPANY v. AGRICULTURAL DITCH COMPANY.

[22 COLORADO, 513.]

IRRIGATION—APPROPRIATION.—A mere diversion of water from a stream does not constitute an appropriation. To make it such there must be an application of the water to a beneficial use, and, in case of irrigation, it must be applied to the land to make the appropriation complete.

IRRIGATION—DITCH CORPORATIONS ARE QUASI PUBLIC CARRIERS, for the purpose of conveying water from the natural streams to places where it may be applied to beneficial uses.

IRRIGATION—APPROPRIATORS OF WATER from the same stream, through the same ditch, may have different priorities of right to the use of such water, based upon the time of the several appropriations.

WATER AND WATERCOURSES.—WATER FROM TRIBUTARIES of a natural stream cannot be appropriated to the injury of prior appropriations from the main stream.

IRRIGATION.—WATER COMPANIES OWNING AND OPERATING DITCHES are trustees for their stockholders and bound to protect their interests.

IRRIGATION—RIGHTS OF WATER COMPANIES.—Under the statutes of Colorado, a ditch company may have a priority of right to take water, which priority may be determined by the statutory method, and, so determined, by a proper decree, is binding upon all parties to the proceeding.

CONSTITUTIONAL LAW—TITLE OF ACT.—An act entitled "An act providing for the appointment of superintendents of irrigation for the water divisions of this state," fixing their compensation and providing for the payment thereof, prescribing their duties and requiring a bond for the faithful performance of such, requiring clerks of district courts to furnish such superintendents with certain certified decrees, and providing for the payment of such clerks' fees, embraces but one general subject, which is clearly expressed in its title, and that is, the appointment of superintendents of irrigation, fixing their compensation, and prescribing their duties.

CONSTITUTIONAL LAW—POLICE POWER.—The power conferred by the Colorado statute of 1887 upon superintendents of irrigation in providing for their appointment, fixing their compensation, and prescribing their duties and powers, is executive and not judicial, and is properly exercised as a part of the police power of the state.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW.—The Colorado statute of 1887, providing for the appointment of superintendents of irrigation, fixing their compensation, and prescribing their powers and duties, is not unconstitutional as providing for the taking of property without due process of law.

CONSTITUTIONAL LAW—DECREES UNDER IRRIGATION STATUTES.—Under the irrigation statutes of Colorado, decrees entered in statutory proceedings for the adjudication of priorities to the use of water are prima facie evidence of rights between different water districts, and must be enforced by the public officers intrusted with the distribution of water until they are impeached in some appropriate manner by proper proceedings.

PARTIES.—EXECUTIVE OFFICERS of the state distribut-

ing water in violation of statute to plaintiff's injury, are properly made parties defendant in an action by him to prevent such injury.

CONSTITUTIONAL LAW.—STATUTES MUST BE UPHOLD as constitutional, unless their unconstitutionality is made to appear beyond a reasonable doubt.

Action to restrain the unlawful diversion of water and for damages. The court below sustained a demurrer to the complaint, and plaintiff appealed. The statute of 1887 (Colorado Sess. Laws 1887, 295), referred to in the opinion, provides as follows:

"Section 1. That the governor shall appoint a superintendent of irrigation for each of the water divisions now existing within the state, or which may hereafter be created, such superintendents of irrigation to hold office for a period of two years from the date of their respective appointments, or until their successors shall be appointed and qualified. . . .

"Sec. 2. Said superintendent of irrigation shall have general control over the water commissioners of the several districts within his division. He shall, under the general supervision of the state engineer, execute the laws of the state relative to the distribution of water in accordance with the rights of priority of appropriation, as established by judicial decrees, and perform such other functions as may be assigned to him by the state engineer.

"Sec. 3. Said superintendent of irrigation shall, in the distribution of water, be governed by the regulations of this act, and acts that are now in force; but, for the better discharge of his duties, he shall have the authority to make such other regulations to secure the equal and fair distribution of water, in accordance with the rights of priority of appropriation, as may, in his judgment, be needed in his division; provided, such regulations shall not be in violation of any part of this act, or other laws of the state, but shall be merely supplementary to and necessary to enforce the provisions of the general laws and amendments thereto.

"Sec. 4. Any person, ditch company, or ditch owner, who may deem himself injured, or discriminated against, by any such order or regulation of such superintendent of irrigation, shall have the right to appeal from the same to the state engineer, by filing with the state engineer a copy of the order or regulation complained of, and a statement of the manner in which the same injuriously affects the petitioner's interest. The state engineer shall, after due notice, hear whatever testimony may be brought forward by the petitioner, either orally or by way of affidavits,

and, through the superintendent of irrigation, shall have power to suspend, amend, or confirm the order complained of."

"Sec. 7. Within thirty days after his appointment, said superintendent of irrigation shall send to the clerk of the district court, within his division, of such counties as have had rendered by the district court of such county judicial decrees, fixing the priorities of appropriation of water for irrigation purposes for any water district, a notification of his appointment to such office, and shall request of the said clerk a certified copy of every decree of the district court establishing priorities of appropriation of water used for irrigation purposes within that district. Thereupon, it shall be the duty of such clerk, within ten days after the receipt of such request from said superintendent of irrigation, to prepare a certified copy of all decrees of such district court establishing priorities of water rights made within that district, under the provisions of the General Statutes of the state of Colorado, and transmit the same to the superintendent of irrigation requesting it. Said superintendent of irrigation shall then cause to be prepared a book to be entitled 'The Register of Priorities of Appropriation of Water Rights for Water Division No. —, State of Colorado,' within which he shall enter and preserve such certified copies of decrees. Said superintendent of irrigation shall, from such certified copies of decrees, make out a list of all the ditches, canals, and reservoirs entitled to appropriations of water within his division, arranging and numbering the same in consecutive order, according to the dates of their respective appropriations within his division, and without regard to the number of such ditches, canals, or reservoirs may bear within their respective water districts. Said superintendent of irrigation shall make from his register a tabulated statement of all the ditches, canals, and reservoirs in his division whose priorities have been decreed, which statement shall contain the following information concerning each ditch, canal, and reservoir arranged in separate columns. The name of the ditch, canal, or reservoir; its number in his division; the district in which it is situated; the number of it in its proper district; and the number of cubic feet of water per second to which it is entitled, and such other and further information as he may deem useful to the proper discharge of his duty. In case any decrees of court establishing priorities of appropriation of water for irrigation purposes are made after the transmittal of the copy of previous decrees to the superintendent of irrigation, it shall be the duty of

the clerk of the court wherein such decree is rendered, to transmit to the superintendent of irrigation of the division within which said county is situated, within ten days after it is rendered, a copy of such decree, and the superintendent of irrigation shall enter the same in his register. Such register to be filed and kept in the office of the state engineer."

"Sec. 9. All water commissioners shall make reports to the superintendent of irrigation of their division as often as may be deemed necessary by said superintendent. Said report shall contain the following information: The amount of water necessary to supply all the ditches, canals, and reservoirs of that district; the amount of water actually coming into the district to supply such ditches, canals, and reservoirs; whether such supply is on the increase or decrease; what ditches, canals, or reservoirs are at that time without their proper supply; the probability as to what the supply will be during the period before the next report will be required, and such other and further information as the superintendent of irrigation of that division may suggest. Said superintendent of irrigation shall carefully file and preserve such reports and shall, from them, ascertain what ditches, canals, and reservoirs are, and what are not, receiving their proper supply of water, and, if it shall appear that in any district in that division any ditch, canal, or reservoir is receiving water whose priority postdates that of the ditch, canal, or reservoir in another district, as ascertained from his register, he shall at once order such postdated ditch, canal, or reservoir shut down and the water given to the elder ditch, canal, or reservoir. His orders being directed at all times to the enforcement of priority of appropriation, according to his tabulated statement of priorities, to the whole division, and without regard to the district within which the ditches, canals, and reservoirs may be located. The reports of water commissioners by the superintendents of irrigation shall be filed and kept in the office of the state engineer."

"Sec. 10. In case any ditch, canal, or reservoir, in any district within such superintendent of irrigation's division, shall fail to receive its regular supply of water, the owner or controller of such ditch, canal, or reservoir may report such fact to the water commissioner of that district, who shall immediately apportion the water in his district, and send forthwith by telegram, if necessary, a report of such fact to the superintendent of irrigation of his division, and thereupon it shall be the duty of said superintendent to compare such report with his register, and if any ditch, canal, or reservoir of any other district of his division is re-

ceiving water to which any ditch, canal, or reservoir of any other district is entitled, he shall at once order the shutting down of the postdated ditches, canals, or reservoirs having the priority of appropriation; provided, however, that nothing in this act shall be construed as interfering with the priority of water for domestic use."

Bryant & Lee and J. W. McCreery, for the plaintiff in error.

C. J. Hughes, Jr., and A. Smith, for the defendants in error.

520 HAYT, C. J. In speaking of the phrase "due process of law," as found in the fifth amendment of the constitution of the United States, in the case of Davidson v. New Orleans, 96 U. S. 97, the following language is used: "But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the federal constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded. This court is, after an experience **521** of nearly a century, still engaged in defining the obligation of contracts, the regulation of commerce, and other powers conferred on the federal government, or limitations imposed upon the state."

The policy of our court in construing the constitution and statutes of this state with reference to irrigation, and the reasons therefor, are lucidly set forth in the foregoing language, written by Mr. Justice Miller, in reference to one of the most important provisions of the federal constitution. The court, realizing the importance and novelty of questions affecting the priorities of right to the use of water for the purposes of irrigation, has endeavored from the earliest period to confine the discussion of each case to those matters which were necessary to a determination of the particular cause under consideration.

As a result of the many cases upon this branch of the law that have been brought into this court for determination, certain fundamental principles have been established, which will aid us materially in determining the present controversy. Among those peculiarly applicable to the issues raised by the pleadings in this case may be mentioned: 1. A mere diversion of water from a stream does not constitute an appropriation recognized by the constitution and statutes. To make it such there must be an application of the water to a beneficial use, and, in case of irriga-

tion, it must be applied to the land to make the appropriation complete; 2. Ditch corporations are quasi publici carriers—a means to an end to be resorted to for the purpose of conveying water from the natural streams to places where it may be applied to beneficial uses; 3. Appropriators of water from the same stream, through the same ditch, may have different priorities of right to the use of such water based upon the time of the several appropriations; 4. The water of the tributaries of a natural stream cannot be appropriated to the injury of prior appropriations from the main stream; ⁵²² 5. A corporation owning and operating a ditch becomes a trustee for its stockholders and is bound to protect their interests; 6. Under the statutes of 1879, 1881, and 1883, a ditch company may have a priority of right to take water, which priority may be determined by the statutory method, and, when so determined by a proper decree, is binding upon all parties to the proceeding: *Rominger v. Squires*, 9 Colo. 327; *Supply Ditch Co. v. Elliott*, 10 Colo. 327; 3 Am. St. Rep. 586; *Wheeler v. Northern etc. Co.*, 10 Colo. 582; 3 Am. St. Rep. 603; *Farmers' High Line etc. Co. v. Southworth*, 13 Colo. 111; *Strickler v. Colorado Springs*, 16 Colo. 61; 25 Am. St. Rep. 245; *Combs v. Agricultural Ditch Co.*, 17 Colo. 146; 31 Am. St. Rep. 275; *Fort Morgan etc. Co. v. South Platte Ditch Co.*, 18 Colo. 1; 36 Am. St. Rep. 259; *Louden Irrigating etc. Co. v. Handy Ditch Co.*, 22 Colo. 102; *Boulder etc. Ditch Co. v. Lower Boulder Ditch Co.*, 22 Colo. 115.

The complaint in this case was found insufficient by the court of appeals, because it fails to state the names of the users of water from plaintiff's ditch, with the date of their appropriations, and the amount of land for which the water is needed and similar facts. In support of its conclusion, the court quotes copious extracts from the opinions filed in the case of *Farmers' etc. Co. v. Southworth*, 13 Colo. 111, and *Combs v. Agricultural Ditch Co.*, 17 Colo. 146; 31 Am. St. Rep. 275. Those cases were, however, unlike the case at bar, for the reason that they involved the rights of different consumers receiving water from the same ditch, while here the contest is between different corporations owning different ditches as to the priority of the appropriations of the several ditches.

Moreover, in the case at bar the complaint sets forth the construction of plaintiff's canal, with the date thereof, and alleges a diversion of water and the application of the same for agricultural purposes to lands lying under the ditch, and gives the time of all of these acts as being prior to November 20, 1865. It also

alleges the amount of water so taken, used, and appropriated as aforesaid, and that such use has been continued without interruption from November 20, 1865, ⁵²³ to the commencement of the suit, except as interfered with by defendant. It further alleges that this amount of water is necessary to supply the users and consumers of water under its ditch with water for the irrigation of their crops and for their other agricultural operations.

In addition to the foregoing, it alleges that a decree was entered in and for water district No. 2 on the twenty-eighth day of April, 1883, in a court of competent jurisdiction, to wit, the district court of Arapahoe county, by which decree it is provided, inter alia, that the users and consumers of water for irrigation and other purposes from plaintiff's ditch were entitled to the priority of the use of water from the Platte river to an amount of sixty-one and sixty-one hundredths cubic feet per second as of date of November 20, 1865, setting forth in haec verba that portion of the decree establishing plaintiff's right.

It is then averred, that afterward, to wit, about the twenty-first day of December, 1874, the defendant company constructed its ditch, known as the "Agricultural ditch," and thereby claim to have appropriated one hundred and one and fifty-four hundredths cubic feet of water; that the Agricultural ditch is taken from Clear creek in Jefferson county, this stream being one of the main tributaries of the Platte river, discharging its waters into this river at a point above the headgate of plaintiff's ditch. This is followed by other averments, showing that defendant's rights were junior in point of time to plaintiff's, and showing that the defendant company has, notwithstanding this fact, wrongfully diverted and caused to be diverted water into its said ditch, to which water plaintiff has the prior right.

The decree is pleaded in accordance with the requirements of section 65 of the Code of Civil Procedure, while the proceeding in which it was rendered is specially provided for by the irrigation statutes of this state. As a basis for such an adjudication, it is only necessary for the party claiming a water right to file a statement, containing the name or names, together with the post-office address of the claimant ⁵²⁴ or claimants, with a description of the headgate, general course of the ditch and the name of any stream from which said ditch, canal, or reservoir is supplied with water, the length, width, and depth thereof, the time of the appropriation of water by original construction, also by enlargement or extension, the present capacity of the ditch, canal, or reservoir, and also the number of acres of land lying under it

and being or proposed to be irrigated by water from such ditch, canal, or reservoir; this statement to be signed by the proper party or parties.

The statute designates the facts to be included in the statement. It is not the practice to give the names of the individuals supplied by any such ditch, or the number of acres of land owned by each. Such is not required by the statute nor demanded by any decision of this court. As we have already stated, the statute provides for a decree awarding priorities to the several ditches and not to those claiming water under the ditches. It is, however, necessary in making proof to show that the water has been actually applied to the land in order that a completed appropriation may be shown. Under some of the ditches in this state there are thousands of consumers, and it would be impracticable, by reason of their number alone, to make them parties to a proceeding like the one before us. Moreover, such consumers change from year to year, and this furnishes an additional reason against the contention of defendants in error. Courts will never sanction a practice which imposes an impossible or even an unreasonable requirement upon litigants.

As was well said in the case of *Walworth v. Holt*, 4 Mylne & C. 619, many years ago: "I think it is the duty of this court to adapt its practice and course of proceeding to the existing state of society, and not, by too strict an adherence to the forms and rules established under different circumstances, to decline to administer justice and to enforce the rights for which there is no other remedy. This has always been the practice of this court, though not at all times sufficiently attended to. It is the ground upon which the court ⁵²⁵ has in many cases dispensed with the presence of parties who would have been, according to the general practice, necessary parties."

The case at bar was brought by a corporation having an appropriation duly established by a decree of court, for the purpose of enforcing the same, as provided by the act of 1887. The statute is entitled "An act providing for the appointment of superintendents of irrigation for the water divisions of this state; fixing their compensation and providing for the payment thereof; prescribing their duties, and requiring a bond for the faithful performance of each; requiring clerks of district courts to furnish such superintendents with certain certified decrees, and providing for the payment of such clerks' fees."

If the legislature, in establishing water districts throughout the state, had given heed to the topography of the country, it

would have made the various water districts of the state coextensive with the area of lands to be supplied from a given stream and its tributaries. Although this has been its policy in recent years, at first this policy was not followed, and we frequently find, as in this case, a stream and its tributaries extending into two or more water districts. The present controversy springs from such a state of facts.

Under the act of 1887, the water superintendent is required to distribute the water in accordance with the decrees of courts having jurisdiction, without regard to the water districts in which such decrees may have been entered, although by the statutes providing for such adjudications, notice is only provided for those claiming water in the particular district the priority of which is to be adjudicated. No provision is made for those owning lands situate outside of the district to be made parties to the proceeding, although one and the same stream may be relied upon as the common source of supply, and the different interests may for this reason be antagonistic.

Is the act of 1887 constitutional? Its constitutionality is attacked because, as it is claimed, the purposes of the act ⁵²⁶ are not clearly expressed in its title; and because its provisions, if enforced, would deprive parties of their priority to the use of water, without due process of law.

This court has frequently called attention to the advisability of making the titles of acts general, but the opinions in which this has been done were not announced until subsequent to the passage of the act in question. Although a general title might have been selected for this act which would be free from objection, we think the title adopted is not in violation of the constitutional provision relied upon. The act provides for the appointment of superintendents of irrigation; fixing their compensation and prescribing their duties, etc. All the matters embraced therein are directly germane to the appointment of superintendents. What could be more natural and proper in an act so entitled than to fix the duties, compensation, etc., of the officers to be appointed? The act embraces but one general subject, which is clearly expressed in the title selected. The purpose of the constitutional provision in this respect is not violated, and the provision as construed by repeated decisions of this court is sufficiently complied with: *Golden Canal Co. v. Bright*, 8 Colo. 144; *Clare v. People*, 9 Colo. 122; *Dallas v. Redman*, 10 Colo. 297; *Harding v. People*, 10 Colo. 387; *Edwards v. Denver etc. R. R. Co.*, 13 Colo. 59.

The statute clothes the superintendent with no judicial power. It provides that he shall ascertain the priorities as established by decrees of the district court and register the same in a book to be kept for that purpose, and that he shall, to the best of his ability, take care that each and every ditch shall receive the water to which it may be entitled under such judicial decrees. The power conferred is executive and not judicial: *Murray v. Hoboken etc. Co.*, 18 How. 272.

Is the act of 1887 in violation of the inhibition against the taking of property without due process of law? It has been determined by this court in many cases that decrees adjudicating priorities to the use of water in the several water districts ⁵²⁷ are conclusive under the acts of 1879 and 1881 between the ditches and canals of the particular water district in which such decrees are entered, but this is the first instance in which a question has been presented as to force and effect of such decrees between the various claimants to priorities in different districts.

Under the act of 1887, these decrees are made *prima facie* evidence as between the different districts. They are not, however, made conclusive evidence. The courts are still open for the purpose of entertaining the usual proceedings, statutory or otherwise, that have hitherto been found appropriate for determining the priorities between claimants for water for irrigation of lands situate in different districts.

In the absence of decrees settling the priorities between different districts, the water must be distributed or appropriated in some manner. If the provisions of the act of 1887 cannot be carried into effect, then each claimant is at liberty to determine such priority for himself and take water accordingly. The inevitable consequence of such a course is to arouse the passions of the people, and, as said in the case of *White v. Farmers' etc. Co.*, 22 Colo. 191, to provoke unseemly breaches of the peace.

This court has repeatedly held that statutes like the one under consideration may be enacted in the exercise of the police power of the state. This matter was much considered in the case last cited, where the extent of the police power was considered in cases where the public interest is affected, and the following from *Beer Co. v. Massachusetts*, 97 U. S. 25, was quoted with approval: "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals."

At the time of the convening of the legislature of 1887, the problem presented by the conditions then existing was ⁵²⁸ difficult of solution. As we have seen, these difficulties arose to a large extent from previous injudicious legislation, whereby water districts were created without proper attention being paid to the topography of the country and the conditions of its streams.

The legislature, by the act of 1887, has attempted to solve the difficulty by providing an officer and making it his duty to distribute the water according to the decrees rendered, without reference to the water district in which such decrees are to be found. As we have said, the act does not attempt to make such decrees conclusive as between the various districts, but, in effect, it provides that until the courts shall determine otherwise in some appropriate proceeding, the superintendent shall treat the decrees as prima facie correct and distribute water accordingly. We believe this regulation is fairly within the police power of the state, as defined in the case of *White v. Farmers' etc. Co.*, 22 Colo. 191, and that it violates no constitutional provision; the effect being only to require the distribution of water in a certain way until such time as the rights of the parties can be definitely ascertained and adjudicated: *White v. Farmers' etc. Co.*, 22 Colo. 191.

Undoubtedly, the owners of priorities in one water district may, by appropriate pleadings, challenge the correctness of decrees entered in other water districts, where the rights of the former are unjustly affected thereby, and this may be done by answer in this case, but until such decrees are impeached no sufficient reason has been advanced why the public officers intrusted with the distribution of water should not be governed thereby, and, as we have attempted to show, such a course offers a solution free from constitutional objection of what at best is a difficult problem. This construction gives effect to the legislation of 1879, 1881, and 1883, as well as the statute of 1887. When an act of the legislature is attacked as in violation of the constitution of the United States, or of the state, by a familiar rule, we are required to uphold the legislation, unless its unconstitutionality appears ⁵²⁹ beyond all reasonable doubt. Such a case has not been made out by appellants. In fact, after a careful examination of the points made, we see no reason to doubt the constitutionality of the act attacked, viz., the statute of 1887.

It necessarily follows from what has already been said that the plaintiff company has such an interest as will enable it to maintain this action, and it is unnecessary either to unite with it its stockholders or those who are receiving water through its ditch,

or make the users of water under the defendant ditch or its stockholders parties defendant. A contrary construction would practically defeat the ends of justice and close the courts to appeals from ditch companies which may be unlawfully and injuriously deprived of water to which they are entitled.

Another ground of demurrer is the misjoinder of parties defendant, in this, to wit, that this defendant is improperly joined with other defendants, to wit, James P. Maxwell, as state engineer; Isaac H. Batchellor, as superintendent of irrigation for water district No. 1; J. G. Hartzell, as water commissioner for district No. 7. The complaint shows that these parties were each and all executive officers of the state, and that they were distributing water in violation of the act of 1887 to the plaintiff's injury. They were, therefore, properly made defendants in this action.

It is claimed that the action cannot be maintained, for the reason that the complaint shows that there is now pending and has been one adjudication concerning the same subject matter. We are unable to see any foundation for this ground of demurrer.

In our opinion, none of the grounds of demurrer relied upon are well taken, and it should have been overruled.

The judgment of the court of appeals is accordingly reversed, and the cause remanded, with directions to that court to reverse the judgment of the district court and require the defendants to answer the complaint.

WATERS.—DIVERSION of water without applying it to a beneficial use within a reasonable time, is not a valid appropriation thereof: *Combs v. Agricultural Ditch Co.*, 17 Colo. 146; 31 Am. St. Rep. 275, and note; *Fort Morgan Land etc. Co. v. South Platte Ditch Co.*, 18 Colo. 1; 26 Am. St. Rep. 259, and note.

WATERS.—STATUS OF IRRIGATION COMPANY.—An irrigation or canal company is not the proprietor of the water diverted by it, but is only an intermediate agency, existing for the purpose of aiding consumers in the exercise of their constitutional rights, as well as a private enterprise prosecuted for the benefit of its owners: *Watt v. Larimer etc. Irr. Co.*, 18 Colo. 298; 36 Am. St. Rep. 280, and note.

WATERS.—APPROPRIATOR'S RIGHT IN TRIBUTARIES.—A prior appropriator of water from the main stream is not subject to subsequent appropriation from its tributaries by others: *Strickler v. Colorado Springs*, 16 Colo. 61; 25 Am. St. Rep. 245.

WATERS.—PRIORITY OF APPROPRIATION of water in point of time gives superiority of right among appropriators for like beneficial purposes: *Strickler v. Colorado Springs*, 16 Colo. 61; 25 Am. St. Rep. 245, and note.

WATERS.—RIGHTS OF DITCH COMPANIES.—A company may organize for the purpose of constructing an irrigation ditch and divert the unappropriated water of a natural stream, either with or

without incorporation; but it cannot thus withhold the water from a beneficial use, nor reserve it for future use by junior appropriators to the prejudice of prior appropriators nor to the exclusion of those who, in the meantime, undertake in good faith to make a valid appropriation thereof: *Combs v. Agricultural Ditch Co.*, 17 Colo. 146; 31 Am. St. Rep. 275, and note.

CONSTITUTIONAL LAW.—Acts of the assembly should not be adjudged void upon mere doubts of their constitutionality: *State v. Bargas*, 53 Ohio St. 94; 53 Am. St. Rep. 628, and note. If there is a doubt in the mind of the court respecting the validity of a statute, it must be sustained: *State v. Roby*, 142 Ind. 168; 51 Am. St. Rep. 174, and note.

STATUTES—TITLE EMBRACING MORE THAN ONE SUBJECT.—If a statute includes two distinct subjects, both expressed in the title, the whole act must be treated as void: *Ritchie v. People*, 155 Ill. 98; 46 Am. St. Rep. 315, and note. See on this subject the extended notes to *Davis v. State*, 61 Am. Dec. 837, and *Neuendorff v. Duryea*, 25 Am. Rep. 245.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

WILKINS v. YOUNG.

[144 INDIANA, 1.]

ENTIRETIES, ESTATES BY.—Where lands are conveyed to a husband and wife, and there are no words of limitation in the deed, or where it does not appear from the tenor thereof that it was intended to create an estate in joint tenancy, they take as tenants by the entireties.

JOINT TENANCY BETWEEN A HUSBAND AND WIFE.—The conveyance of real property to a husband and wife, to have and to hold to them in joint tenancy, their heirs and assigns forever, vests an estate in them as joint tenants, and not as tenants by the entireties.

CONVEYANCE, INTENTION OF THE PARTIES, WHEN IMMATERIAL.—Where there is no ambiguity in a conveyance, what the grantors or grantees intended by its terms, or in what manner they subsequently treated it, has no bearing on its construction.

A JOINT TENANT CANNOT DEVISE any part of the property, though he may convey any part of it to a stranger and thereby defeat his cotenant's right to survivorship.

A JOINT TENANT MAY MORTGAGE HIS INTEREST in the property of the cotenancy, and to the extent of the mortgage lien the interest of the survivor will be destroyed or suspended.

WILLS—DEVISE BY A JOINT TENANT.—A statute providing that any person may devise any interest descendible to his heirs which he may have in lands, tenements, etc., does not authorize a joint tenant to devise any part of the subject matter of the tenancy.

W. G. Colerick and M. V. B. Spencer for the appellees.

S. M. Hench and H. C. Hartman, for the appellants.

² **JORDAN, J.** Action by appellees in the lower court, wherein they sought to recover the possession of certain described real estate from the appellant, John H. Wilkins, and to quiet their

title thereto against both of the appellants. A trial resulted in a judgment in favor of appellees, from which appellants prosecute this appeal, and assign numerous errors, whereby they assail certain rulings and decisions of the trial court, and the final judgment and decree thereof.

At the request of the parties, the court found the facts specially and stated its conclusion at law thereon. As this finding is supported in its material points by the evidence and as the principal questions involved in this appeal are fully presented by said finding and conclusions of law thereon, we deem it only necessary to consider the alleged errors arising out of these conclusions.

The following are the material facts as found by the court: "In 1870, one Samuel Gordon married Phoebe Ginther, who had been, prior to that time, divorced from a former husband, one Peter Ginther; that appellees are the only children and heirs of said Phoebe, being the fruits of her former marriage to said Peter; ³ that no children were born unto her by virtue of her marriage to Samuel Gordon; that said Samuel Gordon and said Phoebe lived together as husband and wife from the year 1870 until the death of said Samuel, which occurred at Fort Wayne, Indiana, on the fourteenth day of April, 1886; that his said wife Phoebe survived him, until June 22, 1890, at which date she died intestate, leaving surviving her appellees as her children and only heirs; that on November 23, 1878, one James B. White, who was then the owner, in fee simple, of the real estate in controversy, situated in Allen county, Indiana, for and in consideration of the sum of four hundred and fifteen dollars, together with his wife, executed a warranty deed, whereby they conveyed to said Samuel Gordon and Phoebe, his wife, said real estate; that in said deed, immediately after the description of the premises, are the following words: "To have and to hold the same to the said Samuel Gordon and Phoebe Gordon, his wife, in joint tenancy, their heirs and assigns forever." This deed was acknowledged and recorded in the recorder's office of said county. On the fifteenth day of October, 1885, Samuel Gordon, the husband, executed to the appellant, Herman Wilkins, a mortgage upon the said lands, to secure the payment of two hundred dollars, as evidenced by a promissory note; that his wife (Phoebe) did not join with him in the execution of said mortgage.

"On the seventeenth day of October, 1895, said Samuel Gordon executed a will, wherein he willed that at his death the said real estate should go to the appellant, John H. Wilkins. After the

death of Samuel Gordon said will was duly probated in the circuit court of Allen county, Indiana, at which county said testator died. After the death of Samuel Gordon, said John H. Wilkins took possession of said real ⁴ estate, and that the rental value thereof is sixty dollars per annum. The only right or title of the appellant John H. Wilkins is under the devise to him in said will. The only right, title and interest that appellant Herman Wilkins claims in and to said real estate is under the mortgage executed to him by said Samuel Gordon, and for taxes assessed against the said land and paid by him for the purpose of protecting his said mortgage lien. The only right or title in said real estate claimed by appellees is by inheritance thereof, as the children and heirs of their deceased mother, Phoebe Gordon." Upon this finding the court stated its conclusions of law substantially as follows: "1. That under the said deed, said Samuel Gordon and Phoebe, his wife, held the said real estate as tenants by entirety, and that at the death of her husband, Samuel, she became the sole owner thereof, and upon her death the same descended to appellees as her heirs; 2. That the mortgage executed by Samuel Gordon to Herman Wilkins is void, because the said Phoebe, his wife, did not join in the execution thereof; 3. That the defendant John H. Wilkins did not acquire or take any title to said real estate under the will of Samuel Gordon, for the reason that he (Gordon) had no interest in said real estate, subject to be devised by will; 4. That said defendant John H. Wilkins unlawfully holds possession of said real estate to plaintiffs' damage in the sum of two hundred and forty dollars."

To each of these conclusions of law appellants each separately excepted. Over their exceptions and objections, the court, upon this finding, rendered judgment in ejectment against John H. Wilkins and ⁵ quieted appellees' title against both of the appellants, and decreed that the mortgage of Herman Wilkins was null and void, and that the devise of said real estate by Gordon to John H. Wilkins was of no effect.

In this state a joint tenancy can only be created as provided by section 3341 of the Revised Statutes of 1894 (Rev. Stats. 1881, sec. 2922). Where lands are conveyed to husband and wife, and there are no words of limitation in the deed, or where it does not manifestly appear from the tenor thereof that it was intended to create an estate in joint tenancy, they will take as tenants by entirety: *Hadlock v. Gray*, 104 Ind. 596, and authorities there cited. It is equally well settled by the general rule controlling in a conveyance of real estate that the husband and wife may be

defeated by conditions, limitations, or stipulations in the instrument of conveyance, when they clearly indicate an intention of the grantor to create in the grantees a different estate. A joint tenancy may be created to exist between husband and wife by the express terms or tenor of the deed of conveyance: *Thornburg v. Wiggins*, 135 Ind. 178; 41 Am. St. Rep. 422, and authorities there cited. This question being settled, we are next to determine what was the character of the tenancy created by the conveyance of White to Gordon and wife. It is obvious and clear, we think, that the following expression or stipulation in said deed, namely: "To have and hold the same to the said Samuel Gordon and Phoebe Gordon, his wife, in joint tenancy, their heirs and assigns forever," brings the conveyance in question clearly within the provisions of section 3341 of the Revised Statutes of 1894, and we are, therefore, constrained to hold that by these express terms in the instrument, a joint tenancy was vested in Gordon and wife, and that they did not take and hold the realty ^a so conveyed to them as tenants by entirety: *Thornburg v. Wiggins*, 135 Ind. 178; 41 Am. St. Rep. 422; *Barden v. Overmeyer*, 134 Ind. 660; *Case v. Owen*, 139 Ind. 22; 47 Am. St. Rep. 253. We may here add that the latter words, "their heirs and assigns forever," are superfluous, and in no way affect the meaning or intent of the grantor. And we may further say that, there being no ambiguity in this deed, it follows that what the grantor or grantees understood by its terms, or in what manner they subsequently treated it, has no bearing upon the construction thereof.

The next points arising out of the special finding and conclusions of law relative thereto, and which are presented for our consideration, are as to the power of Samuel Gordon to mortgage and devise his moiety in the lands involved in this action. This will necessitate an examination, at least of some of the features impressed by law upon these particular estates of joint tenancy when they are once created. Tenants of this kind are said to hold individually and jointly, having one and the same interest, accruing through one and the same conveyance, commencing at the same time and held by one and the same possession. Upon the death of one joint tenant, there being no severance in the estate, his entire interest is cast upon the survivor or survivors to the exclusion of the inheritance of the same by his heirs. The interest of the survivor in the realty is consequently increased by the extinguishment of the interest of the tenant deceased. It is settled in law that a joint tenant may alienate or convey to a

stranger his part or interest in the realty, and thereby defeat the right of the survivor: Tiedeman on Real Property, sec. 238; 1 Washburn on Real Property, 682, cl. 22; 4 Kent's Commentaries, 460; 1 Preston on Estates, *136; *Bevins v. Cline*, 21 Ind. 40; Am. & 7 Eng. Ency. of Law, 892; 11 Am. & Eng. Ency. of Law, 1092; *Duncan v. Forrer*, 6 Binn. 193.

In the ancient language of the law, joint tenants were said to hold *per my et per tout*, or in plain words, "by the moiety or half and by all." The true interpretation of this phrase being that these tenants were seised of the entire realty for the purpose of tenure and survivorship, while, for the purpose of immediate alienation, each had only a particular part or interest: 1 Preston on Estates, *136; 4 Kent's Commentaries, 460. Partition at common law could not be enforced by joint tenants, but, under our statute, partition of these estates may be enforced: Rev. Stats., sec. 1186. The interest of each tenant is subject to sale upon execution; *Thornburg v. Wiggins*, 135 Ind. 178; 41 Am. St. Rep. 422; *Freeman on Executions*, sec. 125. Having these rights and powers, at least, over his interest in the land so held, there can be no sufficient reason urged why the power of the joint tenant to mortgage the same should be denied. Any interest in real estate which a person may sell and convey he may also mortgage: *Jones on Mortgages*, sec. 136. We are, therefore, of the opinion that a joint tenant may mortgage his interest in the joint estate in like manner as though he were a tenant in common, and to the extent of the mortgage lien the right of the survivor will be destroyed or suspended, and the equity of redemption, at the death of the tenant, will be all that will fall to the surviving companion. This right of the tenant to mortgage is supported by the following authorities: *York v. Stone*, 1 Salk. 158; *Simpson v. Ammons*, 1 Binn. 175; 2 Am. Dec. 425.

It is settled by numerous authorities that the devise, under the will of Samuel Gordon, of his interest in the lands in question, to appellant John H. Wilkins, was inoperative and void, and the latter acquired no title ^s thereby. The reason for this rule is apparent. Unless there is a severance during the lifetime of the devising tenant, at his death the right of the survivorship immediately accrues, and, as the devise cannot take effect until after the death of the testator, the tenant is thereby disqualified for devising his moiety in lands so held; or, in other words, as this paramount right of the survivor, or survivors, instantly prevails upon the death of the testator, there remains no estate of inheritance upon which the will can operate: *Swift v. Roberts*,

2 Burr. 1488; *Duncan v. Forrer*, 6 Binn. 193; 4 Kent's Commentaries, 460. A joint tenant, being disqualified to exercise this power at common law, is also disqualified by our statute of wills; section 2726 of the Revised Statutes of 1894 (Rev. Stats. 1881, sec. 2556) provides that persons may devise any interest descendible to their heirs which they may have in any lands, tenements, etc. As we have seen that the interest of a joint tenant does not descend, it follows, therefore, that under this statute he has no right or power to devise the same by will. From the conclusions which we have reached herein, it is apparent that the court erred in holding in its first conclusion that the deed created a tenancy by entirety in Gordon and wife. That it also erred in holding in its second conclusion that the mortgage executed to appellant Herman Wilkins by Samuel Gordon is void. The court did not err in stating its third and fourth conclusions of law. As under the special finding of facts the ultimate judgment against John H. Wilkins is right, therefore, the intervening errors complained of by him must be deemed and held to be harmless. The judgment as against Herman Wilkins is reversed and the cause remanded, with instructions to the lower court to grant him a new trial and "leave to reform the issues if requested. The judgment as to John H. Wilkins is affirmed.

All concur.

PER CURIAM. It being shown to the court that Herman Wilkins, coappellant herein, paid the cost of the transcript in the appeal of said cause to this court, and he having secured a reversal of the judgment, so far as the same affected his interest to the real estate involved, and it further appearing that, in order for said appellant to obtain the relief sought in this appeal, it was necessary for him to have certified to this court the transcript of all the proceedings of the lower court, it is therefore ordered that appellees' motion to modify the judgment and retax the cost herein be, and the same is hereby, overruled, at their cost.

HUSBAND AND WIFE—ENTIRETIES.—A tenancy by the entirety is created by a conveyance of land to a husband and wife which does not state the manner in which they shall hold such land: *Stetz v. Shreck*, 128 N. Y. 263, 26 Am. St. Rep. 475, and note. Tenancy by the entirety is to be presumed when the grantees are husband and wife, unless, from the language employed in the deed, it is manifest that a different purpose was intended: *Thornburg v. Wiggins*, 135 Ind. 178; 41 Am. St. Rep. 422, and note with the cases collected. At the common law, under a conveyance of land to a husband and wife, they do not take either as joint tenants or tenants

in common, unless by express words or words strongly implying such intention: *Baker v. Stewart*, 40 Kan. 442; 10 Am. St. Rep. 213, and note.

JOINT TENANCY—CONVEYANCE BY ONE JOINT TENANT.—One joint tenant cannot convey a part of the joint estate by metes and bounds to a stranger: *Porter v. Hill*, 9 Mass. 34; 6 Am. Dec. 22, and note. To the same effect see *Varnum v. Abbot*, 12 Mass. 474; 7 Am. Dec. 87.

LYNCH v. ROSENTHAL.

[144 INDIANA, 86.]

LOTTERY CONTRACTS ARE AGAINST PUBLIC POLICY, and those who enter into them shall not have any relief in the courts to enforce those that remain executory, or to recover what has passed under such as have been executed.

LOTTERY SCHEME, WHAT IS.—A scheme by which a number of lots of unequal value are sold at a uniform price and others are given away, the purchasers to determine by lot the particular lot to be awarded to each respectively, and also to determine by some agreement among themselves the manner of awarding the prize lots, is a lottery scheme contrary to public policy, and all agreements for carrying it into effect are void.

ESTOPPEL, WHO MAY NOT RELY UPON.—One who attempts to assert a vicious and unlawful contract is in no position to insist that another shall be estopped from urging the illegality of such contract, because before suit was brought against him, he declined to proceed with the contract for another reason than that of its illegality.

Mann & Beatty, La Follette & Adair, and France & Merryman, for the appellant.

R. K. Erwin and J. R. Bobo, for the appellee.

⁸⁶ **HACKNEY, C. J.** This was a suit by the appellant against the appellee for specific performance of a contract for the purchase of real estate. The material features of the contract were that Lynch held a contract for the purchase of a tract of land lying adjacent to the corporation line of the city of Decatur, in Adams county, which land he was about to plat as an addition to said city, in accordance with a diagram then drawn and made a part of the contract exhibiting fifty-four lots. The appellees and others agreed severally by the express provisions of that contract, to purchase of said first party (Lynch) the number of lots indicated by the number placed opposite "his name" on the following conditions, to wit: "The price of said lots shall be the same as shown by the annexed plat," the prices varying according to classes and location, ⁸⁷ "and whenever all of said lots are sold, except the six lots . . . marked 'reserved' . . . and the lots marked 'to be given away,' then said second parties shall meet and

determine by lot the number of the lot or lots to be awarded to each respective subscriber, and shall also determine in some manner, to be agreed upon by themselves, the manner of awarding the prize lot; as soon as said lots are awarded and it is determined in whom the respective ownership shall lie, then the said Allen T. Lynch shall make out and deliver to each party a good and sufficient warranty deed for each of said lots, to each of said subscribers." It is further stipulated that one-half of the purchase price for any lots shall be paid or secured when the deed is delivered and the other half when Lynch may build and put in operation, near the lots, a furniture factory of the character therein described. There were thirty-five subscribers for one lot each, the appellee being one of that number.

Each of the three paragraphs of complaint alleges subscriptions for less than the whole number of lots for sale under said contract, and the waiver, by all parties, of any requirements to sell all of such lots; that all of the subscribers, including the appellee, met and determined by lot which of the platted lots should be designated for conveyance to each subscriber, including a described lot for the appellee. And it is alleged in detail that the appellant complied with the requirements of the contract on his part; that he executed the required deed of conveyance to the appellee and tendered it to him, and, upon his refusal to accept it, the same was brought into court for him.

To the complaint the appellee filed seven answers in bar, the third, fourth, fifth, and sixth of which were sustained, against the appellants' demurrer, and are here assigned as severally insufficient.

⁸⁸ The third answer pleads that all the lots agreed to be sold were not sold and that the stipulation as to the sale thereof was not waived. This much of the answer presents the same question arising upon the sixth paragraph of answer. Counsel offer no objection to the sufficiency of either of these paragraphs in this respect, and we observe no objection to them. If all of the lots had gone into the hands of separate bona fide purchasers, their prospective value would certainly have been greater than if but few had been sold and a large number left in the hands of a single owner. But, in addition to this feature of the third paragraph, it alleges that, after said subscriptions were made, the appellant and a number of subscribers met, and, upon the suggestion and assistance of the appellant and his attorney, certain of said fifty-four lots were awarded to the subscribers severally by placing the numbers of lots severally upon tickets and placing

them in a box, and then by placing the names of the subscribers severally upon tickets and placing them in another box, whereupon two persons, who were blindfolded, drew simultaneously from the boxes a name and a number of a lot until all of the names were drawn; that in each instance the lot whose number was drawn, when a name was drawn, was awarded to the subscriber whose name was so drawn and constituted the selection of the lot to be conveyed to him; that at the same time and in the same manner said persons awarded the prize lot to one of the subscribers; that is to say, they placed in one box thirty-four blank tickets and one ticket marked "prize lot," and in the other box tickets containing severally the names of the subscribers, and as names were drawn from one box tickets were drawn from the other until the name of one subscriber and the ticket bearing the "prize lot" appeared ⁸⁹ simultaneously, when that lot was awarded to such subscriber and was thereafter conveyed by appellant to him. The contract and the manner of its attempted execution are alleged to have been void as against public policy.

The fourth answer alleged that the prices of the lots as marked upon the plat were in excess of the actual values of the lots, and that the appellant, as an inducement to persons to subscribe, offered the chance of obtaining the prize lot in addition to that subscribed for; that appellant participated in the drawing which was described as in the third paragraph.

The fifth answer alleged the stipulations of the contract as to the selection of the lots subscribed for and the awarding of the prize lot, that the lots were not of the values placed upon them, and that the values of those in any class were variant, so that one person drawing a lot, at a given price, might obtain one of greater or less actual value than that obtained by another subscriber drawing one of the same price.

Appellant's learned counsel have not discussed their objections to these answers separately, but they have attacked them collectively as not disclosing the invalidity of the contract. They will be regarded, therefore, as having waived all other questions arising upon them.

The argument is not made that contracts tainted with the vice of lottery schemes are enforceable. That such contracts are against public policy and that those who have entered into them shall have no relief, in the courts, to enforce those that are executory or to recover that which has passed under such as have been executed, is without doubt: Const., art. 8, sec. 15; *Burger v. Rice*, 3 Ind. 125; *Swain v. Bussell*, 10 Ind. 438; *Rothrock v. Per-*

kinson, 61 Ind. ⁹⁰ 39; United States v. Olney, 1 Abb. (U. S.) 275; Whitney v. State, 10 Ind. 404; Crews v. State, 38 Ind. 28; Hudelson v. State, 94 Ind. 426; 48 Am. Rep. 171; Riggs v. Adams, 12 Ind. 199; Am. & Eng. Ency. of Law, 1187; Rev. Stats. 1894, secs. 2170-2172 (Rev. Stats. 1881, secs. 2076-2078).

The important question here is as to the character of the present contract. Does it infringe this principle of public policy? This inquiry depends upon what a lottery scheme is. In Hudelson v. State, 94 Ind. 426, 48 Am. Rep. 171, it was held that where a merchant, with each sale of merchandise to the value of fifty cents, gave the purchaser the right to guess as to the number of beans in a glass globe, the nearest guesser to receive a gold watch, the transaction was a lottery. The court there quoted with approval several definitions of a "lottery," some of which are as follows: "Whether the enterprise . . . be called a scheme of chance, a gift enterprise, or a lottery, it is still a scheme of chance, and in that sense a lottery or gift enterprise: Lohman v. State, 81 Ind. 15." "Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to have for it, that is a lottery": Hull v. Ruggles, 56 N. Y. 424. "A lottery is a scheme for the distribution of prizes by chance." In Rothrock v. Perkinson, 61 Ind. 39, it was said: "It is well settled in this state that every scheme for the division or disposition of property or money by chance, or any game of hazard, is prohibited by law, and that every contract or agreement in aid of such a scheme is void as against public policy," citing, in connection with some of the cases we have cited, those of Higgins v. Miner, 13 Ind. 346; Thatcher v. Morris, 11 N. Y. 437. Lot is defined to be "a contrivance to determine a question by chance, or without the action of man's ⁹¹ choice of will": Chavannah v. State, 49 Ala. 396; Am. & Eng. Ency. of Law, 1181. Webster's International Dictionary defines lot as "anything used in determining a question by chance, or without man's choice or will."

That the property subject to distribution possesses unequal values, so that one's good or ill luck, in the scheme of distribution, may determine whether he shall receive more or less for his investment, the scheme is a lottery: Dunn v. People, 40 Ill. 465. Nor is it less a lottery because the person whose property is distributed, or the person who pays, does not personally participate in the drawing: Fleming v. Bills, 3 Or. 286; Riggs v. Adams, 12 Ind. 199.

By the definite language of the contract in this case, the lot which the appellee agreed to purchase was to be determined by lot. It was to be one of the fifty-four parcels, to be designated wholly by chance and without the will or choice of the appellant or the appellee. Whether he was to pay one hundred dollars or three hundred dollars was a question over which he had no choice, and the appellant was without control. Any advantage in the selection, by reason of location, character, size, or condition of a lot, from any of the various classes as arranged by the prices marked, was not to be determined by the judgment of a subscriber or the seller, but depended wholly upon the chances to be settled by "lot," as the contract provided. Distribution by chance was never more certainly contemplated, and, if not so contemplated, the manner in which the appellee's alleged purchase was determined was never outrivaled as a method of chance, not even by the guessing upon the number of beans in the globe, for in that instance the person to be benefited exercised his own judgment in determining upon a number. The method adopted was no less objectionable, as one of ⁹² mere chance, than the methods of the old Louisville Library Association, or the more recent Louisiana Lottery. If there had been nothing in the contract directing the choice by lot, and the choice had been made in the manner alleged in some of the answers, every objection would prevail against it that would obtain if the appellee had been assigned a lot as the result of a game of cards, the throwing of dice, or the turning of the roulette. In any one of these methods the result depends entirely upon chance and excludes the exercise of the judgment.

In the case of *Swain v. Bussell*, 10 Ind. 438, this court quoted with approval from *State v. Clark*, 33 N. H. 334, 66 Am. Dec. 723, "that where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what the party who pays the money is to have for it, or whether he is to have anything, is a lottery." In the present case, the subscriber is to get a lot more or less valuable, depending alone upon chance, and he is to pay for it a sum, more or less, depending alone upon chance. It was further said by this court, in the case mentioned, referring to *Den ex dem. Wooden v. Shotwell*, 23 N. J. L. 470: "Wooden had divided a parcel of land into fifty-eight lots of unequal value, from fifty dollars to six hundred dollars per lot, and disposed of them at seventy-five dollars each; and the particular lot of land to which each person was to receive a title was determined by lot. The supreme court of New

Jersey say this was, both in form and substance, a lottery." The difference between that case and the present is merely in degree of advantage or disadvantage to the parties in the amount to be paid and the proportionate values to be received as between those who make the payments. The method of distribution in either involves the objectionable feature of chance, upon which property of ⁹³ higher or lower value and greater or less price is determined without the exercise of the will and judgment of the parties.

The manner in which the chances in this case were determined is even more objectionable. Here fifty-seven lots were made the subject of choice for the selection of but thirty-five lots, and thereby added to the objection of distributing thirty-five lots by chance, the further vice of placing the appellant's remaining twelve lots in the scale, and his ownership, with locations, character, and values all depending upon the result of the drawing.

Another feature of the contract and the manner of executing it is in the offer and award of the "prize lot." Counsel for appellant seek to eliminate this feature of the contract and to uphold that which remains, by insisting that this lot was a gift to all of the subscribers without contract that it should go to any one by lot. If this were true and the appellee was denied the benefit of that part of his contract by the appellant's conveyance to one of the subscribers in violation of the contract, we are at a loss to determine how he, the appellant, is in a position to insist upon the enforcement of a contract which he has violated and rendered impossible of complete execution. But we do not agree with this view of the contract. It is stipulated that a "prize lot" is "to be given away," and is to be "awarded" in a manner to be determined. It is not stipulated that all of the subscribers shall become the owners of this lot, nor, in fact, that any one of them shall, but, when the parties come together, with the knowledge and consent, if not the direct participancy of the appellant, the contract is construed to mean that the prize lot is to be awarded to some one of the subscribers who, by the result of chance, is proven to possess the luck to have his name ⁹⁴ and the "prize lot" ticket drawn simultaneously. This construction of the contract is ratified and acted upon by the appellant in the act of conveying the lot to the lucky subscriber.

This construction of the contract renders certain that doubtful part of it which omitted to stipulate the person to whom and object for which the "prize lot" was to be awarded. It was to increase the interest of a subscriber who, by subscribing for one

lot, had the chance, for the same money, to get two lots. We find, therefore, that both the contract and the manner of attempting to comply with its terms were against good morals, forbidden by public policy, and void.

Appellant insists that the lower court erred in sustaining a demurrer to his reply to these answers, in which reply he alleged that when he tendered appellee's deed it was declined, not because the transaction was against public policy and void, but for the reason, then stated by him, that appellant had not complied with the requirement of the contract as to the building of a factory. Authorities, to the proposition that one may not assert one defense out of court and another in court, to the prejudice of the complaining party, are cited. We do not stop to consider the true doctrine of these cases. It is enough to say that one who asks equity must present clean hands in which to receive it. Here the appellant, from the beginning, had unclean hands. He originated, carried forward, and in this suit sought to enforce, a vicious contract. He is in no position to ask that equity estop his ally from exposing the vice of that contract, the enforcement of which public morals forbid. The evidence supports the judgment of the circuit court. There is no error in the record, and the judgment is affirmed.

LOTTERIES ARE CONTRARY TO PUBLIC POLICY and good morals: *Bass v. Mayor, Melgs*, 421; 33 Am. Dec. 154.

LOTTERIES—SCHEME AS TO TOWN LOTS.—A scheme by which persons associate themselves together into an organization called the "Denver Lot Club," under an agreement that each shall pay two dollars per week; that drawings for town lots shall be had every Monday, at which drawings one of the members is to receive a lot; and that such drawings shall be continued for a period of sixty weeks, is a lottery, within the meaning of a statute prohibiting the disposal of lands or real estate by chance of any kind: *Branham v. Stullings*, 21 Colo. 211; 52 Am. St. Rep. 213, and note. See, also, the extended note to *Yellowstone Klt v. State*, 16 Am. St. Rep. 43, 45.

LUMBERT v. WOODARD.

[144 INDIANA, 335.]

MORTGAGE OF STREET RAILWAYS, EFFECT AS TO SUBSEQUENTLY ACQUIRED PROPERTY.—A mortgage executed by a street railway corporation, and purporting to cover street railway property, does not embrace a subsequently acquired electric light plant, including buildings, waterwheel, shafting, dynamos, and other property rights and franchises connected with such plant, so as to take precedence over a mortgage of such electric light plant, made, at the time of its purchase, to the vendors thereof for the purpose of securing a balance remaining unpaid of the purchase price.

CHATTEL MORTGAGE, FORM OF.—Where no particular form for chattel mortgages has been prescribed by statute, a writing which reasonably expresses the intention of the parties to secure a particular debt, indicating the property and conforming to the statutory requirements as to acknowledgment and recording, should be deemed a chattel mortgage.

CHATTEL MORTGAGE, WHAT IS.—An instrument purporting to bargain and sell a certain electric light plant, providing that the vendor should hold a vendor's lien on such property and all additions thereto to secure an amount specified, and which is assented to by the vendee, who agrees to perform all the obligations therein contained, constitutes a chattel mortgage of the property so specified.

EVIDENCE, SECONDARY, WHEN ADMISSIBLE.—Parol evidence is admissible of the contents of a written lease, where the party in whose favor it is offered testifies that he turned it over to his adversary, who has been called upon to produce it, but testifies that it is not in his possession, and he believes it has been lost or destroyed.

H. D. Wilson and W. J. Davis, for the appellants.

Stephens & Stephens, Chamberlain & Turner and J. M. Van Fleet, for the appellees.

335 HACKNEY, C. J. On petition by appellant Lumbert, one Charles W. Fish was appointed receiver for the Elkhart Electric and Railway Company, a corporation formed by the consolidation of the Citizens' Railway Company and the Elkhart Electric Company, and the appellees, Woodard and Proctor, by consent of the court, sued said receiver upon certain notes, held by them severally, and, as alleged, a written lien securing said notes, for \$8,000, executed by said Elkhart Electric Company, and alleged to have been assumed by the new company.

336 Upon the motion of the receiver, John Cook, trustee for the holders of bonds to the amount of \$25,000, secured by mortgage, and executed by said Citizens' Railway Company, and one Frederick W. Miller, trustee for the holders of \$65,000 of bonds, secured by mortgage, executed by said new company, were made parties. Each of said trustees, Cook and Miller, interpleaded and

sought the foreclosure of the mortgages held by them respectively, and alleged the seniority of their mortgages severally to any lien of Woodard or Proctor.

Upon issues formed and trial had, with special finding and conclusions of law, decree was rendered declaring the alleged lien of Woodard and Proctor senior to the mortgages held by said trustees. The sufficiency of cross-pleadings by Woodard and Proctor severally, the correctness of the court's conclusions of law and the ruling denying a new trial are all urged, upon assignment of error and argument, for the reversal of the judgment of the circuit court. The principal question between the parties is as to the effect of the instrument asserted by Woodard and Proctor to constitute the senior lien so held by the trial court. That instrument was as follows:

"In consideration of the sum of \$17,000.00, to me in hand paid by the Elkhart Electric Company, I have bargained and sold, and by these presents do hereby sell and convey to said Electric company, all of the electric light plant in Elkhart, Indiana, including buildings, waterwheel, shafting, dynamos, lamps, poles, wires, and all other property, rights, and franchises in any manner pertaining to or connected with said plant, it being the only electric plant now operated and located in the city of Elkhart, Indiana. This sale and conveyance to include a transfer and full assignment of all my right, title, and interest in the water ³³⁷ power and the lease with the Elkhart Hydraulic Company, with which said plant is now operated. And I hereby certify that said plant is owned solely by myself; that the same is clear and free from all incumbrances whatever. And I hereby guarantee to defend the same against all lawful claims held or claimed by any persons whatever prior to this date claiming under or through me. In this sale and transfer it is distinctly understood and agree that I am [to] retain and do hold a vendor's lien on all of said property and plant, and all new additions thereto made by said Elkhart Electric Company, to secure the payment of \$13,000.00, balance of purchase money due on said plant, evidenced by sundry notes of various amounts, aggregating said amount of \$13,000.00, all bearing even date herewith and drawing interest at the rate of 8 per cent per annum, payable annually, and all attorneys' fees, all payable at the First National Bank of Elkhart, Indiana. One note for \$2,000 due in six months from date, and four notes for \$2,750 each, due respectively on the second day of January, 1890, 1891, 1892, and 1893, all signed by said Elkhart Electric Company and payable to the order of Marion C.

Proctor. Witness my hand and seal, this 8th day of January, 1889.
MARION C. PROCTOR. [Seal.]

"The Elkhart Electric Company hereby accepts the terms and conditions of the foregoing instrument and agrees to all its obligations therein contained to execute and perform. Witness the name of said company, which is hereto subscribed, by order of its board of directors, by O. N. Lumbert, its president, and E. P. Willard, its secretary, January 8, 1889.

"ELKHART ELECTRIC COMPANY,

"By O. N. Lumbert, President.

"By E. P. Willard, Secretary.

338 "State of Indiana, }
Elkhart County. } ss.

"Before me, E. C. Bickel, a notary public of said county, personally came Marion C. Proctor and acknowledged the execution of the annexed instrument.

"Also, came the Elkhart Electric Company, by O. N. Lumbert, its president, and E. P. Willard, its secretary, and acknowledged the execution of the foregoing and annexed instrument.

"Witness my hand and official seal this 8th day of January, 1889.
E. C. BICKEL, Notary Public. [Seal.]"

This instrument was recorded in the chattel mortgage record of Elkhart county, two days after its execution, to wit, January 10, 1889, the county named being that in which the parties resided. The notes held by Woodard were two of those referred to in said instrument, and that held by Proctor was another of the same series. The property so included in said instrument, and certain additions thereto, are particularly described in the cross-pleadings and special finding of the court.

The mortgage to Cook, trustee, was executed, not upon that covered by the foregoing instrument, but upon the street railway property. It was executed in May, 1886, but the property of the railway company was consolidated with that of the electric company in March, 1891. The alleged lien of Woodard and Proctor, is, by the conclusions of law, found and the judgment of the circuit court applied only to the property covered by the above copied instrument and subsequent additions thereto.

The supposed injustice of maintaining a lien in favor of Woodard and Proctor, as against Cook, trustee for the bondholders, having a lien upon the railway ³³⁰ property, is suggested upon

the assertion that the electric plant was made new and increased from the proceeds of a sale of the railway property. This assertion is not sustained by any finding of the court, or allegation of the pleadings in question. All of the property of the new company, railway and lighting plants combined, was sold by the receiver for \$21,000, and the court expressly found that the proportion of said sum derived from the electrical plant alone, and consisting of the items covered by said copied instrument and the additions made thereto, was twelve twenty-firsts, or \$12,000. It was against this sum that said lien was directed, and not against the parts of said sum representing nine twenty-firsts of said purchase money, or the proportionate value of the railway property. If the alleged lien of the appellees, Woodard and Proctor, is valid, it would be an injustice to them to permit the lien of Cook, trustee, which was alone upon the railway property, to attach to the electric plant and take precedence over their lien upon the electric plant.

The validity of their alleged lien is attacked by the appellants. One argument is, that a "vendor's lien" upon personal property is unknown to the law and applies alone to real estate; that a "vendor's lien" is never an express lien, but arises by implication. The lien in the present instance is not an implied lien, and its validity must depend alone upon the expressed provisions of the instrument. It is not, therefore, that character of lien which equity implies for the protection of the vendor of real estate. Treating it as an attempt to create a lien upon personal property, counsel for appellant maintain that it is not authorized by the statute (Rev. Stats. 1894, sec. 6638; Rev. Stats. 1881, sec. 4913), which provides that: "No assignment of goods, by way of mortgage, shall be valid against any ³⁴⁰ other person than the parties thereto, where such goods are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage shall be acknowledged, as provided in case of deeds of conveyance, and recorded in the recorder's office of the county where the mortgagor resides, within ten days after the execution thereof."

Of this proposition, counsel for appellants say: "Unless this instrument . . . is a chattel mortgage, then it cannot constitute any lien upon the property, because the property was not delivered to the purchaser, or, in other words, the pretended mortgagor, the seller, or pretended mortgagee, parted with possession altogether. Now, a chattel mortgage, to be good as a mortgage,

must claim to be given as security for a certain debt. This don't claim anything of the kind."

If we understand this argument, it is that Proctor, having parted with possession, could not create a lien, could not occupy the position of mortgagee, and that the instrument is not a mortgage, since it fails to recite that it is executed as a security for a certain debt. In construing the instrument we must look to the intention of the parties. That intention, as made clearly manifest, was to give evidence that Proctor had parted with the ownership of the electric plant to the electric company, that the company owed a balance of \$13,000, the debt being particularly described, and that Proctor intended to maintain a lien upon the property for said debt. While this intention is expressed by Proctor alone, the instrument contains, on the part of the company, a paragraph expressly accepting and agreeing to the terms imposed by Proctor, thereby giving mutuality of purpose in the intention so expressed. Of course, Proctor's lien does not depend upon his retention of possession. It rather ³⁴¹ depends upon the expressed provisions of the instrument, properly recorded, as the statute requires. Recording is, by our statute, made the substitute for possession, where possession is not held by the creditor who asserts an interest by way of lien or mortgage. Both the possession of the property and the recording of the instrument of assignment are not essential to the validity of the lien.

Our statute prescribes no form of chattel mortgage, and that which may be deemed reasonably to express the intention to the parties to secure a particular debt, indicating the property and conforming to the statutory requirements as to acknowledgment and recording, should be deemed a chattel mortgage. It is the general rule, as expressed in many of the states, that if it appears from the instrument that the parties intended it as a security, it is a mortgage: *Cobbey on Chattel Mortgages*, secs. 12, 79; *Cooper v. Brock*, 41 Mich. 488; *Weed v. Mirick*, 62 Mich. 414; *Gage v. Chesebro*, 49 Wis. 486; *Peck v. Merrill*, 26 Vt. 686; *McGregor v. Chase*, 37 Vt. 225; *Low v. Wyman*, 8 N. H. 536; *Lawrence v. Neff*, 41 Cal. 566; *Dunning v. Stearns*, 9 Barb. 630; *Ellington v. Charleston*, 51 Ala. 166; *Reynolds v. Ellis*, 103 N. Y. 116; 57 Am. Rep. 701; *Byrd v. Wilcox*, 8 Baxt. 65; *Langdon v. Buel*, 9 Wend. 80; *Harris v. Jones*, 83 N. C. 317; *Plummer v. Shirley*, 16 Ind. 380; *Sidener v. Bible*, 43 Ind. 230; *Davidson v. King*, 47 Ind. 372.

In *Sidener v. Bible*, 43 Ind. 230, the form of mortgage used was such as was in use for mortgaging real estate. It was said by this court: "Still, we think we must regard it as a valid mortgage of the chattels in question, so far as its form is concerned. It is sufficient in respect to its form to vest in the mortgagee an interest in the property according to the apparent intent of the parties."

342 Where no special form is required, it is difficult to observe why the manifest intention of the parties should be defeated because more appropriate words might have been chosen. We have no hesitancy in holding the instrument sufficient to constitute a mortgage. The word "vendor" cannot defeat this conclusion. In its ordinary significance, it is held by the lexicographers to mean one who sells, regardless of the character of the property sold.

The lower court admitted parol evidence of the contents of a certain lease to Proctor, and by him sold to the electric company. The record disclosed a motion by Proctor to require the appellee company to produce the lease, and the affidavits of the company's principal officers showed that it was not in the custody of the company, and the impression that it had been canceled and destroyed. Proctor testified at the trial that he had turned it over to the electric company at the time of the sale. As its existence was a question for the court, we think this showing, *prima facie*, excused the appellee, Proctor, from producing the original. It may be doubted, however, if the contents were not subject to proof by parol without proof of loss, since that instrument and its contents were but collaterally in issue: *Coonrod v. Madden*, 126 Ind. 197.

Finding no error in the record, the judgment of the circuit court is affirmed.

RAILROADS—MORTGAGES—AFTER-ACQUIRED PROPERTY. A mortgage by a railroad company upon its existing roads and franchises may be extended to rolling stock thereafter to be acquired and placed on the road, if the intent to acquire such stock and subject it to the mortgage be clearly and sufficiently expressed. Such mortgages are exceptions to the general rule that property not in esse cannot be conveyed: *Morrill v. Noyes*, 56 Me. 458; 96 Am. Dec. 486, and note. See further on this subject the extended notes to *Mississippi Valley Co. v. Chicago etc. R. R. Co.*, 38 Am. Rep. 353-355, and *Gregg v. Sanford*, 76 Am. Dec. 725.

CHATTEL MORTGAGE—WHAT IS.—An instrument is a mortgage where it clearly appears therefrom that, for practical purposes, the ownership of the property is intended to be transferred and a lien for the purchase price reserved to the seller: *Palmer v. Howard*, 72 Cal. 293; 1 Am. St. Rep. 60, and note. A chattel mortgage, whether in writing or not, is a pledge of personal property to secure

the promise of the mortgagor or someone for whom he stands sponsor. It need not be in writing: *Musser v. King*, 40 Neb. 892; 42 Am. St. Rep. 700, and note.

EVIDENCE—SECONDARY—LOST OR DESTROYED WRITING. If a writing is shown to be lost or destroyed, secondary evidence of its contents may be received: *Spears v. Lawrence*, 10 Wash. 368; 45 Am. St. Rep. 789, and note; *Anchor Milling Co. v. Walsh*, 108 Mo. 277; 32 Am. St. Rep. 600; note to *Roach v. Privett*, 24 Am. St. Rep. 822.

UPLAND LAND COMPANY v. GINN.

[144 INDIANA, 434.]

VENDOR'S LIEN.—THE ASSIGNMENT OF NOTES taken for the purchase money of land transfers, as an incident, the vendor's lien.

NOTES, CHANGE IN FORM OF DOES NOT CHANGE CHARACTER OF THE INDEBTEDNESS.—If a vendee of lands, who has executed a note to the vendor for the balance of the purchase price, subsequently, at the request of his vendor, executes in place of such note two other notes, one to such vendor and the other to a third person, the new notes retain the same character as the old one, and the holders thereof are entitled to the benefits of the vendor's lien.

PRACTICE.—IF A MOTION FOR A NEW TRIAL is as to the whole cause, if the findings in favor of one of the parties upon the issues joined in his cross-complaint are correct, the motion should be overruled, though the evidence is not sufficient to sustain the findings in favor of the other party. In such a case, the motion should be for a new trial on the issues joined in the cross-complaint of the latter.

G. W. Harvey and A. De Wolf, for the appellant.

Brownlee & Paulus, for the appellees.

435 **MONKS, J.** This action was brought by appellee, William Ginn, against appellant and the appellee William M. Brown, receiver of the Upland Glass Company, to recover the amount due on a promissory note executed by appellant, and have the same adjudged to be a vendor's lien on certain real estate owned by appellant.

Appellee Brown, receiver, filed a cross-complaint to recover judgment on a promissory note alleged to have been given for the purchase money for the same land, etc.

It was alleged in the complaint of Ginn, appellee, and the cross-complaint of Brown, receiver, that on April 11, 1893, one Wilhelm sold and conveyed a tract of land to appellant, and, for the purchase money not paid in cash, took appellant's note for over \$2,700; that afterward, on July 3, 1893, appellee, William Ginn, sold and conveyed a tract of land to said Wilhelm, for

which he paid all the purchase money except \$2,018; that on said day it was agreed between appellant, appellee, Ginn, and Wilhelm that, for the purpose of securing the payment of \$2,018, the balance of the purchase money due from Wilhelm to Ginn, appellant would execute to said Ginn its promissory note for \$2,018 of the purchase money due from it to Wilhelm for the real estate purchased from him; that in compliance with said agreement, appellant did execute its note payable to appellee Ginn, whereby it promised to pay him \$2,018 of the purchase money for the real estate conveyed by Wilhelm to appellant; that said note is due and unpaid; that appellant executed ⁴³⁶ its promissory note to said Wilhelm for \$722, being the amount of said purchase money in excess of said \$2,018; that said note was sold and indorsed by said Wilhelm to the Upland Glass Company, of which company said Brown was afterward appointed receiver; that said note is due and unpaid, etc.; that said appellant is wholly insolvent, and has no personal property from which said notes can be paid. The complaint and cross-complaint each contains a prayer for a judgment upon the note sued on, and that the same be adjudged to be a vendor's lien on said real estate sold and conveyed by Wilhelm to appellant. Appellant answered the complaint and cross-complaint by a general denial.

The cause was tried by the court, and a general finding made in favor of appellee Ginn on the complaint, and in favor of Brown, receiver, on the cross-complaint. Judgments were rendered on the finding, one in favor of appellee Ginn, and one in favor of Brown, receiver, and the same were adjudged to be vendor's liens on said real estate, which was ordered to be sold for the payment thereof.

On motion of appellant, the judgment was modified so that it provided that the real estate was not to be sold until the other property of appellant subject to execution was first exhausted. Thereupon appellant filed a motion for a new trial, which was overruled. The only error assigned calls in question the action of the court in overruling the motion for a new trial. The motion for a new trial assigned the following causes therefor: "1. The judgment of the court and the finding thereof are not sustained by sufficient evidence; 2. The finding and judgment of the ⁴³⁷ court are contrary to law and contrary to the evidence."

It is conceded by appellant that appellee Ginn and Brown, receiver, were each entitled to a personal judgment against appellant, and that the court did not err in rendering such judgments.

There is no doubt, under the allegation in the complaint and cross-complaint, that the two notes executed July 3, 1893, by appellant were each given for the unpaid purchase money for the real estate sold and conveyed by Wilhelm to appellant, and that said indebtedness was a vendor's lien on said real estate.

It is expressly alleged that each of said notes was executed by appellant for the unpaid purchase money due from appellant to Wilhelm for the real estate sold and conveyed by him to it. As the court made a general finding for appellees, the only question is, Was there any evidence which sustains this allegation in the complaint? We think there is evidence sustaining this as well as every other material allegation in the complaint and cross-complaint.

It appears from the evidence that appellee Ginn knew when he sold the real estate to Wilhelm that Wilhelm had a note for \$2,700 or more on appellant for a balance on real estate sold and conveyed by him to appellant, and that on July 3d, when Ginn and Wilhelm and the appellant, by its officers, were together, Ginn expressed his willingness to take appellant's paper, which Wilhelm had, if it was purchase money paper, and it was stated to him that it was purchase money paper. They then agreed to divide said note held by Wilhelm on appellant by giving a note to Ginn for \$2,018 of the purchase money appellant owed Wilhelm, and a note to Wilhelm for the remainder, \$722.

The note for \$2,018, executed to Ginn, was ⁴³⁸ for the land sold by Wilhelm to appellant. The note for \$722 sued upon in the cross-complaint was given for the same consideration. According to this evidence, there was no new debt created by appellant giving the note to appellee Ginn. The consideration for the two notes was the same as the note for \$2,700 held by Wilhelm, which was merely divided by giving the two notes mentioned. The \$2,700 unpaid purchase money was a vendor's lien on the real estate held by appellant under the deed from Wilhelm, where the same was evidenced by a note for that amount, and it continued to be such when evidenced by the two notes executed July 3d, one to Ginn and the other to Wilhelm. The right of appellees to enforce a vendor's lien under this evidence was the same as if Wilhelm had taken two notes, one for \$2,018 and the other for \$722, for the purchase money from appellant, instead of one, and had transferred the one for \$2,018 to appellee Ginn, and the other to Brown, receiver, as alleged. The assignment of notes given for the purchase money of land trans-

fers as an incident the vendor's lien: *Felton v. Smith*, 84 Ind. 485 (486); *Midland Ry. Co. v. Wilcox*, 122 Ind. 84 (91).

The controlling question in this case is, whether or not the debt owing is as to appellant a balance due for purchase money on the land sold and conveyed to appellant by Wilhelm: *Nichols v. Glover*, 41 Ind. 24; *Boyd v. Jackson*, 82 Ind. 525; *Dwenger v. Branigan*, 95 Ind. 221; *Barrett v. Lewis*, 106 Ind. 120; *Otis v. Gregory*, 111 Ind. 504. As we have shown, there was evidence which sustains the finding of the court that it was.

Appellant does not seem to insist upon the proposition that the land was not chargeable with a lien for purchase money on account of the \$722 note held by Brown, receiver, as assignee of Wilhelm.

⁴³⁹ It is proper to suggest that as the motion for a new trial was as to the whole case, if the finding of the court was proper in favor of Brown, receiver, upon the issues joined on the cross-complaint, then the motion was correctly overruled, even though the evidence was not sufficient to sustain the finding in favor of the appellee Ginn. In such case, the motion should be for a new trial of the issues joined on the cross-complaint: *Parsons v. Stockbridge*, 42 Ind. 121; *First Nat. Bank v. Williams*, 126 Ind. 423; 2 *Elliott's General Practice*, 1166, note 4, and cases cited; *Elliott's Appellate Procedure*, sec. 844, and notes.

There is no available error in the record.

Judgment affirmed.

NEGOTIABLE INSTRUMENT SECURED BY LIEN—EFFECT OF ASSIGNMENT.—If a promissory note given for the purchase money of land is secured by a lien on the land, a bona fide purchaser of the note before maturity is entitled to the benefit of the lien without regard to the equities between the original parties: *Duncan v. Louisville*, 13 Bush, 378; 26 Am. Rep. 201. A bona fide purchaser for value of a negotiable note secured by mortgage before maturity takes the mortgage, as he does the note, discharged of all equities between the original parties: *Webb v. Hoselton*, 4 Neb. 308; 19 Am. Rep. 638. To the same effect see *Nashville Trust Co. v. Smythe*, 94 Tenn. 513; 45 Am. St. Rep. 748, and note. See, also, the note to *New London Bank v. Lee*, 27 Am. Dec. 720.

McDONALD v. PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY.

[144 INDIANA, 459.]

DEATH OF HUMAN BEING, RECOVERY FOR.—As the right to recover for the death of a human being is purely statutory, one seeking to recover for such death must bring himself clearly within the terms of the statute, which will be strictly construed.

A BASTARD HAS, BY THE COMMON LAW, NO FATHER, and is considered a child of nobody. He cannot be the heir of any one; neither can he have heirs, but of his own body.

THE WORD "CHILD" OR "CHILDREN," when used in a statute, means legitimate child or children.

ILLEGITIMATE CHILD, FATHER CANNOT RECOVER FOR DEATH OF.—Under a statute providing that a father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a child, a father cannot recover for the injury or death of an illegitimate son, of whom such father has had the care and custody since his early infancy.

O. H. Montgomery and J. B. Brown, for the appellant.

S. Stansifer, for the appellee.

459 MONKS, J. Appellant brought this action against appellee under section 266 of the Revised Statutes of 1881 (Rev. Stats. 1894, sec. 267), to recover damages for the death of a minor, alleging in his complaint that said deceased was his son.

Appellee filed an answer, alleging, in substance, that the deceased was a bastard, begotten and born out of wedlock, and that appellant never married the mother of said deceased and never adopted him by the order of any court. A demurrer for want of facts to this answer was overruled.

To this answer appellant filed a reply, alleging, in substance, that the allegations of said answer are **460** true, but that the deceased was his illegitimate child, and that when but six months old appellant received him from his mother and relieved her of his care and custody, and acknowledged him as his son, and afterward discharged every duty as a parent toward him, and received from him all the services, obedience, and respect due from a legitimate son; that his mother abandoned him and is deceased; that such deceased son has no guardian or next of kin except only appellant.

To this reply appellee filed a demurrer for want of facts, which was sustained. Appellant refusing to plead further, judgment was rendered in favor of appellee.

The errors assigned call in question the action of the court in

overruling appellant's demurrer to the answer and in sustaining appellee's demurrer to the reply.

Section 266 of the Revised Statutes of 1881 (Rev. Stats. 1894, sec. 267), upon which this action is predicated, is as follows: "A father, or, in case of his death or desertion of his family or imprisonment, the mother, may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward."

As the right to recover damages for the death of a human being is purely statutory, the statute must be strictly construed, and, before appellant can recover, he must bring himself clearly within its terms. When the statute specifies who may bring such action, only those persons named can maintain it. If no such person exists, then no recovery can be had: *Thornbury v. American Strawboard Co.*, 141 Ind. 443; 50 Am. St. Rep. 334, and cases cited.

At common law, a bastard had no father, and was considered the son of nobody; he was sometimes called *filius nullius* and sometimes *filius populi*: 1 Blackstone's Commentaries, 458, 459; 2 Kent's Commentaries, 212; *Simmons v. Bull*, 21 Ala. 501; 56 Am. Dec. 257, and note 258; *Blacklaws v. Milne*, 82 Ill. 505; 25 Am. Rep. 339; *Marshall v. Wabash R. R. Co.* (Sup. Ct. Mo., Feb. 19, 1894), 25 S. W. Rep. 179.

It is said in Blackstone's Commentaries, 459: "A bastard cannot be heir to any one, neither can he have heirs, but of his own body; for, being *nullius filius*, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived."

It is a rule of construction that *prima facie* the word "child" or "children," when used either in a statute or will, means legitimate child or children; that is, that bastards are not within the meaning of the term "child" or "children": *Thornbury v. American Strawboard Co.*, 141 Ind. 443; 50 Am. St. Rep. 334; *Marshall v. Wabash R. R. Co.* (Sup. Ct. Mo., Feb. 19, 1894), 25 S. W. Rep. 179; *Dickinson v. Northeastern Ry. Co.*, 2 Hurl. & C. 735; *Harkins v. Philadelphia etc. R. R. Co.*, 15 Phila. 286; *Gibson v. Midland Ry. Co.*, 2 Ont. 658; *Marshall v. Wabash R. R. Co.*, 46 Fed. Rep. 269 (273); *Good v. Towns*, 56 Vt. 410; 48 Am. Rep. 799; *Blacklaws v. Milne*, 82 Ill. 505; 25 Am. Rep. 339; *Dorin v. Dorin*, L. R. 7 H. L. 568; *Hill v. Crook*, L. R. 6 H. L. 265; *Barnes v. Greenzebach*, 1 Edw. Ch. 41; *Wait's Actions and Defenses*, 49; 3 Am. & Eng. Ency. of Law, 229, notes on 230-233; 11 Am. & Eng.

Ency. of Law, 870; 1 Beven on Negligence, 250; Patterson's *Railway Accident Law*, sec. 409, p. 492; Tiffany on Death by Wrongful Act, sec. 85; 1 Shearman and Redfield on Negligence, sec. 13.

Dickinson v. Northwestern Ry. Co., 2 Hurl. & C. 735, was an action brought under the statute 9 & 10 Victoria, chapter 93, known as Lord Campbell's act, passed in 1846. That act provides "that every such action shall be for the benefit of the wife, husband, parent, and children of the person whose death shall have been caused." Pollock, ⁴⁶² C. B., said: "But beyond all doubt in the construction of the act of parliament the word 'child' means legitimate child only." This case is cited and approved in *Gibson v. Midland Ry. Co.*, 2 Ont. 658.

Marshall v. Wabash R. R. Co., 46 Fed. Rep. 269, was an action brought to recover damages for the death of another under section 4425 of the Revised Statutes of 1889 of Missouri. That part of the statute providing who should sue and recover when the deceased was a minor was as follows: "Third. If such deceased be a minor and unmarried, whether such deceased unmarried minor be a natural born or adopted child, . . . then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment, or, if either of them be dead, then by the survivor." The court held that the father of an illegitimate child did not come within the meaning of the act and could not maintain such action.

In *Harkins v. Philadelphia etc. R. R. Co.*, 15 Phila. 286, it was held, under the statute of Pennsylvania, which enacts "that the persons entitled to recover damages for any injury causing death shall be the husband, widow, children, or parents of the deceased and no other relative," did not give anyone the right to recover damages for the death of an illegitimate child, the court said "that the words 'husband, widow, children, parents of the deceased and no other relative' " had in view the family relation as constituted and recognized by the law, and that it was not intended to extend the benefits of the act to persons not falling within the legal definition of the enumerated relationships."

We think it clear, both upon principle and the authorities cited, that the father of an illegitimate child cannot recover damages for the death of such child under the provisions of section 266 of the Revised Statutes of 1881 (Rev. Stats. 1894, sec. 267).

The court did not err, therefore, in overruling appellant's ⁴⁶³ demurrer to the answer or in sustaining appellee's demurrer to the reply.

Judgment affirmed.

NEGLIGENCE CAUSING DEATH—RECOVERY FOR.—The right of action for wrongfully or negligently causing the death of a person is purely statutory: *Usher v. West Jersey R. R. Co.*, 126 Pa. St. 206; 12 Am. St. Rep. 863. At common law, a civil action does not lie for causing the death of a human being: *Jackson v. Pittsburgh etc. Ry. Co.*, 140 Ind. 241; 49 Am. St. Rep. 192; *Edgar v. Castello*, 14 S. C. 20; 37 Am. Rep. 714; *Connecticut etc. Ins. Co. v. New York etc. R. R. Co.*, 25 Conn. 265; 65 Am. Dec. 571, and note; *Hubgh v. New Orleans etc. R. R. Co.*, 6 La. Ann. 495; 54 Am. Dec. 565.

BASTARDY—INHERITANCE.—A bastard could not inherit even from its mother at common law, but this rule was changed by statute in Illinois in 1829, which rendered illegitimates competent to inherit from their mother: *Orthwein v. Thomas*, 127 Ill. 554; 11 Am. St. Rep. 159, and note. A bastard cannot inherit at common law: *Norman v. Helst*, 5 Watts & S. 171; 40 Am. Dec. 493, and note. See, especially, the extended notes to *In re Ingram*, 12 Am. St. Rep. 102, and *Simmons v. Bull*, 56 Am. Dec. 261.

COFFIN v. STATE.

[144 INDIANA, 578.]

DAMAGES.—FOR THE BREACH OF A CONTRACT TO SELL STATE BONDS, the measure of damages is the difference between the market value of the bonds and the price agreed to be paid therefor, and cannot include the loss to a purchaser of the profits to be realized from his resale, when the vendor did not know of the contemplated resale.

DAMAGES.—LOSS OF COLLATERAL ENGAGEMENTS, depending upon the fulfillment of the principal contract, are too remote to be considered in estimating the damages for a breach of the principal contract.

APPELLATE PROCEDURE.—THE FAILURE TO ASSESS NOMINAL DAMAGES is not an error affecting the substantial rights of the parties, and therefore does not require the reversal of the judgment on appeal.

C. Martindale, for the appellants.

W. A. Ketcham, attorney general, for the state.

579 McCABE, J. The appellants, as partners in the banking business under the firm name and style of Coffin & Stanton, sued the State of Indiana to recover damages for the breach of the following alleged contract, namely:

“Office of S. P. Sheerin & Co.,

“Brokers and Appraisers of Realty.

“Indianapolis, Ind., March 17, 1887.

“To the Governor, Treasurer, and Auditor of State, Indianapolis, Ind.

“Gentlemen: We will take your proposed state loan of \$330,000 to run five years, and to be redeemable at the pleasure of the

state in two years, for which we will take the bonds of the state at par bearing three and three-tenths (3 3-10) per centum interest, payable semi-annually; principal and interest payable in New York.

Respectfully submitted,

"COFFIN & STANTON,

"By S. P. Sheerin."

"Indianapolis, Ind., March 17, 1887.

"The above proposition, \$330,000, 3 3-10 per centum, is hereby accepted.

"ISAAC P. GRAY, Governor.

"J. A. LEMCKE, Treasurer of State.

"BRUCE CARR, Auditor of State."

The damages claimed as arising out of the alleged breach of the above contract and the breach thereof are alleged as follows: "That in pursuance of said contract and acting upon said contract, the plaintiffs immediately resold said bonds in the state of New York, at a figure which would net these plaintiffs the sum of \$3,564.00; that, thereafter, the said state officers did, on the twenty-first day of March, ⁵⁸⁰ 1887, notify the said plaintiffs that they would not perform the contract; that the state of Indiana has failed to perform its contract as aforesaid, and still fails and refuses to perform the same, though plaintiffs have stood ready and have offered to perform their part of said contract."

The superior court overruled a demurrer to the complaint, and the issues formed thereon were tried by the court, resulting in a general finding for the defendant, upon which judgment was rendered over the plaintiff's motion for a new trial. The action of the court in overruling the later motion is the only error assigned; and the only ground or reason assigned in the motion for a new trial is, that the decision is not sustained by and is contrary to the law and the evidence. It is not claimed that the evidence makes any better case than the complaint.

The natural presumption arising from the facts stated in the complaint, aside from the special circumstances of the alleged resale of the bonds by the plaintiffs before they got them at a profit of \$3,564, was that the bonds were worth the money which was to be paid for them, and the money was worth the bonds. Where the goods are contracted for, as was the case here, to be paid for on delivery, the measure of damages for nondelivery is the differ-

ence between the market value of the goods and the contract price at the time fixed for delivery: *Frink v. Tatman*, 36 Ind. 259; 10 Am. Rep. 19; *Beard v. Sloan*, 38 Ind. 128; *Vickery v. McCormick*, 117 Ind. 594. Therefore, if between the date of the contract and the time fixed for delivery or the breach of the contract there was no change in the market value of the bonds, the defendant could be held liable only for nominal damages: *Rosenbaum v. McThomas*, 34 Ind. 331.

There is no allegation in the complaint, and it is not ⁵⁸¹ claimed, that there is any showing in the evidence that there had been any increase in the market value of the bonds between the date of the contract, March 17th, and the date of its breach, the twenty-first day of the same month. Therefore, for aught that is shown outside of the alleged special resale of the bonds by them, the plaintiffs' money in their pocket is worth as much as the bonds, and therefore they are not damaged by the failure to get it exchanged for something of no more value than their money, which they still retain.

It remains to be determined whether the proof of the allegation that the plaintiffs, acting upon said contract, immediately resold said bonds in the state of New York at a net profit of \$3,564, affords any ground for recovery of that or any other sum as damages for the breach of the alleged contract. The natural presumption would arise from the written instrument itself, that plaintiffs were buying the bonds for the profit to be derived from the semi-annual interest at the rate of three and three-tenths per centum thereon. Under such circumstances, both parties to the contract would have full notice that the market value of the bonds would be the measure of damages.

There is no allegation in the complaint that the defendant or her agents had any notice or knowledge of the contemplated resale of the bonds by the plaintiffs. The rule in such cases is stated in 5 American and English Encyclopedia of Law, 13, 14, thus:

"The liability for a breach of contract is less extensive than that for a tort; involving only such consequences as were the direct result of the breach, and were within the contemplation of the parties at the time of the formation of the contract.

"(a) *Hadley v. Baxendale*, the leading English case on this subject, and one followed by the American ⁵⁸² courts, has been considered to lay down the following rules as to damages for the breach of contract: '1. That damages which may fairly and

reasonably be considered as naturally arising from a breach of contract, according to the usual course of things, are always recoverable.' Among such are losses caused by the loss of a season, the fall of the market, any increased expense caused the plaintiff by the breach, or substantial inconvenience from that cause. . . .

"Damages arising out of the usual course, but from peculiar circumstances, are too remote, unless the special circumstances were known to the defendant at the time of the breach."

Parties to the contract are not supposed to know more of one another's affairs than may be communicated to them, nor to consider existing or contemplated transactions with other persons unless these are made known to them. Hence, the losses on collateral engagements depending on the fulfillment of the principal contract are too remote to be considered in estimating the damages for the breach of the principal contract: *Lawrence v. Wardwell*, 6 Barb. 423; *Harper v. Miller*, 27 Ind. 277; 5 Am. & Eng. Ency. of Law, 15, and authorities cited in note. To the same effect is *Sedgwick on Damages*, 6th ed., 79, and authorities there cited. *Vickery v. McCormick*, 117 Ind. 594, in effect, holds the same thing. It follows from what we have said that the most the appellants were entitled to recover was mere nominal damages.

The failure to assess nominal damages is not an error that affects the substantial rights of appellants: *Patton v. Hamilton*, 12 Ind. 256; *Hacker v. Blake*, 17 Ind. 97; *Black v. Coan*, 48 Ind. 385; *Mahoney v. Robbins*, 49 Ind. 146; *Wimberg v. Schwegeman*, 97 Ind. 528.

⁵⁸³ The superior court, therefore, did not err in overruling appellants' motion for a new trial.

Judgment affirmed.

THE MEASURE OF DAMAGES FOR THE BREACH OF A CONTRACT TO SELL personal property, when the purchase price has not been paid, is the difference between the contract price and the market price at the time and place of the promised delivery: *Austrian v. Springer*, 94 Mich. 343; 34 Am. St. Rep. 350, and note; *Theiss v. Weiss*, 166 Pa. St. 9; 45 Am. St. Rep. 638; *McGrath v. Gegner*, 77 Md. 331; 39 Am. St. Rep. 415. See, also, the note to *Trigg v. Clay*, 29 Am. St. Rep. 729.

DAMAGES PURELY SPECULATIVE in character and dependent on so many contingencies that they cannot be traced with reasonable certainty to the breach of the contract are not allowable: *Hitchcock v. Supreme Tent etc.*, 100 Mich. 40; 43 Am. St. Rep. 423, and note. All damages resulting necessarily, immediately, and directly from the breach of a contract of sale are recoverable, but not those that are contingent and uncertain: *Trigg v. Clay*, 88 Va. 330; 29 Am. St. Rep. 723, and note.

DAMAGES—LOSS OF PROFITS.—It is only when the loss is indisputable and the amount can be estimated with almost absolute certainty that loss of profits forms the proper measure of damages: *Moulthrop v. Hyett*, 105 Ala. 493; 53 Am. St. Rep. 139, and note.

COMMISSIONERS v. HEASTON.

[144 INDIANA 583.]

BOARDS OF COUNTY COMMISSIONERS IN SOME RESPECTS ACT JUDICIALLY and in others ministerially. While rightfully acting in the former character, they are treated as courts, and their judgments and orders cannot be collaterally assailed, and the principles of former adjudication are applicable to them, but, when they act ministerially, their orders are not judicial, and are not binding on the county when not authorized by law.

COUNTIES, ALLOWANCE OF CLAIM AGAINST, WHEN NOT JUDICIAL.—The county commissioners in hearing and allowing claims against the county do not act in their judicial capacity. The effect of the statute requiring the filing and presenting of claims against counties is merely to deny claimants the right to sue until this has been done, or, in other words, to give the county an opportunity to discharge its legal obligations without the expense of a lawsuit. The fact that the statute grants to claimants a right of appeal to the circuit court does not prove that either acts as a court in allowing claims.

ESTOPPEL BY JUDGMENT—MUTUALITY.—One of the essential elements of an estoppel by judgment is, that both the litigants must be alike concluded by the judgment, or it binds neither.

COUNTIES, ALLOWANCE AND PAYMENT OF ILLEGAL DEMANDS, RIGHT TO RECOVER BACK.—The county commissioners cannot, by allowing and ordering paid a claim not legally chargeable against the county, bind it as by a judgment, nor does such allowance preclude the county from maintaining an action to recover the moneys so illegally allowed and paid.

A COUNTY MAY MAINTAIN AN ACTION TO RECOVER BACK MONEY PAID to a public officer, though his claim was allowed by the county commissioners, whenever, in equity and good conscience, he ought not to retain such moneys.

COUNTIES—EVIDENCE.—AN ALLOWANCE OF A CLAIM AGAINST A COUNTY by its board of county commissioners is *prima facie* evidence of its correctness. Therefore, in a suit by a county to recover moneys paid on an allowed claim, it must assume the burden of proving that it was not a legal charge against it.

MISTAKE OF LAW.—MONEYS PAID UPON CLAIMS MADE AGAINST A COUNTY and allowed by its commissioners, but which were not legally chargeable against it, cannot be regarded as voluntary payments made under a mistake of law, the recovery of which cannot be permitted. The payment of such claims cannot be considered as a payment by the county at all, but rather as a misappropriation of money due to the illegal act of its commissioners in allowing claims whose allowance was forbidden by law.

L. T. Milligan, O. W. Whitelock, S. E. Cook, B. K. Elliott, and W. F. Elliott, for the appellant.

Spencer & Branyan, Kenner & Lesh, and A. C. Harris, for the appellee.

⁵⁸⁴ JORDAN, J. This was an action against the appellee, by the appellant, the board of commissioners of Huntington county, to recover of the former the sum of seven thousand two hundred and twenty-one dollars and ninety cents, alleged to have been allowed him as auditor of said county by its commissioners in violation of the statutes. Upon a trial had, there was a judgment rendered, in effect, that the appellant take nothing by the action, and that appellee recover his cost, and to reverse this judgment appellant prosecutes this appeal. The complaint alleges substantially the following facts:

That the appellee, Heaston, was elected and served as auditor of Huntington county, from the first day of November, 1887, to November 1, 1891; that he was paid and received for said term as such officer all salary and compensation allowed by law; that during his term, notwithstanding the fact that he had been paid and received from the county all of his salary and compensation allowed him by law, he, under the color of said office, illegally taxed up fees, and, in violation of law, demanded, extorted, and received payment of the same, in his official capacity, from the county, the said fees not being allowable under the statutes of the state. Here follows an itemized list of fees so taxed and received by appellee from the county, amounting in the aggregate to seven thousand two hundred and twenty-one dollars and ninety cents, for which judgment is demanded. This schedule, filed as an exhibit, and made a part of the complaint, shows, among other things, certain sums of money received by the appellee from the county arising out of fees taxed and charged by him in highway cases, gravel road matters, and ditch proceedings before the board of commissioners, and for filing papers in his office, etc. A demurrer being overruled to the complaint, appellee then filed an answer in two paragraphs, the first of which was a denial. By the second paragraph, he admitted ⁵⁸⁵ that he had received the sums of money as charged in the complaint, but averred the facts that he presented the claims in an itemized and verified account, as due and owing to him by the county, to its board of commissioners while in legal session for the transaction of business, and that the said board allowed the same against the county, and by

an order of record directed that the money be paid out of the county treasury, and that it was so paid to him upon a warrant drawn upon the treasury thereof.

He further alleges therein that the claims were allowed and the money paid to him in good faith, and that the orders of the board allowing the same were not appealed from, and are in full force and effect, and that the sums of money so allowed and paid to him are the identical ones and upon the same accounts described in the complaint, and for which a recovery is sought, and that said orders, or judgments, so made and entered by the board of commissioners were a full, final, and complete adjudication of all the matters alleged in the complaint between the same identical parties herein, and that plaintiff is thereby estopped from recovering anything in this action.

A demurrer to this paragraph for insufficiency of facts was overruled and excepted to, and the plaintiff was ruled to reply.

The action of the court in overruling the demurrer to this paragraph of the answer is the first error assigned and presented by the appellant, and is virtually treated as the chief question for the consideration of this court.

The contentions of the learned attorneys for appellant are, in the main, that these allowances were made by the county commissioners in defiance of law; that the latter were guilty of a crime in so doing; that appellee received the county's money and converted ⁵⁸⁰ the same to his own use without authority of law, and that the county is not bound by this unauthorized or forbidden act, nor precluded from recovering the money back from the appellee, and among their citations they refer to section 2105 of the Revised Statutes of 1894 (Rev. Stats. 1881, sec. 2018), and sections 6543, 6544, 6548, and 6549 of the Revised Statutes of 1894, the latter being sections 2, 3, 7, and 8 of an act in force June 5, 1883 (Acts 1883, p. 48), also section 7853 of the Revised Statutes of 1894 (Rev. Stats. 1881, sec. 5766). They further insist that, conceding that the commissioners allowed the claims to appellee, as he alleges, however, in doing so they acted in their administrative or ministerial capacity, and not as a court, and that the principle of *res adjudicata* does not apply, and the county is not estopped to inquire into the illegality of these allowances. They further contend that, conceding that they acted in the matter as a court, the claims allowed were forbidden by law, and hence there was an absence of jurisdiction. While, upon the side of appellee, his learned counsel contend that, in allowing these

claims in the manner and form as shown by this paragraph of the answer, the board of commissioners of Huntington county acted as a court, and, in passing upon and allowing these claims in favor of appellee, it exercised its judicial powers, and that it had jurisdiction in the premises, and that its judgments rendered under the alleged facts are valid and a complete bar and estoppel against the county. They also insist that the board having the power to judicially act and decide in the matter, its judgments, right or wrong, are binding upon the county, and cannot be collaterally called in question.

The contentions and argument of appellee's counsel from their standpoint are to some extent supported by authorities cited, among which are decisions ⁵⁸⁷ of this court. The manifest theory of the cause of defense, as outlined by the facts alleged in this answer, is that of *res judicata*. It is a confession of appellant's cause of action, but seeks to avoid it upon the ground that the claims mentioned in the complaint have been adjudicated between the parties in the commissioner's court, and that appellant is thereby estopped from contradicting in this action the verity and binding force of the alleged judgment rendered.

The trial court, in overruling the demurrer to this answer, in effect, adjudged that the facts therein averred were sufficient to constitute this defense. Boards of commissioners, under the law, in the discharge of their duties have, at least, a dual character. In some respects they act judicially, and the law regards them as a court, and from their decision an appeal lies in this state under section 5772 of the Revised Statutes of 1881 (Rev. Stats. 1894, sec. 7859), by a party aggrieved, to a higher court. In other respects they act in an administrative capacity, as the representative of the county: See Elliott's General Practice, sec. 197, and cases there cited. When they rightfully exercise their powers as a court, it is settled by the authorities that they are to be treated as such, and their judgments rendered, or orders made, cannot be collaterally impeached, and the principles of former adjudication are applicable thereto. But if, upon the contrary, the commissioners of Huntington county did not, under the law, in allowing the claims of appellee, act as a court, but were simply in the discharge of administrative duties, and that the orders so made can be said to be but quasi judicial, then we think it must follow, as a legal consequence, that the appellee cannot, by virtue of his defense alleged, shield himself from liability as against appellant's right to recover the money which he, as it ⁵⁸⁸ is averred, has extorted

and received in defiance of law. The next inquiry is, In what character did the commissioners act, and what functions were they discharging when they allowed the claims or demands of appellee, in controversy?

By section 7815 of the Revised Statutes of 1894 (Rev. Stats. 1881, sec. 5731), the board of commissioners seems to be created in the first place for "transacting county business." However, it is well settled that these boards have such other powers and duties, judicial and otherwise, as may be lodged in them by the legislature. Section 7830 of the Revised Statutes of 1894 (Rev. Stats. 1881, sec. 5745), prescribes their duties, among which are: "2. To allow all accounts chargeable against such county. . . . 4. To perform all other duties that may be enjoined on them by any law of this state."

It is true, as we have said, that under this last provision in the discharge of duties enjoined upon them by statute, the commissioners, in many cases not necessary here to mention, act as a court, and their decisions are regarded as judgments, from which an appeal will lie under section 5772 of the Revised Statutes of 1881, which grants appeals generally to the circuit court.

It is likewise true that when administrative duties are enjoined upon these boards by law, from their action thereon no appeal can be taken unless especially authorized by statute: Board etc. v. Davis, 136 Ind. 503.

The statute relative to the collection or allowance of claims against a county has, in later years, undergone some changes, and such a construction has been placed upon this procedure by the courts of the state that indicate a holding to the effect that, at least as the law now stands, the commissioners, in hearing the claims of a creditor of the county, do not act in their ⁵⁸⁹judicial capacity. By an act of 1879 provisions were made for the filing and allowance of claims.

The first section of that act, which is section 7845 of the Revised Statutes of 1894 (Rev. Stats. 1881, sec. 5758), provides: "That any person or corporation having a 'legal claim' against any county shall file it with the auditor to be presented by him to the board."

Section 2 (Rev. Stats. 1894, sec. 7846, Rev. Stats. 1881, sec. 5759) requires the commissioners to examine into the merits of all claims so presented, and they may, in their discretion, allow the same in whole or in part.

Section 3 provides for an appeal to the circuit court, and sec-

tion 4 provided that no court should have original jurisdiction of any claim against a county, except in the manner provided in the act. By an act of 1885 (Acts 1885, p. 80), section 3 of the act of 1879 was amended and now exists as section 7856 of the Revised Statutes of 1894.

In the case of *Bass etc. Works v. Board etc.*, 115 Ind. 234, this legislation was reviewed, and it was there held, in effect, by this court, that under the law as it stood subsequent to the amendment of 1885, the presentation of the claim to the commissioners, in the first instance, was but a condition precedent to the claimant's right to institute a suit upon it in the circuit or superior court.

Mitchell, J., speaking for the court in that case, on page 239 of the opinion, said: "After a good deal of hesitation, we are constrained to the conclusion that the purpose of the act as it now stands was to require claims against counties to be first presented to the respective boards of commissioners before bringing suit. This is to the end that a county shall not be involved in litigation which might be avoided by affording it the opportunity to discharge ⁵⁹⁰ its legal obligations without the expense of a suit."

In the case of *Board etc. v. Stock*, 11 Ind. App. 167, the question as to the requirements of the law in regard to collecting claims against a county was considered by the appellate court of this state. It was there said by that court: "The presentation of the claim before the board is a condition precedent to the right to maintain a suit upon the claim. . . . The filing of the claim with the board is in the nature of a demand upon such board to pay such claim."

In *Board etc. v. Nichols*, 12 Ind. App. 315, 54 Am. St. Rep. 528, the matter was again considered by this latter court. In the case last cited, there was an attempt to plead a former adjudication of the claim before the board of commissioners. In considering this point, the court said: "The object of the present statutes in requiring a claim against a county to be first filed and presented to the board of commissioners for allowance before bringing suit thereon is to give it an opportunity to discharge its legal obligations without the expense of a lawsuit: *Bass etc. Works v. Board of Commrs.*, 115 Ind. 234. The board, in hearing such claim, acts merely in the capacity of an auditing committee. Its action is ministerial and not judicial. Any order made by it in allowing or refusing to allow the claim does not rise to the dignity of a judicial determination or judgment."

We cannot agree with appellee that, under the statutes as they existed when the allowance in question was made, presenting his claims to the commissioners was, in effect, the institution of a suit by appellee against the county for the recovery of the money demanded, and that the order made allowing the same is a judgment of a court, which, under the ⁵⁹¹ rule of former recovery, cannot be collaterally assailed. If it was a suit against the county for the recovery of money in the sense urged by counsel, then the claimant was the plaintiff and the county the defendant, and the commissioners were in the discharge of a double duty—acting as a court, and also as the representative of the defendant—or otherwise the county could not be said to be in court. Such a construction as contended for apparently leads to an absurdity. It would follow that the court and the party defendant were virtually the same. It is an axiom of the law that no man can be a judge in his own case.

We have seen that by section 7830 of the Revised Statutes of 1894, the board is the agency of the county for the transaction of its business. A portion of this business is the auditing and allowing of "legal claims."

We are of the opinion, and are constrained to hold, that when the board examined into and allowed the claims presented to them by appellee, it stood in the eye of the law as the representative of its county, and thereby acted in its administrative capacity, and not in the character of a court; that while its order so made might be termed quasi judicial, yet it did not attain to the rank of a judicial determination or judgment so as to bring it under the protection of the rule of *res judicata*. The fact that the statute pertaining to the auditing of claims grants an appeal to the circuit court at the option of the claimant lends no force to the contention that the board acts as a court in allowing the same.

The right of appeal from the action of boards in their administrative character is frequently conferred by statute. The appeal in such cases is not permitted because the action of the board is considered judicial, but it is granted as a method of getting the matter involved before a court that it may be determined ⁵⁹² judicially. It may be said, however, that in view of the fact that, at the time of the enactment of the statute in regard to filing claims, there existed a general right of appeal from all judicial decisions of the board under the section to which we have referred, but notwithstanding this fact the legislature did especially authorize an appeal from an order disallowing a claim in whole or

in part, that fact might perhaps be accepted at least as evidence tending to show a legislative recognition that the act of the board in the matter of allowing claims was not judicial, and that therefore an appeal would not lie therefrom under the section authorizing appeals in general. This latter statute applies to decisions of the board which are of a judicial character, and is not applicable to those made in matters pertaining to its administrative or ministerial duties, and we must presume that the legislature recognized that fact: *Bunnell v. Board etc.*, 124 Ind. 1. It is held by the following decisions that the allowance of a claim by a board of commissioners is not conclusive, but only prima facie evidence of its correctness, and in effect not *res adjudicata*: *Commissioners v. Keller*, 6 Kan. 510; *Supervisors v. Catlett*, 86 Va. 158; *Albernathy v. Phifer*, 84 N. C. 711.

As bearing upon the question see, also, *Hunt v. State*, 93 Ind. 311; *Wolfe v. State*, 90 Ind. 16; *Bunnell v. Board etc.*, 124 Ind. 1; *State v. Board etc.*, 136 Ind. 207. Again, if we consider the question from another standpoint, we must reach the conclusion that the county is not estopped or precluded from calling in question the order of the board allowing the claims, for the reason that there is an absence of mutuality. One of the essential elements of an estoppel by judgment is, that ⁵⁹³ both litigants must be alike concluded by the judgment, or it cannot be set up as conclusive upon either: *Freeman on Judgments*, sec. 159; *Hunt v. State*, 93 Ind. 322.

Under the act of 1885, had the claim of appellee been disallowed in whole or in part, he had the option to either appeal or institute an independent action against the county in the circuit court. In that event, the decision of the board disallowing his claim could not have been pleaded against him as *res judicata* in his action in that court. If the order did not bind the appellee, then it can be said that mutuality was wanting, and, under the rule just stated, it could not bind the county. In any view, we think it must be held that appellee cannot successfully interpose the defense set up in his answer to the alleged cause of action, and the court erred in overruling the demurrer thereto. Acting, then, as the representative or agency of the county in allowing the claim in controversy, did the board bind the former by their action in awarding the appellee the money thereon, as charged, without warrant of law, and in defiance thereof? In their administrative capacity the commissioners exercise their powers as public or special agents, and cannot exceed the author-

ity conferred upon them by law; the latter is the letter of their agency. Within legal limits, or scope of their authority, their action in auditing, determining, and allowing the amount due to a creditor of the county, in the absence of fraud, or perhaps mistake, binds the latter. But they cannot bind the county by allowing and ordering a claim to be paid not legally chargeable to it, or the allowance of which is prohibited by statute. They have not unlimited choice as to the objects to which the money of the public shall be applied: *Harney* ⁵⁹⁴ v. Indianapolis etc. R. R. Co., 32 Ind. 244. See, also, *Shirk v. Pulaski Co.*, 4 Dill. 209; *People v. Supervisor*, 14 Mich. 336; *Board etc. v. Ellis*, 59 N. Y. 620, and cases there cited; 4 Am. & Eng. Ency. of Law, 389.

In *Harney v. Indianapolis etc. R. R. Co.*, 32 Ind. 244, this court, by Worden, J., on page 246 of the opinion, said: "The counties are corporations created for the purpose of convenient local municipal government, and possess only such powers as are conferred upon them by law. They act by a board of commissioners, whose authority is defined by statute. One of the powers conferred is to collect taxes levied upon the people and property within the county. In the disposition of the money thus collected into its general treasury, the board has not unlimited discretionary choice as to the objects upon which it shall be expended. It can only be applied to certain specified objects, and the building of railroads is not one of these objects, or necessary to carry into effect any of the purposes for which such corporations were created."

A board of commissioners cannot illegally make an allowance under the guise of making the same for services voluntarily rendered or things voluntarily furnished: *Gemmill v. Arthur*, 125 Ind. 258. The case of *Board etc. v. Ellis*, 59 N. Y. 620, was an action by Richmond county, in the state of New York, to recover of the defendant money allowed to him by the board of supervisors, upon accounts not legally chargeable to that county, and it was there held that the action could be successfully maintained. The rule preventing the recovery of money voluntarily paid has no application under the facts in this case. As charged in the complaint, the claims were allowed and the money paid without any legal authority for so doing.

In view of the alleged facts, these claims were not ⁵⁹⁵ only allowed in violation of law, but they were presented by the appellee and the money of the county unlawfully received by him, and he is chargeable with knowledge of the illegal acts.

It was no payment by the county. The latter, as the principal, had no part in the payment. It could not, as a public corporation, be held to consent to the payment of, or expenditure of, the public money in defiance of law. Awarding to the appellee this money, under the alleged facts, was in a legal sense equivalent to an unlawful appropriation of the county's money to his own use by the aid of its board of commissioners. The allowance and payment of the money being unlawful, the commissioners did not act within the scope of their authority, and therefore did not bind the county: *Board etc. v. Ellis*, 59 N. Y. 620; *Lee v. Board etc.*, 124 Ind. 214. Independent of the right given by section 6549 of the Revised Statutes of 1894 to recover back the money upon the part of appellant, which statute the appellee mildly insists has no application to an action under the facts in this case, we are of the opinion, however, that a right of action exists in favor of appellant. If the appellee has received and has the money of the county under such circumstances that in equity and good conscience he ought not to retain the same, and which ex aequo et bono belongs to the county, an action for its recovery will lie in favor of the latter: *McFadden v. Wilson*, 96 Ind. 253, 257, and authorities there cited; *Lemans v. Wiley*, 92 Ind. 436. If, under the facts in the case at bar, we should place the construction on the law as contended for by appellee, then a way would be paved by which it would be rendered easy for any person, under the guise of a legal claimant against a county, through the aid of its commissioners, if the latter were inclined to close their eyes to legal prohibitions, to unlawfully ⁵⁹⁶ obtain and appropriate to his own use the public money, and, when called upon in a court of justice to account for the same, deny the right of the county's recovery upon the ground of *res judicata*. Such in reason is not the law. It is not essential in this appeal that we should examine the various claims alleged to have been unlawfully allowed to appellee in order to determine their validity.

Without deciding, we may here, however, suggest that we recognize certain items in the claims allowed that were not legally chargeable to the county, and, as the judgment must be reversed, we must presume that upon another trial the lower court, under the issue and the law, will properly adjudge whether a part or the whole of the claims in controversy were illegally allowed and paid to appellee, and award judgment accordingly.

As we have held that the order of the commissioners allowing the claims are, at least, *prima facie* evidence of their correctness,

and the appellant, by her action, having in effect assailed the same, the burden is cast upon her to overthrow them by showing that the claims in controversy were not legal charges against her, for the reason that there was no law which authorized them to be allowed in favor of appellee. The case of Snelson v. State, 16 Ind. 29, and other similar decisions of this court, which appellee insists are controlling of the point involved herein, in view of the present law relative to the allowing of claims against counties, as construed by the latter decisions, must be deemed to be modified as to the broad doctrine therein enunciated, and, under the facts and circumstances in this case, we cannot accept them as authority on the particular question involved.

For the error in overruling the demurrer to the second paragraph of the answer, the judgment is reversed, ⁵⁰⁷ with instructions to the lower court to sustain the demurrer to said paragraph and for further proceedings in accordance with this opinion.

ON PETITION FOR REHEARING.

JORDAN, J. We have carefully considered the reasons urged by the appellee for a rehearing in this appeal, but we are still of the opinion that a correct result was reached in the former hearing. It must be remembered that the complaint to which appellee's second paragraph of answer was addressed alleged that the latter, in addition to his salary as county auditor, did, under the color of his office, illegally tax and charge the fees in controversy, and, in violation of law, demanded and received the money from the county. These alleged facts the answer admitted, but sought to avoid the cause of action, upon the ground that the appellee had, from time to time, presented his claims to the board of commissioners of the county, and that the same had been duly allowed by said board and payment thereof awarded to him in pursuance of the order of the commissioners, from which no appeal had been taken. The theory of the answer was, that the board, in passing upon and allowing the claims, acted as a court, with full jurisdiction over the person of the parties and the subject matter involved, and that its order in making the allowance to the appellee out of the public funds, although wrongful and illegal, was an adjudication of the validity of the claims in question and precluded the appellant from maintaining its action. We denied the contention of appellee upon this proposition, and held that the paragraph was insufficient in bar of the action for the reasons given in the opinion. It is again strenuously insisted

598 by counsel for the appellee that the case of *Snelson v. State*, 16 Ind. 29, ought to control our decision herein. That case, in holding in effect that the board of commissioners, in allowing claims against a county, exercised the powers of a court, to say the least, under former statutes, asserted a questionable doctrine. In view of the more recent legislation to which we referred in the original opinion, it must be manifest that the rule laid down in the *Snelson* case in this particular, can no longer be sustained. There is also an insistence by appellee that the money sought to be recovered was paid to him under a mistake of law, and therefore was a voluntary payment by the county, and, under a well-settled rule, cannot be recovered. But, aside from the fact that a recovery is expressly authorized by statute, it may be said that the rule preventing the recovery of money voluntarily paid cannot be held, under the facts, to apply in the case at bar. If the allowance of the claims was made by the commissioners in defiance of a positive statute (as is section 6548 of the Revised Statutes of 1894; Elliott Supplement, sec. 1975), the payment thereunder could not, in a legal sense, be considered as a payment by the county to the appellee, but the money might be said to have been obtained by him by virtue of the illegal act of the commissioners in allowing claims forbidden by the statute.

Under such circumstances, the allowance and payment could not be viewed as the act of the county, but rather as the result of the illegal act of her officials: See *Ada Co. v. Gess* (Sup. Ct. Idaho, Dec. 31, 1895), 43 Pac. Rep. 71; *Guheen v. Curtis*, 2 Idaho, 1151; *State v. Moore*, 1 Ind. 548.

Petition overruled.

On the Effect of the Allowance or Rejection of Claims Against Counties and other Municipal Corporations.

It is usual in statutes respecting county, township, and other municipal government to provide that all claims against them shall be presented to, and allowed or rejected by, the trustees, supervisors, commissioners, town council, or some other body, and that no action shall be maintained upon such a claim unless it shall have been so presented. In some instances, a remedy by appeal is provided in behalf of the party whose claim has been rejected. The courts have not been able to agree respecting the nature of the authority thus vested in and exercised by these local boards, some of the courts characterizing it as executive, others as legislative, and others as judicial or quasi judicial. After the allowance of a claim, the municipality may, for some reason then existing or subsequently discovered, choose to

contest the allowance and to insist that it is not liable for the amount allowed or for some part thereof. Of course, if the board making the allowance acted in some matter over which it had no authority to act, so that its action may be regarded as without jurisdiction, the municipality can, under no view of the case, be bound thereby. If, however, there was jurisdiction to act upon the claim, the municipality and the claimant will be regarded as bound thereby, if, in the view of the court, the action was judicial or quasi judicial, and will, on the other hand, not be bound or estopped by such action if it be regarded as executive or legislative in its character.

The view prevailing in some of the states upon the subject here under consideration was thus expressed by the supreme court of Alabama, the authority to allow or reject claims being in that state vested in the commissioners' court of the county: "In the exercise of this authority the act of the court is not judicial, but executive. If it audits and allows a claim not properly and legally chargeable on the county, or which it has not authority to allow, it exceeds the power with which it is intrusted, and as the act of a corporation which is ultra vires, is void, so is the action of the court. Or, if upon false evidence it should be lured into the allowance of an unjust claim, or should allow a claim which was wanting in consideration, or the consideration of which failed, the county would not be estopped from defending against it. The audit and allowance has no more force and effect than a settlement between individuals. It is a simple admission by the court of county commissioners that there is a valid subsisting debt due and owing by the county. The admission prima facie fixes a liability on the county": *Commissioners' Court v. Moore*, 53 Ala. 25; *Jeffersonian etc. Co. v. Hilliard*, 105 Ala. 576; *Board of Commrs. v. Nichols*, 12 Ind. App. 315; 54 Am. St. Rep. 528; *De Kalb County v. Auburn etc. Works*, 14 Ind. App. 214; *Board of Commrs. v. Heaston*, 144 Ind. 583; ante, p. 192; *Webster County v. Taylor*, 19 Iowa, 117; *Clark v. Polk County*, 19 Iowa, 248; *Clark v. Des Moines*, 19 Iowa, 199; 87 Am. Dec. 423; *Shirk v. Pulaski County*, 4 Dill. 209. The general theory of the cases is, that the examining and auditing board is the mere agent or representative of the municipality; that it would be impossible to confer upon it strictly judicial functions as between the county and persons claiming to be its creditors, for the reason that an agent who is acting for the alleged debtor manifestly cannot be regarded as acting judicially in a proceeding to which his principal is a party; that the requirement of the presentation and allowance or rejection of claims is in order that the municipality may have an opportunity to examine such claims before being harassed by suits thereon, and finally, that such allowance, even as against the municipality, amounts only to an admission of indebtedness, which, like all other admissions, is receivable merely as evidence, and not as conclusively binding, and cannot estop the party making them from showing that they were improvidently or incorrectly made, and that the indebtedness did not exist: *Leaven-*

worth County v. Keller, 6 Kan. 511; Peoria County v. Roche, 65 Ill. 77; Reppy v. Jefferson County, 47 Mo. 66; Abernathy v. Phifer, 84 N. C. 711; Board of Supervisors v. Catlett, 86 Va. 158.

In discussing the character of the functions performed by boards of supervisors acting as an examining and auditing board, Chief Justice Waite in *Gurnee v. Brunswick County*, 1 Hughes, 270, 275, said: "The board are the representatives of the people, elected to supervise the business of the county which has been, by law, committed to their care. They constitute a branch of the executive department of the government, not of the judiciary. A part of their duties is to examine, settle, and allow accounts chargeable against the county, and, when settled, to issue warrants and levy taxes for their payment. They are the officers chargeable by the law with the duty of auditing claims. Demand of payment must be made on them; they alone represent the county for that purpose. When the account is presented to them, it is for allowance, not for adjudication. In settling and allowing they do not act judicially; they simply recognize the claim as valid against the county, and allow it, or they reject it. They render no judgment and issue no execution. Their duty is to direct payment of the accounts by the proper officer, and to provide him with the necessary means for that purpose by taxation. When they have made their allowance, the account has become liquidated, and may be sued without further demand. All these duties are purely administrative; and the proceeding by which their performance is enforced partakes in no respect whatever of the character of a suit."

Opposed to the decisions already cited are others, nearly, if not quite, equal in number and weight, affirming that in acting upon a claim presented against the municipality, the auditing board exercises judicial or quasi judicial functions. Thus, in the case of *Wall v. Trumbull*, 16 Mich. 228, which was an action against a supervisor for issuing a warrant to collect a certain alleged illegal tax by which the property of the plaintiff was sold, it was claimed that the liability of the defendant arose from acts performed by him in his official capacity, resulting in the allowance of certain claims for bounties. The court was of opinion that, conceding the defendant to have acted in the matter of the allowance of the claims, with which he was charged, yet in so doing he was not performing a mere ministerial duty, but was acting judicially, and hence could not be held liable, for it is "a rule of very great antiquity that no action will lie against a judicial officer for any act done by him in the exercise of his judicial functions, provided the act, though done mistakenly, were within the scope of his jurisdiction," and it was held that as the board of which defendant was a member had jurisdiction to pass upon claims against the county, his action was judicial and could not involve him in personal liability. Under a statute of Nebraska investing the board of county commissioners with authority to examine and settle all accounts of the receipts and expenditures of the county, and to allow all accounts chargeable against the county, and

providing that when so settled, county warrants might be issued therefor, and that any person aggrieved by any decision of the board might appeal from its decision to the district court of the county, it was held that their decision, whether in favor of or against the allowance of a claim within their jurisdiction, and where a right of appeal was given, was conclusive both upon the county and the claimant, unless such appeal were prosecuted and resulted in a reversal or modification of the action of the county commissioners: *Brown v. Otoe County*, 6 Neb. 111; *State v. Buffalo County*, 6 Neb. 454; *Dixon County v. Barnes*, 13 Neb. 294; *Ragoss v. Cumling County*, 36 Neb. 375; *State v. Churchill*, 37 Neb. 702; *Sioux County v. Jameson*, 43 Neb. 265; *Heald v. Polk County*, 46 Neb. 28; *State v. Vincent*, 46 Neb. 408. The courts of Mississippi are fully committed to the views announced in the Nebraska decisions herein cited: *Carroll v. Board of Police*, 28 Miss. 38; *County of Yalabusha v. Carby*, 3 Smedes & M. 529; *Board of Police v. Grant*, 9 Smedes & M. 77; 47 Am. Dec. 102. In New York, a like conclusion has been reached, though no right of appeal from the action of the supervisors was given. Thus, in an action by the jailer and keeper of the courthouse of a county to recover a sum claimed to be due to him for services rendered to the county, it was said: "This action is, in effect, though not in form, an appeal by the plaintiff from the decision of the board of supervisors acting in their judicial capacity, upon his claim against the county of Greene. His claim is conceded to have been against the county, and it was presented to the board for allowance, was examined and passed upon by that body, the amount to be actually and justly due declared, and its payment provided for in the mode prescribed by law. It is alleged that the decision of the board was clearly erroneous in respect to the amount actually and legally due the plaintiff, and it seems to be assumed that this error on the part of that tribunal affords a good foundation for the action in the supreme court upon the same claim. This is a radical mistake. The erroneous decision of that board, if it committed any error, furnishes no ground for an original action on the same claim, and certainly the law recognizes no such proceeding for the purpose of reviewing and correcting the errors in its decisions. On the contrary, as the law gives no appeal from the determination of a board of supervisors in auditing and allowing, or rejecting, claims properly submitted to be audited, it necessarily follows that their action in the matter is final and conclusive. The board of supervisors is the body to which the statute has committed the power 'to examine, settle, and allow all accounts chargeable to such county, and to direct the raising of such funds as may be necessary to defray the same.' It was held by this court in *Brady v. Supervisors of New York*, 10 N. Y. 260, that it had exclusive jurisdiction in such matters, and that no action could be maintained for the recovery of a county charge either against the county or the board of supervisors. The decision is entirely conclusive of this case. It is claimed by the appellant's counsel that the decision in that case is not controlling in this, because, in that case,

the plaintiff had never submitted his claim to the supervisors to be examined, settled, and allowed. But the fact that the demand in this case has been submitted to the appropriate tribunal and has there been examined, settled, and allowed so far as it was deemed to be accurate and just, makes the case still stronger, if possible, against the plaintiff. The court, however, in that case, went the entire length of holding that no action could be maintained in a court of law for the recovery of a claim of this character. This has always been understood to be the law of this state": *Martin v. Supervisors*, 29 N. Y. 646. The courts of this state have, to some extent at least, receded from the views at first expressed, and have declared that the action of boards of supervisors is not judicial in the sense that they admitted of no correction, though no right of appeal was expressly given by the statute. A board having allowed a claim subsequently became of the opinion that such allowance was erroneous, and entered an order rescinding and annulling its action. It was argued that the board had no right to do this, because in auditing and allowing a claim the supervisors act in a judicial capacity, "and their powers are restricted like inferior judicial tribunals, who, having once given judgment, may not review or reverse their own action, even if erroneous, or grant new trials, unless especially empowered to do so by statute." The court said that, in a largely qualified sense, "it may be true that in such matters the action of the supervisors is quasi judicial, but I think not in any such sense as renders an erroneous or improper allowance incapable of correction by the body committing the error. Boards of supervisors are not judicial tribunals any more than is the legislature of the state to be regarded in any of its actions a court of justice, although it may audit, allow, or reject claims against the state, and in any case repeal or reconsider its action, when found to have been erroneous. The board of supervisors are mere local legislative bodies, in many respects of limited power; but, where they have jurisdiction, they may act for their county precisely as the legislature may act for the state. If they act without jurisdiction, their acts are void, the same as is the action of the legislature when a violation of any provision of the constitution. If, having jurisdiction, by fraud or falsehood, or any misconception of fact, a wrong thing is done, there is no reason in law or morals or in public policy why they may not, on discovering their error, at once correct it. There is no substantial reason for hampering such a body in its power to correct its own errors and to do right, by applying to it the technical rules which pertain to justices' courts and other inferior judicial tribunals, supposed to proceed according to the course of the common law, and whose mere errors can only be corrected by a direct proceeding in review": *People v. Board of Supervisors*, 65 N. Y. 222. The courts of California are undoubtedly pledged to the doctrine that the action of boards of supervisors and like boards is judicial in its character, at least in so far that the allowance of the claim establishes the liability of the municipality, so that neither it nor any of its officers may resist the enforcement of

the claim, provided it be one of a class for which the municipality is liable, and the auditing board, in allowing it, may be regarded as acting within its jurisdiction: *Colusa County v. De Jarnett*, 55 Cal. 373. Thus, in response to an application for a writ of mandate to compel the county auditor to issue warrants upon the county treasurer for sums specified, claimed to be due for services of the complainant as constable in arresting criminals, the auditor resisted the application for the writ on the ground that the services allowed for had not been performed. At the hearing of the application, a motion was made for a judgment that a final writ of mandate issue upon the pleadings, on the ground that the matters set forth in the return constituted no ground of defense, and that the board of supervisors having passed upon the facts as to the services rendered and the amount due, their judgment was final in regard to such facts and not subject to review in the pending proceeding. This motion was granted, and the action of the court in granting it was affirmed on appeal, the supreme court in its opinion saying: "The claim of the respondent for fees, in payment of services as a constable, was one which the board of supervisors had jurisdiction to hear and determine. There is no suggestion of a failure to present a duly itemized account, verified as by law required, or, in fact, of any irregularity, except that the services were not rendered. This amounts merely to a charge that the board decided the case wrong. The jurisdiction to hear and determine a case involves, from a jurisdictional standpoint, the abstract right to determine it wrong as well as right. In other words, the jurisdiction to determine being given, it is not divested by an error of judgment in reaching a result. When the board of supervisors heard and determined the facts involved in the claim, and made their order for allowance thereof, it became res adjudicata, and, in the absence of fraud, conclusive": *McFarland v. McCowen*, 98 Cal. 331. A similar rule was subsequently applied in like circumstances when a city clerk refused to draw a warrant on the city treasurer in favor of a claimant for the amount of his demand presented to and allowed by the city trustees: *McConoughey v. Jackson*, 101 Cal. 265; 40 Am. St. Rep. 53.

Allowance for Matters which Cannot Constitute a Valid Claim.—Even in those states in which boards of supervisors or other auditing board are deemed to exercise a judicial or quasi judicial power and to make decisions which, unless set aside, shall be binding both upon the county and upon the claimant, they are not intrusted with authority to determine questions of law. In other words, if the claim presented be one which, assuming the facts alleged to be true in the claim, may constitute a proper demand against the municipality, the board has power, in effect, to determine whether or not the facts in support of such claim exist, and, if they do, to determine the amount which ought to be paid to the claimant, but, on the other hand, if the claim presented does not in law constitute a charge against the county, no action on the part of its board of supervisors can render the county liable thereon. Notwithstanding its allowance

by the auditing board, it still constitutes no claim against the municipality, and imposes upon none of its officers any duty nor vests them with any authority to make payment thereof. Indeed, any payment upon their part may be regarded as entirely unauthorized by law and may render them liable as for a misappropriation or unauthorized use of the public money: *Linden v. Case*, 46 Cal. 171; *People v. El Dorado County*, 11 Cal. 170; *Branch etc. Co. v. Yuba County*, 13 Cal. 190; *Trinity County v. McCammon*, 25 Cal. 117; *State v. Washoe County*, 14 Nev. 66; *People v. Lawrence*, 6 Hill, 244; *Che-mung Bank v. Supervisors*, 5 Denio, 517; *Board of Supervisors v. Ellis*, 59 N. Y. 620, and the principal case.

If the allowance of a claim has the effect of a judgment, relief therefrom, as in other cases of judgments, may be had upon the allegation and proof of fraud: *Phelps County v. Bishop*, 68 Mo. 250. Such relief must, however, be had by some appropriate judicial action, and not by undertaking to disregard or collaterally attack the allowance made by the auditing board.

Reconsidering an Allowance.—We have already seen that, in the state of New York, relief may be had from the allowance of a claim through an order of the auditing board annulling its action thereon. The courts of that state were, perhaps, driven to this decision by the consideration that otherwise under their previous rulings no relief could be had from the hasty, inconsiderate, or unadvised action of such boards. In other states, however, whether the action of the board be regarded as judicial or administrative, the courts are inclined to treat it as exhausting the power or authority of the board to take any further action, and therefore deny that such action as they have taken can be annulled or revoked by them at some subsequent session: *Commissioners' Court v. Moore*, 53 Ala. 25; *Yalabu-sha County v. Carbry*, 3 Smedes & M. 529; *Carroll v. Board of Police*, 28 Miss. 38; *Arthur v. Adam*, 49 Miss. 404.

Action Upon Disallowed Claims.—There is less inclination on the part of the courts to apply the doctrine of *res adjudicata* to the allowance of a claim as against the claimant than there is against the municipality, and the general rule is, that so far as the claimant is concerned, the presentation of his claim is merely one of several steps required of him before he can enforce it against the municipality, and if the municipality, through its auditing board, disallows the claim, such disallowance entitles him to maintain an action thereon in the courts: *Chapman v. State*, 104 Cal. 690; 43 Am. St. Rep. 158; *Reppy v. Jefferson County*, 47 Mo. 66; *Abernathy v. Phifer*, 84 N. C. 711. This rule, as will appear from the decisions already cited, appears not to prevail in Mississippi, Nebraska, and New York. Whether the allowance of the claim be regarded as a judgment or not, conclusively establishing the liability of the municipality, it is at least *prima facie* evidence against it and in favor of the claimant, and, in an action against the municipality, he may doubtless, in the absence of countervailing evidence, rely upon such allowance as sufficient evidence of his demand: *Commissioners' Court v. Moore*, 53 Ala. 25.

GILLILAND v. JONES.

[144 INDIANA, 662.]

FRAUDULENT TRANSFERS—SUBSEQUENT PURCHASERS.—A voluntary conveyance, made with intent to hinder, delay, and defraud creditors, is void as against subsequent, as well as prior, creditors, though the grantee did not know of, nor participate in, the fraudulent intent of the grantor.

FRAUDULENT TRANSFERS.—IN CASES OF VOLUNTARY CONVEYANCES, it matters not whether or not the donee had notice of the fraudulent intent of the grantor.

APPELLATE PROCEDURE—HARMLESS ERROR.—An erroneous order sustaining a demurrer to a complaint does not constitute a sufficient cause for reversing a judgment, when, upon the adding of a paragraph to the complaint, a trial thereon is had and a finding made from which it is clear that the plaintiff had no right of recovery, and therefore could have sustained no injury from the order sustaining the demurrer to the original complaint.

H. J. Milligan, for the appellants.

Knefler & Berryhill, for the appellee.

662 HACKNEY, C. J. This was a suit by the appellee to set aside as fraudulent a conveyance of real estate made to the appellants, it was alleged, as volunteers. The lower court, in special term, sustained a demurrer to the original complaint, consisting of a single paragraph; thereupon the appellee filed an additional **663** paragraph of complaint, upon which issue was joined and a trial had, resulting in a special finding, with conclusions of law and a decree in favor of the appellants. From that decree there was an appeal to the general term of said court, where the decree was reversed for error in sustaining said demurrer. From that reversal the appellants have appealed to this court. The question for decision by this court is, therefore, as to the sufficiency of said complaint.

The appellee's claim arose subsequent to the conveyance in question, and the complaint contained no allegation that the grantees knew of or participated in the alleged fraudulent intent of the grantor. Counsel for appellants concede the ordinary rule that a voluntary grantee cannot hold against existing creditors, although he possessed no knowledge of the grantor's fraudulent intent to cheat, hinder, or delay such creditors, but it is insisted that this rule does not apply to subsequent creditors. To this insistence are cited the cases of *Bishop v. Redmond*, 83 Ind. 157; *Stumph v. Bruner*, 89 Ind. 556; *Plunkett v. Plunkett*, 114 Ind. 484; *Bright v. Bright*, 132 Ind. 56. We have carefully examined these cases, and do not find that they lend any support to

the proposition here presented. There are expressions in the cases to the effect that the mere want of consideration is not enough, and that there must be some badge of positive fraud. These expressions, however, were not employed with reference to the participancy of the grantee. Nor do we find any decision of this court or any other holding that the voluntary grantee must participate in the fraudulent intention and purpose of the grantor. With reference to existing creditors, the rule is settled in this state that the voluntary grantee takes no valid title as against them, regardless of the question of his knowledge or fraudulent intent: *Milburn v. Phillips*, ⁶⁶⁴ 136 Ind. 680; *Roberts v. Farmers etc. Bank*, 136 Ind. 154; *York v. Rockwood*, 132 Ind. 358; *McAninch v. Dennis*, 123 Ind. 21; *Bishop v. State*, 83 Ind. 67; *McCole v. Loehr*, 79 Ind. 430; *Spaulding v. Blythe*, 73 Ind. 93.

In *May on Fraudulent Conveyances*, section 45, it is said: "In cases of voluntary conveyances, it matters not whether or not the donee had knowledge or notice of the fraudulent intent, for they are not within the exception in favor of bona fide purchasers by persons 'not having, at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud, or collusion.' Where the conveyance is voluntary, it is the motive of the giver, not the knowledge of the acceptor, that is to weigh; for volunteers cannot be said to be injured by the gift to them being defeated; . . . they are only deprived of a gain to which others had a better right." In *Bump on Fraudulent Conveyances*, third edition, pages 267, 268, it is said: "If there is an actual intent to hinder, delay, or defraud creditors, on the part of the grantor, then the law relating to fraudulent conveyances, as distinguished from mere voluntary conveyances, is applicable. It follows from the definition of a voluntary conveyance that the question in regard to its validity or invalidity depends upon the intent of the party making it, and not on the motive with which it is received. . . . It is the innocent purchaser and not the innocent donee that is protected. The only question is *quo animo* the gift or grant is made. It is the motive of the giver and not the knowledge of the acceptor that is to determine the validity of the transfer. . . . A donee, who sets up a voluntary conveyance when it would, if established, defeat creditors, participates in and carries out the intent of the donor." Again, ⁶⁶⁵ on page 272, this author says: "The law stamps a man's generosity with the name of fraud when it prevents him from acting fairly toward his creditors, and presumes fraud if he disables himself

from paying his debts. In such cases, the presumption of fraud arises and may exist without the imputation of moral turpitude. The principle is, that persons must be just before they can be generous, and that debts must be paid before gifts can be made."

Speaking of the English statutes on the subject, and these statutes have frequently been held to have but declared the rules of the common law, the author just quoted says: "The statute embraces not merely conveyances made with intent to delay, hinder, or defraud creditors, but conveyances, made to . . . defraud others. The word 'others' is inserted to take in all manner of persons, as well creditors after as before the conveyance, whose debts should be defrauded. . . . It is accordingly well settled that if a party makes a conveyance of his property with the express intent to become indebted to another, and to defraud him of his debt by means of this artifice, such subsequent creditor may contest and by proof defeat the transfer, although he was not a creditor of the grantor at the time of the conveyance": Bump on Fraudulent Conveyances, 315. The rules, and the reason therefor, thus stated leave no room to distinguish between prior and subsequent creditors as to any requirement that the grantee shall be shown to have acted with knowledge of and participancy in the fraudulent intent of the grantor. Nor do we believe that any such distinction can be sustained upon authority.

The additional paragraph of complaint differed from the original paragraph only in alleging the knowledge of the grantees of the fraudulent intent of the grantor. A fact specially found was that the ⁶⁶⁸ grantor did not make the conveyance with fraudulent intent. From this fact it is urged that the ruling upon demurrer to the original paragraph of complaint was harmless. By section 401 of the Revised Statutes of 1894 it is provided that: "The court must, in every stage of the action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." In the presence of the fact so specially found, it cannot be doubted that the appellee would have failed upon his original paragraph of complaint. That fact would have defeated his cause of action in whatever form it could have been pleaded, and it was a fact upon which the two paragraphs did not differ. The appellee, as to that fact, was not deprived of any evidence nor misled in any respect by the ruling upon demurrer. If there had been a general finding, we could not know that the appellee's failure was not due to

the want of evidence of the participancy of the appellants, grantees, in the alleged fraudulent intent of the grantor. The theory of the court in sustaining the demurrer was, that such evidence was necessary, and we would probably be required to presume that the theory thus indicated was followed to the close. But since the appellee did not stand upon the ruling upon demurrer, and availed himself of the privilege of filing an additional paragraph, upon which he failed by reason of a finding which would have been fatal to his cause if the ruling upon demurrer had not been against him, he was certainly not harmed by that ruling. He had, upon the additional paragraph, every opportunity to show a fraudulent intent on the part of said grantor that he could have had upon the original paragraph, or that he could now have if a new trial ¹⁸⁶⁷ were permitted for the error in sustaining said demurrer.

Counsel for appellee do not advise us in what respect "the substantial rights of" their client are affected by the ruling of which they complain, and we have been unable to discover wherein an injury was done to such rights. It is true that, as the record stood when the ruling was made, the error was prejudicial, but, like many errors which may be waived or be cured, it is found that by the subsequent proceedings the appellee had no cause of action. That conclusion was reached upon a pleading filed by the appellee, and after he had received every advantage from the evidence that was open to him under the pleading which had gone down under the demurrer. Having filed an additional paragraph of complaint, the appellee occupied no different position than if he had filed both paragraphs at one time and one paragraph had failed upon demurrer.

The appellee's contention is, that this court may not go to the special findings to learn that he was not harmed by the ruling. This contention is not supported by the decisions which hold that where the finding is general the court will not go to the evidence to ascertain whether the party was harmed by an erroneous ruling upon pleadings. One reason for the rule in those cases is, that this court does not weigh the evidence; upon this question the trial court has weighed the evidence and has distinctly found that the appellee had no cause of action under the pleading in question. Nor do we think the argument sound that the special finding is in the record only for the purpose of testing the accuracy of the conclusions of law. It is true that one against whom conclusions of law are stated upon a special finding of facts may,

upon a motion for a new trial, attack the correctness ⁶⁶⁸ of the facts found, but, where that is not done, the facts are certainly to be accepted as established for all purposes.

Counsel state their proposition as follows: "But it matters not what is set forth in the special finding of facts, under our practice where a demurrer has been sustained to a good pleading and there is no other paragraph on file at the time, under which the same facts were admissible in evidence, the supreme court cannot, by looking at the evidence or finding of the court pronounce the error harmless: See *Moyer v. Brand*, 102 Ind. 301; *New v. Walker*, 108 Ind. 365; 58 Am. Rep. 40." In the first of these cases it is said: "The case is before us without the evidence upon the special finding of facts. We cannot look to this special finding of facts to pronounce the error harmless, on the ground that the case has been disposed of upon its merits. If the answer had been allowed to stand, the evidence might have been different, and hence the special finding might have been different." Here it can be said, as we have already said, that the evidence could not have been different nor could the special finding have been different if the paragraph of complaint in question had remained in the issues. We cannot, therefore, regard that case as an authority here. In *New v. Walker*, 108 Ind. 365, 58 Am. Rep. 40, it is said: "It is contended by the appellee's counsel that there is a special finding showing that the appellant was not a purchaser in good faith, no harm was done her in sustaining a demurrer to the reply. We cannot concur in this view. The decision in *Sohn v. Combern*, 106 Ind. 302, does not sustain the counsel's position. In that case, there was no demurrer, but the attack was by the assignment of errors, and, besides, all that was said in that case which is in any degree relevant to the present subject ⁶⁶⁹ was addressed to the provisions of section 345 of the code respecting the overruling—not the sustaining—of demurrers. It cannot be legally possible that if a party's reply presenting facts which completely avoid and nullify the answer of his adversary is held to be insufficient, the special finding can cure the error. *If his pleading is overthrown, he is not entitled to give evidence in support of the theory which it asserts, and he is, therefore, necessarily and materially injured by the ruling striking it down.*"

The holding in that case was probably correct with reference to the pleading there in question, and we recognize it as correct in any case where the party cannot or may not give evidence, under other pleadings, of the theory advanced by the pleading to which

a demurrer has been sustained. The reason for the holding in the case first cited is stated in the words above italicized, and, wherever that reason may obtain, we readily concur in the holding of that case. In the case before us, the complaining party had another pleading under which evidence was indispensable upon an essential theory of the paragraph which went down. That evidence and that theory were of the essence of the cause of action, and, having failed upon it, he could not have suffered by the adverse ruling. In *Conley v. Grove*, 124 Ind. 208, the complaint was bad, yet the case was tried upon it, and a correct finding and judgment upon the facts as agreed upon. There could be no other finding or judgment except that rendered. No good can be accomplished by reversal of the case, as the same finding and judgment would have to be rendered if the cause were reversed and the complaint amended. The correctness of the facts found in the present case not being questioned, we can say, as was said in the case from which we have just ⁶⁷⁰ quoted, that the judgment upon another trial must be the same. A different result could only come from the possibility of the appellee being able to add to his evidence of fraud on the part of the grantor. In that contingency, the harm to the appellee would arise, not from the demurrer, but from the denial of another opportunity to contest the good faith of his adversary.

So in *McComas v. Haas*, 93 Ind. 276, this court looked to the special verdict to ascertain if a ruling upon demurrer to an answer was harmless. So, in *Evansville etc. Co. v. Maddux*, 134 Ind. 571, this court looked to the special verdict to ascertain if a ruling upon demurrer to a paragraph of complaint was harmless.

In *Olds v. Moderwell*, 87 Ind. 582, this court looked to the answer of the jury to special interrogatories to determine that the sufficiency of an answer was an immaterial question and as disclosing that upon a vital issue the case was properly decided. So, with reference to a special finding: *Walling v. Burgess*, 122 Ind. 299. We take it that where the record affirmatively discloses the presence of an issue irrevocably decided against one who complains of an erroneous ruling, he is not harmed by that ruling if, upon that issue, he must have failed without that error. This conclusion implies, of course, that the complaining party could not have been prejudiced from the want of an opportunity to be heard upon that issue.

The general term of the superior court should have held the

error, in sustaining the demurrer, to have been harmless, and should have affirmed the judgment of the special term.

The judgment of the general term is reversed.

FRAUDULENT CONVEYANCES—RIGHTS OF SUBSEQUENT CREDITORS.—A voluntary conveyance is not as against subsequent creditors fraudulent nor void, though the grantor was indebted at the time it was executed: *Rudy v. Austin*, 56 Ark. 73; 35 Am. St. Rep. 85, and note; *Jackson v. Plyler*, 38 S. C. 496; 37 Am. St. Rep. 782, and note. This question is fully discussed in the extended notes to *Hagerman v. Buchanan*, 14 Am. St. Rep. 750, and *Jenkins v. Clement*, 144 Am. Dec. 706.

FRAUDULENT VOLUNTARY CONVEYANCES—KNOWLEDGE OF DONEE.—With respect to the grantee of a voluntary conveyance, as he had paid no consideration, he had no equities equal to those of pre-existing creditors of the grantor. His intent is therefore immaterial and the conveyance to him must stand or fall according to the presumed intent of the grantor. The grantee cannot support the conveyance by showing his entire innocence or want of knowledge of the intent or circumstances of the grantor: *Extended note to State v. Mason*, 34 Am. St. Rep. 402.

CASES
IN THE
APPELLATE COURT
OF
INDIANA.

TERRY v. PROVIDENT FUND SOCIETY.

[13 INDIANA APPEALS, 1.]

INSURANCE—ACT OF UNAUTHORIZED AGENT—RATIFICATION.—If an unauthorized person solicits an application for insurance, and the insurer recognizes the regularity of the application and the legitimacy of the channel through which it comes, it thereby places such person upon the same foundation and invests him with the same authority as its commissioned agents.

INSURANCE—ACT OF UNAUTHORIZED AGENT—RATIFICATION.—The failure on the part of an insurance company to deny the execution of a policy, and its acceptance of an application therefor, amount to a ratification of the acts of an unauthorized agent, in soliciting the insurance, receiving the application, and conditionally delivering the policy.

INSURANCE—ACT OF UNAUTHORIZED AGENT—RATIFICATION—ESTOPPEL.—If an unauthorized person solicits an application for insurance, and the insurance company recognizes the regularity of the application, it thereby recognizes such person as its agent, the payment of the first advance premium to him is payment to the company, and estops it from denying such payment to the home office.

T. J. and W. F. Brooks, for the appellant.

J. D. Alexander, for the appellee.

2 REINHARD, C. J. This is a suit on an accident insurance policy. The cause was tried by the court. Special findings were made by the court, with its conclusions of law thereon. The appellant excepted to the conclusions of law, and unsuccessfully moved for judgment on the findings. The court rendered judgment for appellee. The appellant's assignments of error are: "1. The court erred in its conclusions of law on the special finding

of facts; 2. The court erred in overruling appellant's motion for judgment on the special finding of facts." These alleged errors may be considered together.

The policy contains the following provision: "This insurance shall not take effect until the first advance quarterly premium call shall be paid at the home office in New York, for which a receipt shall be given over the name of the president showing the date and hour of payment." Also the following: "No waiver shall be claimed by reason of the acts of any person, unless such acts shall be specially authorized in writing over the signature of the president of the society."

It is not claimed that the first quarterly premium (which amounted to five dollars) was paid at the home office in New York. The appellee's contention is, that the sum was never paid to the company or any authorized agent of the same. The appellant contends that he paid one-half the premium to the agent who procured the insurance to be written, and that as to the other half, which was said agent's commission, the agent gave the appellant credit for the same.

The facts found specially show that about December 10, 1893, one R. H. Carpenter, who lived near Huron, in Lawrence county, solicited the appellant to take a policy of accident insurance in the appellee company. Carpenter, who had previously solicited appellant in ³ that behalf, had in his possession one of said company's blank applications, which he filled out and got appellant to sign. He forwarded the application to one E. F. Sutherland, at Mitchell, Indiana, and he to Dorman N. Davidson, the appellee's general agent for the state of Indiana, at Indianapolis, who, in turn, forwarded the same to the appellee's home office in New York City, where it was duly received and marked "accepted," and a policy issued thereon, on the eighteenth day of December, 1893. At the same time a receipt for the first premium call of five dollars was signed by the president of the company, which, together with the policy, was transmitted by mail to said Davidson, with instructions to deliver the policy and receipt to the applicant on the receipt of the five dollars. Sutherland was not a commissioned agent of the company, but had some of its blank applications, and used them for persons desiring insurance in appellee company. When filled out and signed he sent such applications to Davidson, who forwarded them to the home office. Carpenter was unknown to the company or the state agent. When it was ascertained that Carpenter had taken

the application, the words "R. H. Carpenter" were written on the margin thereof, but only as a memorandum to designate the person who had taken the application. At the time Sutherland sent the application to Davidson, he requested the latter to send him (Sutherland) the policy and hold the receipt for the money until he (Sutherland) had sent the same to Davidson. In accordance with this request, Davidson sent the policy to Sutherland, who handed or sent the same to Carpenter. About January 1, 1894, Carpenter delivered the policy to the appellant, who paid Carpenter two dollars and fifty cents in cash, and the latter gave appellant credit for two dollars and fifty cents additional, saying that it was his commission for securing the policy, which was true. Carpenter, ⁴ at the same time, also delivered to the appellant a blank of said company for making proof of loss in case of accident. On the eighth day of January, 1894, appellant was injured, and, in consequence thereof, was disabled for a period of sixteen weeks, for which, if properly insured, he would have been entitled to receive indemnity from the company at the rate of ten dollars per week. Carpenter resided six miles from Huron, where the appellant lived, and the latter had known Carpenter for fifteen years. Appellant, when he made the application, was able to read, and on the night of the day upon which he received the policy he read all its conditions and provisions, including the ones hereinbefore alluded to and the further one that "the provisions and conditions aforesaid, and a strict compliance therewith during the continuance of this contract, are conditions precedent to the issuance of this certificate and to its validity and enforcement, and no waiver shall be claimed," etc., as heretofore stated. The court further finds that "the said plaintiff trusted entirely to Carpenter"; that Davidson held said receipt at Indianapolis, waiting for the money to pay the said first premium, until about December 31, 1893, and, not having received the same, returned the receipt to the home office with advice that the said premium had not been paid, when, on January 3, 1894, the policy was canceled by the company, and the word "canceled" stamped on said application. The company or its agents never notified appellant of the cancellation of the policy until after notice of said injury. On January 16, 1894, the state agent, Davidson, was informed by Sutherland that Carpenter had paid him two dollars and fifty cents on and for the appellant's advance premium, and asked instructions as to what should be done with the money, and was informed by Davidson that the policy had been

forfeited for nonpayment of the advance ⁵ premium January 3, 1894, and instructed him to return the money to appellant or Carpenter, and it was so tendered by Sutherland, but refused, and Sutherland still holds the money subject to the orders of the appellant or Carpenter. On the eighth day of January, 1894, appellant made proof of his injury on the blank given him by Carpenter, and appellant forwarded said proof to the home office of the appellee, where it was duly received on January 12, 1894, and the company notified appellant denying any liability and informing him of the cancellation of the policy. Appellant, after reading the policy, never went to see Carpenter to learn why he had not given him a receipt for the money paid him, signed by the president of the company, showing the amount, date, and hour of payment, nor did he ever demand such a receipt nor inquire whether Carpenter had the same, or had any written authority from the company to transact its business. If there was any limitation on Carpenter's authority to act as agent, appellant had no knowledge of the same except as the same was disclosed by the policy. When it received notice of the signing, the company denied all liability under the policy, and for said injury, and has denied all liability ever since. The policy had among other indorsements upon it the following:

"\$5.00.

December 18, 1893.

"Received of E. A. Terry five dollars of first advance quarterly annual premium call on policy No. 6,082, this December 18, 1893.

"A. N. LOCKWOOD, President.

"This receipt is void unless dated on the day of actual payment and at that time countersigned by D. N. Davidson."

The following indorsement was written across the face of the policy: "Payment having been made after the ⁶ date of expiration of assessment, no indemnity will be allowed for injuries received between the date of expiration and time of payment."

Also the following indorsement across the face in blue pencil: "Canceled. D. N. Davidson, 12-18-93.—1-3-94."

The application is stamped across its face "canceled," and beneath this word is written in red ink: "January 3, 1894. Non-payment advanced premium call."

Also the following in red ink: "Accident Department. Application accepted at 5 P. M. this 18th day of Dec., 1893.—Sec'y."

We think, under the facts found, it must be held that Carpenter had authority to deliver the policy upon condition of the pre-

payment of the advance premium according to the terms of the policy. This is true, as we conceive, from the fact that the execution of the policy is not denied under oath, and that the risk was accepted by the company upon the appellant's application. The failure to deny the execution of the policy and the acceptance of the application amount to a ratification of the acts of the agent in soliciting the insurance, the receiving of the application, and the conditional delivery of the policy: *Home Ins. Co. v. Gilman*, 112 Ind. 7; *Kerlin v. National etc. Assn.*, 8 Ind. App. 628. The only reason urged for the cancellation of the policy was the failure of the applicant to send the advance premium to the home office, for it cannot be denied, we think, that if the appellant had sent the money to the home office or paid it to Davidson or the company's recognized agent, Sutherland, the delivery of the policy through Carpenter could not be successfully disputed. The company could, of course, have repudiated the acts of Carpenter entirely, and refused to recognize his authority as its agent to contract ⁷ for the insurance. But it cannot be heard to ratify the acts of Carpenter in part and repudiate them in part. When it recognized the regularity of the application and the legitimacy of the channel through which it came, it placed Carpenter upon the same foundation with other agents of the company for soliciting and contracting for insurance. He had just as much authority in that behalf as a regularly commissioned agent would have had. Had such commissioned agent been sent by the appellee to the appellant to solicit this insurance, without instructions except to comply with the terms of the application and policy, there would be just as much reason for disputing his authority to deliver the policy, except upon payment of the premium, as there was here on the part of Carpenter. But the authorities above cited firmly establish the rule, we think, that where the applicant is ignorant of any limitation upon the agent's authority, as it is found was the case here, and the applicant acts in good faith and relies upon the acts and statements of the agent, within the scope of his apparent authority, the principal will be bound by the agent's statements and acts, and this, we think, includes a waiver of the condition that the advance premium must be paid at the home office and a receipt procured for the same.

In the case of *Kerlin v. National etc. Assn.*, 8 Ind. App. 628, it was said by Davis, J., speaking for this court: "So if, at the

time the application is made or the insurance is contracted, circumstances or conditions exist which are in conflict with the terms and conditions of the application or policy, and the agent of the company knew of their existence, 'and agreed that as to them the conditions' of the application should not be effective, the insurer cannot take advantage of their existence to defeat a recovery after loss has occurred."

⁸ In the present case, of course, the company is not subject to the criticism of having waited till the injury had occurred before asserting its defense. It canceled the policy before such injury because it had not received the premium. But if the premium was paid to its agent, as we must hold that it was, it is in effect the same as if it had been paid at the home office, and the fact that the money was not accounted for by the agent before the injury cannot be made a cause for forfeiting the policy. It seems to us that the question before us is narrowed to the inquiry whether the insured shall be made to suffer for the misconduct of the company's agent. Under the circumstances, we think the appellee is estopped to deny the payment of the premium to the home office, the agent, Carpenter, having waived the same, and accepted it in cash less his commission, which he had a right to remit. To quote again from the case of *Kerlin v. National etc. Assn.*, 8 Ind. App. 628: "In our opinion . . . the agent of the company had the right, on the occasion in question, to do all that could have been done, in relation to such matters, by the officers of the company at the home office."

Indeed, the conduct of the secretary or other officers at the home office was such as to lead to the conclusion that it was not the intention that the money should be paid at the home office. The receipt for the advance premium was sent with the policy to the general agent at Indianapolis. But whether such was the intention or not is immaterial, if the requirement to pay at the home office was waived.

As said by Mitchell, J., in *Home Ins. Co. v. Gilman*, 112 Ind. 7: "It is well settled that payment of the premium in cash may be waived by an agent authorized to deliver policies and receive payment, notwithstanding a stipulation in the policy to the contrary; and unless a policy is so delivered is avoided by showing bad faith or collusion, it is enforceable. . . . If the company has been credited with the premium in account by its agent, or if credit has been extended by the agent to the assured, or if it has,

in fact, been paid to him, no doubt it is a sufficient payment to the company to support the policy."

In May on Insurance, section 360, it is said: "If the agent be authorized to receive the premium, on agreement between the assured and the agent that the latter will be responsible to the company for the amount, and hold the assured as his personal debtor therefor, it is a waiver of the stipulation in the policy that it shall not be binding until the premium is received by the company or its accredited agent": See, also, *Behler v. German etc. Ins. Co.*, 68 Ind. 347; 11 Am. & Eng. Ency. of Law, 308, 336; *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96.

Moreover, in the case in hand the appellee must have known that the application was taken by Carpenter, as the words "Credit R. H. Carpenter" were written on the back of the application after it had passed from appellant's possession and without his knowledge. Whatever knowledge this implied was possessed by the appellee when it received the application and indorsed it as "accepted." Even if Carpenter was but a broker, he was still authorized to deliver the policy and receive the premium: *Indiana Ins. Co. v. Hartwell*, 123 Ind. 177; *Criswell v. Riley*, 5 Ind. App. 496.

There is no contention that two dollars and fifty cents was not the correct amount coming to the appellee after deducting the commission. In fact, as already intimated, the only complaint appears to be that Carpenter did not promptly turn over the money to the company. If, however, he was its agent for the purpose of delivering the policy and collecting the premium, as we think we have demonstrated ¹⁰ he was, then the appellee is bound by the payment made to him, and the policy was in force when the appellant was injured. We think, therefore, the court erred in its conclusions of law and in not rendering judgment in favor of the appellant.

Judgment reversed, with instructions to the trial court to restate its conclusions of law in accordance with this opinion, and to render judgment thereon in favor of appellant for one hundred and sixty dollars and interest from the ninth day of February, 1894.

AGENCY—UNAUTHORIZED AGENT—EFFECT OF RATIFICATION OF ACTS OF.—If a principal adopts the contract of a self-constituted agent, who has assumed to act for him without authority, he is bound to inquire and ascertain the extent the self-constituted agent assumed to act in his behalf. He is bound by all acts

within the scope of the assumed authority of such agent: *Busch v. Wilcox*, 82 Mich. 336; 21. Am. St. Rep. 563, and note. See further the extended note to *Atlee v. Bartholomew*, 5 Am. St. Rep. 110-114.

AGENCY—RATIFICATION OF ACT OF UNAUTHORIZED AGENT.—The ratification of a demand of one purporting to act for another may be made by the latter by adopting the action founded upon such demand: *Grafton v. Follansbee*, 16 N. H. 450; 41 Am. Dec. 736. Accepting the benefits arising from a contract of an unauthorized agent ratifies the contract, if it is one capable of ratification by parol: *Dispatch Line v. Bellamy Mfg. Co.* 12 N. H. 205; 37 Am. Dec. 203. To the same effect see *Taylor v. Conner*, 41 Miss. 722; 97 Am. Dec. 419. See, especially, the extended notes to *Ward v. Williams*, 79 Am. Dec. 387, and *McDowell v. Simpson*, 27 Am. Dec. 344.

LUICK v. DRISCOLL.

[13 INDIANA APPEALS, 279.]

SLANDER—DEFAMATORY WORDS SPOKEN OF AND TO THE WIFE by a third person in the presence of the husband only, constitutes a publication, for which an action of slander may be maintained.

J. N. & E. R. Templer, for the appellant.

J. W. Ryan and W. A. Thompson, for the appellee.

²⁸⁰ DAVIS, J. This was an action by appellee against appellant for damages, for the speaking of slanderous words alleged to have been falsely spoken by appellant of and concerning appellee.

Only one question is presented for our consideration, and that is, whether the speaking of the defamatory words of and to the wife in presence of the husband only constitutes a publication. The proposition is conceded that, to constitute slander, the defamatory words must have been spoken within the presence and hearing of some third person. It appears that the slanderous word were spoken to and of appellee by appellant, that they were so spoken in the presence and hearing of her husband, Warren Driscoll, and that no other persons were present. The charge, in substance, was that appellee was stealing eggs belonging to appellant. Counsel for appellant contend that such charge made against appellee in the presence of her husband only does not constitute a publication. We do not so understand the law. Under the common law, without any reference to the enlarged rights of married women under modern legislation, defamatory language spoken of and to the wife in the presence of the husband constituted a publication: *Wenman v. Ash*, 13 Com. B. *836; *Newell*

on Defamation, 237; Odgers on Libel and Slander, side pp. 152, 153; Flood on Libel and Slander, 45. See, also, Rev. Stats. 1894, sec. 6976; Rev. Stats. 1881, sec. 5131; Logan v. Logan, 77 Ind. 558; Holmes v. Holmes, 133 Ind. 386.

²⁸¹ It is also insisted that appellee's husband must have known that the statement that appellee had stolen appellant's eggs was untrue, but it does not appear that the husband was present when the alleged larceny should have been committed. It is not shown that the husband knew the transaction referred to in the charge and that the transaction did not constitute the crime named by appellant: Carmichael v. Shiel, 21 Ind. 66; Berry v. Massey, 104 Ind. 486.

So far as our attention has been directed to the record, we find no error in the ruling of the trial court.

Judgment affirmed.

Lotz, J., did not participate in this decision.

SLANDER—PUBLICATION OF.—Calling an innocent woman a "whore" in the hearing alone of the speaker's wife is not a charge of incontinency within the meaning of the North Carolina statute: Note to Sesler v. Montgomery, 12 Am. St. Rep. 78.

MANCHESTER FIRE ASSURANCE Co. v. GLENN.

[18 INDIANA APPEALS, 365.]

INSURANCE—DIVISIBILITY.—If property insured consists of several distinct items, and is so situated that the risk on one item cannot be affected without affecting the risk on the other items, or if the various items are necessarily subject to destruction by the same conflagration and the consideration is entire, the contract is indivisible, and the loss cannot be apportioned. The rule is otherwise if the property is so situated that the risk on each item is separate and distinct from the others.

INSURANCE—ASSIGNMENT—WAIVER.—If an insurance agent, with full knowledge of all the facts, prepares a policy of insurance and an assignment thereof, this constitutes a waiver of the conditions in the policy, as well as of the right to insist that a portion of the policy cannot be assigned.

INSURANCE—PLEADING.—If, in an action on a policy of insurance, the insured alleges a fulfillment of all of the conditions of the policy on his part, and this is met with a general denial, together with a plea in bar, a demurrer to the plea in bar is properly sustained.

INSURANCE.—ASSIGNMENT of a policy of insurance is the creation of a new contract between the company and the assignee, the terms of the old policy being the basis of the new contract.

INSURANCE—WAIVER OF FORFEITURE.—Issuing or continuing a policy of insurance with full knowledge by the com-

pany of existing facts, which, according to a condition of the contract, make it voidable, is a waiver of the condition.

INSURANCE—ASSIGNMENT—WAIVER.—Conditions in a policy of insurance against assignment are for the benefit of the company, and may be waived by it.

S. N. Chambers, S. O. Pickens, and C. W. Moores, for the appellant.

R. J. Tracewell and Elliott & Hostetter, for the appellees.

³⁶⁶ LOTZ, J. This action was brought by the appellee against the appellant on a policy of fire insurance. The first and second assignments of error call in question the sufficiency of each paragraph of amended complaint. It appears from the averment of the first paragraph that Koerner & Zimmer, a copartnership, were the owners of a building situate on a lot in the town of Bird's Eye; that Frank Zimmer, one of the partners, was the sole owner of a stock of merchandise and the office furniture and fixtures contained in said building; that the appellant executed a policy of insurance in which it was stipulated that, in consideration of the sum of thirty-five dollars, it insured Koerner & Zimmer and Frank Zimmer against loss by fire for the period of one year in the sum of one thousand dollars divided as follows: three hundred dollars on the building; thirty-three dollars and thirty-three cents on office furniture and fixtures, and six hundred and sixty-six dollars and sixty-seven cents on stock of merchandise. It further appears from the allegations that while the policy was in full force, Frank Zimmer, being the sole owner of the goods and of the office furniture and fixtures, sold and transferred the same to the appellee, James E. Glenn; that subsequently to the sale Frank Zimmer, by his written indorsement on said policy, assigned to the appellee all his interest in the policy, so far as it covered and embraced his interest in the stock of merchandise and the ³⁶⁷ furniture and fixtures; that at the time of issuing the policy and making the assignment, the company, through its agent, had full knowledge that Koerner & Zimmer were the owners of the buildings, and that Frank Zimmer was the sole owner of the stock of goods and of the furniture and fixtures; that the company consented to the assignment of said policy by Frank Zimmer to the appellee, and that the written assignment was prepared by its agent; that it was the intention of all the parties concerned that the assignment of the policy should only include the interest of Frank Zimmer in the stock of goods and the furniture and fixtures; but that, by mutual mistake, the assignment was

made to include all the interest Frank Zimmer had in the policy; that while the policy was in full force, the stock of merchandise and the furniture and fixtures were damaged by fire; that at the time of the injury thereto, the appellee was the owner of the merchandise and the furniture and fixtures; and that he had fully complied with all the conditions and terms of said policy on his part. William Koerner and Frank Zimmer, composing the firm of Koerner & Zimmer, were made parties defendant to answer to any interest they might have in the policy. A copy of the policy, with the written assignment thereon, was made an exhibit to the complaint.

The second paragraph is the same as the first, except it shows that the appellant waived the conditions in the policy requiring the insured to make proof of loss.

It is urged as an objection to each paragraph that the policy declared on is an entirety, and that the attempted assignment of a portion of it by Frank Zimmer was void, and conferred no rights upon the appellee. It is true that the consideration named in the policy is a single definite amount of money, although the amount of the risk is apportioned in various sums to several distinct ³⁶⁸ classes of property. It also appears that the several classes of property were exposed to the same conflagration and risk. Ordinarily, the concurrence of these conditions makes the contract of insurance an entirety. If the property covered by the policy consist of several distinct items, and is so situated that the risk on one item cannot be affected without affecting the risk on the other items, or where the various items are necessarily subject to destruction by the same conflagration, and the consideration is entire, the contract is indivisible, and the loss cannot be apportioned; but the rule is otherwise if the property be so situated that the risk on each item is separate and distinct from the others, so that what affects the risk on one does not affect the risk on the others: *Havens v. Home Ins. Co.*, 111 Ind. 90; 60 Am. Rep. 689; *Phenix Ins. Co. v. Pickel*, 119 Ind. 155; 12 Am. St. Rep. 393. A contract of insurance is personal as to the assured. The character of the assured is one of the most important elements in the contract, and one person cannot be substituted for another as the assured without the consent of the insurer: *Moffitt v. Phenix Ins. Co.*, 11 Ind. App. 233. It is contended here that as the policy was an entirety and the risk indivisible, no portion of it could be assigned, and that the substitution of a new party as the assured as to particular items of the

property rendered the attempted assignment of no effect. The assignment of a policy with the consent of the insurer ordinarily creates a new contract. Whether or not the assignment of a portion of an entire contract is valid or creates a new contract we need not decide, for it is well settled that if a policy be issued with full knowledge by the company of all existing facts, which, according to the conditions of the policy, make it voidable, the conditions are waived: *Home Ins. Co. etc. v. Duke*, 84 Ind. 253; *Indiana Ins. Co. v. Capehart*, 108 Ind. 270. ³⁰⁹ It is here averred that the agent of the company, with full knowledge of all the facts, prepared the policy and the assignment. This constitutes a waiver of the conditions of the policy, as well as a waiver of the right to insist that a portion of the policy could not be assigned. If the assignment actually included more or all of the interest of Frank Zimmer in both the building and the goods, the appellant is in no position to complain if the appellee seeks to recover for the loss of the goods alone. It is also apparent from the wording of the policy that it was the intention to insure Frank Zimmer, as to some interest distinct from that of Koerner & Zimmer. There was no error in overruling the demurrers to each paragraph of the complaint.

The next assignment of error relates to the ruling of the court in sustaining appellee's demurrer to appellant's plea in abatement. This plea was addressed to the whole complaint. It avers in substance that, by the terms and provisions of the policy, it was incumbent on the assured, before he was entitled to commence his action on the policy, to furnish to the company proof of his loss, and that this he did not do before instituting the action. The appellee, in his first paragraph of complaint, alleged a fulfillment of all the conditions of the policy on his part; and in his second paragraph he alleged a waiver on the part of the company of the proof of the loss. Furnishing the proof of loss as stipulated in the policy, or a waiver thereof, was a condition precedent to the appellee's right of recovery. As the appellee could not recover unless he proved that, prior to instituting the action, he made proof of the loss as required by the policy, or that the appellant waived such proof, the matter pleaded in the answer was properly matter in bar, and not in abatement. The appellant was entitled to show, under the general denial, that the appellee had ³⁷⁰ failed to comply with the conditions of the policy in this respect or to show that it had not waived such proof: *Indiana*

Ins. Co. v. Capehart, 108 Ind. 270. The demurrer was properly sustained.

The last assignment of error discussed by appellant's counsel is the overruling of the motion for a new trial. The questions arising under this assignment are the same as those in the case of *Indiana Ins. Co. v. Glenn*, 13 Ind. App. 534. We there considered the same questions under the same assignment, and decided them adversely to the contention of the appellant, and they need no further consideration now.

Judgment affirmed.

ON PETITION FOR REHEARING.

LOTZ, J. The appellant has petitioned for a rehearing in this case, and, in support thereof, says: "The court has not apprehended our position in this case. It is not a question of ultimate liability of the company. It is a question of procedure, a question of pleading. So far as the question is concerned, the question of the ultimate liability of the company is not involved. What we desire to present is, that under the pleadings in this case Mr. Glenn cannot recover, because there has never been any policy of insurance issued to him that he has declared upon."

In this contention we do not concur, for a contract of insurance was entered into with Glenn. Counsel seem to overlook the fact that the assignment of a policy of insurance is the creation of a new contract between the company and the assignee, the terms of the old policy being the basis of the new contract. This proposition is abundantly sustained by authority: *Moffitt v. Phenix Ins. Co.*, 11 Ind. App. 233; *New v. German Ins. Co.*, 371 Ind. 5, 5 Ind. App. 82; *Continental Ins. Co. v. Munns*, 120 Ind. 30. This court, in speaking of the assignment of a policy in *New v. German Ins. Co. etc.*, 5 Ind. App. 82, used this language: "Such consent is equivalent to the creation of a new contract between the assignee and insurer according to the terms of the policy assigned. It is not strictly an assignment, but the creation of a new contract."

If we understand appellant's further contention, it is that there can be no recovery upon the policy in favor of Glenn alone until it and the assignment are reformed; that there can be no reformation, for there is no ambiguity or uncertainty apparent; that the contract fully expresses the intentions of the parties, and there is no occasion for a reformation.

No reformation was asked or obtained, and, if appellant's po-

sition is correct, none could be decreed. Here again the appellant overlooks the fact that this action is based upon the new contract. The new contract was between the company and Glenn. Koerner and Zimmer had no interest in the new contract. The assignment apparently covered Zimmer's interest in the realty and personalty. The averments in reference to the ownership were intended to show that the appellant waived certain conditions of the policy. "Issuing or continuing a policy of insurance with full knowledge by the company of existing facts, which, according to a condition of the contract, make it voidable, is a waiver of the condition": *Havens v. Home Ins. Co.*, 111 Ind. 90; 60 Am. Rep. 689. If, as a matter of fact, the new contract embraced or covered other property than the personalty, the appellant cannot complain if the appellee only seeks to recover for the personal property destroyed. It is further contended that the policy or contract is an entirety and indivisible; that the assignment to Glenn rendered the contract ³⁷² void. The cases of *Havens v. Home Ins. Co.*, 111 Ind. 90, 60 Am. Rep. 689, and *Phenix Ins. Co. etc. v. Pickel*, 119 Ind. 155, 12 Am. St. Rep. 393, are again urged upon our consideration.

It occurs to us that appellant's counsel misapprehend the force of those decisions. When the risk or property insured is an entirety, no change can be made in any part of it without affecting the risk on the whole. Thus, if a portion of it be mortgaged or additional insurance be taken upon it, or if the title or ownership of a portion be changed without the consent of the insured, such changes affect the entire risk, and cause a forfeiture. In these instances, the hazard may be increased, and, being done without the consent of the company, renders the contract void.

But this principle has no application here, for it is alleged that the company consented to the assignment.

These conditions were conditions for its benefit, and it certainly had the power to waive them. No principle is better settled than this. Here again appellant's counsel overlook the fact that this is a contract directly between Glenn and the company. Nothing has been done to increase the hazard under the new contract. Nothing appears in this case, which, in the remotest degree, calls for the application of the rule contended for.

Petition overruled.

INSURANCE—INDIVISIBILITY OF CONTRACT.—Where property insured is so situated that the risk on one item cannot be af-

fectured without affecting the risk on the other items, the policy is to be regarded as entire and indivisible: *Phenix Ins. Co. v. Pickel*, 119 Ind. 155; 12 Am. St. Rep. 393; *Geiss v. Franklin Ins. Co.*, 123 Ind. 172; 18 Am. St. Rep. 324, and note; *Loomis v. Rockford Ins. Co.*, 77 Wis. 87; 20 Am. St. Rep. 96, and note.

INSURANCE—ASSIGNMENT OF POLICY—EFFECT OF.—The effect of an assignment of a policy of insurance, when the insurer consents to it, is that a new contract arises between the insurer and the assignee having all the terms and conditions of the policy, the assignee being substituted in place of the parties originally insured: *Hanover etc. Ins. Co. v. Brown*, 77 Md. 64; 39 Am. St. Rep. 386, and note. See, especially, the extended note to *New York etc. Ins. Co. v. Flack*, 56 Am. Dec. 747.

INSURANCE—FORFEITURE—WAIVER.—If an insurance company, having knowledge of facts rendering its policy voidable, deliberately claims and exercises a right thereunder, it waives all right to avoid it because of such facts: *Enos v. St. Paul etc. Ins. Co.*, 4 S. Dak. 639; 46 Am. St. Rep. 796, and note; note to *Home etc. Ins. Co. v. Kennedy*, 53 Am. St. Rep. 526.

MANCHESTER FIRE ASSURANCE Co. v. KOERNER.

[13 INDIANA APPEALS, 372.]

INSURANCE—ASSIGNMENT OF PART OF POLICY.—A policy of insurance on a building and a stock of merchandise therein, issued to a partnership and to one of its members, reciting that the former are the owners of the building and that such member is the owner of such merchandise, is, in effect, two different contracts of insurance, and an assignment of the policy by such member affects only his interest in the merchandise.

INSURANCE—SEPARATE CONTRACTS IN SAME POLICY—WAIVER OF CONDITIONS.—A policy of insurance on a building and a stock of merchandise therein, issued to a firm and to one of its members, reciting that the firm are the owners of the building and that such member is the owner of the merchandise, is in effect, two different contracts of insurance, and a provision in the policy, that if the insured is not the sole and unconditional owner of the property at the time of the issue of the policy and of the loss, the policy shall be void, is waived, if the facts as to ownership were known to the insurer at the time of the issue of the policy.

INSURANCE—ARBITRATION—WAIVER.—A provision in a policy of insurance for an appraisal of loss by arbitrators before action is brought is waived by the insurer, when, after selection of arbitrators and their failure to agree, the insurer adjusts the loss and requests the insured to make proof thereof in that amount, and the insured complies with such request.

JUDGMENTS—RES JUDICATA—SEPARATE CONTRACTS. A judgment upon one contract in a policy of insurance is not an adjudication upon another separate and distinct contract growing out of the same policy, in which others are interested who had no interest in the former contract or suit, and who filed no cross-action therein, although made parties thereto. Such judgment does not bar their right of action.

S. N. Chambers, S. O. Pickens, and C. W. Moores, for the appellant.

R. J. Tracewell and Elliott & Hostetter, for the appellees.

³⁷³ LOTZ, J. This action was brought by the appellees, ³⁷⁴ William Koerner and Frank Zimmer, on a policy of fire insurance issued by the appellant. It is the same policy upon which suit was instituted in the case of Manchester etc. Assur. Co. v. Glenn, 13 Ind. App. 365, ante, p. 225. It is averred in the complaint that the plaintiffs were the owners of a building situate on a certain lot in the town of Bird's Eye; that Frank Zimmer, one of the plaintiffs, was the sole owner of a stock of merchandise and fixtures contained in the building; that an agent of the company prepared and countersigned the policy, and that at the time he did so he had full knowledge of the facts that Koerner and Zimmer owned the building, and that Frank Zimmer was the sole owner of the stock of merchandise and fixtures; that the policy insured Koerner and Zimmer in the sum of three hundred dollars against damage by fire on their building, and Frank Zimmer in the sum of seven hundred dollars on the stock of merchandise and fixtures; that Frank Zimmer subsequently assigned his interest in the policy, so far as the same affected the stock of merchandise and fixtures, to one James E. Glenn; that by mistake the assignment was made to include all the interest of Zimmer in the policy when the intention was to include only his interest in the stock and fixtures; that the policy was issued on the eleventh day of September, 1892, and continued for the period of one year; that on the twentieth day of August, 1893, the building was totally destroyed by fire. It is averred generally that the plaintiffs complied with all the conditions of the policy on their part. Following this general averment it is alleged that immediately after the fire on the twenty-first day of August, 1893, the plaintiffs notified the company of their loss on the building; and that the company, on the twenty-third day of August following, sent its adjusting agent to the scene of the fire; and that said adjusting agent proceeded to examine into the facts, circumstances, and ³⁷⁵ incidents of said loss, and then and there attempted to agree with plaintiffs as to the value of the building and the plaintiffs' loss occasioned by its destruction; that plaintiffs and defendants were unable to agree as to the value of the building or the loss occasioned by its destruction; that, at the suggestion of the defendant, the value and loss were submitted to arbitration, the plaintiffs selecting one arbitrator and the defendant one; that the

arbitrators met and took and held the matters to be arbitrated under consideration until the — day —, 1893; that on the — day of October, 1893, the arbitrators having failed to agree or make any award in the premises, the adjusting agent of the defendant agreed and promised to pay plaintiffs because of their loss the sum of two hundred and fifty-one dollars and seventy-one cents, adjusting their loss at the sum of seventeen hundred dollars, said first sum being the pro rata part due plaintiffs on the policy in suit, on the basis of seventeen hundred dollars; that afterward on the — day of December, 1893, the defendant sent to plaintiffs (blank) proof of said loss for them to make, with said sum of seventeen hundred dollars being filled in said (blank) proof of loss, as the amount of plaintiffs' loss because of the destruction of their building, and that plaintiffs did, on the — day of December, 1893, make due proof of their said loss, using therefore the (blank) form so sent them, and mailed the same to the company, and that such proof is now in its possession; that the building was owned by the plaintiffs at the time of the fire, and was of the value of three thousand dollars. James E. Glenn was made a party defendant to answer as to any interest he might have in the policy. A copy of the policy, with the written assignment indorsed thereon, was made an exhibit to the complaint. From the written indorsement it appears that Frank Zimmer, as the owner of the property covered by the policy, assigned it to Glenn. Among the conditions ³⁷⁶ of the policy are the following: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value. . . . Said ascertainment or estimate shall be made by the insured and this company, and, if they differ, then by appraisers as hereinafter provided; and the amount of loss or damage having been thus determined, the sum for which this company is liable, pursuant to this policy, shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of loss have been received by this company in accordance with the terms of this policy. . . . In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers shall then estimate and appraise the loss, stating separately sound value and

damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss." "This entire policy, unless otherwise provided by agreement, indorsed hereon or added hereto, shall be void if the interest of the insured be other than unconditional and sole ownership. . . . No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

A demurrer for want of facts was overruled to this complaint, and this ruling is one of the errors assigned.

The appellant contends that it appears from the policy ³⁷⁷ itself and from the assignment indorsed thereon, that at the time of the fire the plaintiffs, Koerner and Zimmer, had no interest in the property; that an interest held by Koerner alone is not sufficient to support an action on the policy in favor of both of the plaintiffs. It is true that the written assignment shows that Frank Zimmer, as the owner of the property, assigned the policy to Glenn; but we think it apparent from the terms of the policy itself that Frank Zimmer individually and the firm of Koerner and Zimmer were both insured. The terms of the policy are, "does insure Koerner and Zimmer and Frank Zimmer." This, taken in connection with the averments that Koerner and Zimmer were the owners of the building, and that Frank Zimmer was the owner of the stock of merchandise, and that these facts were known to the company, sufficiently shows that the assignment to Glenn only affected Zimmers' interest in the goods. The execution of the policy, under the circumstances disclosed, was, in effect, separate contracts of insurance, one with Koerner and Zimmer and one with Frank Zimmer, and that the assignment made by Zimmer only included his interest in the goods. It is also insisted that the complaint shows that the plaintiffs were not the unconditional and sole owners of the property insured at the time the policy was issued, nor at the time of the loss; that in this respect the terms of the policy were violated and the insurance forfeited. Whatever the rule may be as to forfeitures where fraud or misrepresentation is used to deceive or mislead the company, such rule has no application where all the facts are known to the company when it issues the policy. Such condition of the policy may be waived: *Manchester etc. Assur. Co. v. Glenn*, 13 Ind. App. 365; ante, p. 225.

The last objection urged against the sufficiency of ³⁷⁸ the complaint is, that it appears from the conditions of the policy that the action was prematurely brought; that no action will lie until after the arbitrators shall have ascertained the amount of the loss. A provision in a contract for the payment of money upon a contingency that the amount to be paid shall be submitted to arbitration, and that such award shall be final as to that amount is a valid stipulation: Wood on Insurance, 757; May on Insurance, sec. 493; Liverpool etc. Ins. Co. v. Wolff (N. J., June 7, 1888), 14 Atl. Rep. 561; United States v. Robeson, 9 Pet. *319. There are many cases which hold that if the contract further provides that no action shall be maintained upon it until after such an award, then the award becomes a condition precedent to the right of action: Hamilton v. Liverpool etc. Ins. Co., 136 U. S. 242; Martinsburg etc. R. R. Co. v. March, 114 U. S. 549; United States v. Robeson, 9 Pet. *319.

When no such condition is expressed in the contract, or cannot be necessarily implied from its terms, the authorities are all agreed that the provision for submitting the amount to arbitration is collateral and independent; that while a breach of such condition will support a separate action, it cannot be pleaded in bar to an action on the principal contract: Hamilton v. Home Ins. Co., 137 U. S. 370.

There is some conflict in the authorities as to when such conditions are precedent or merely optional: Kahnweiler v. Phenix Ins. Co. etc., 57 Fed. Rep. 562; Wright v. Susquehanna etc. Fire Ins. Co., 110 Pa. St. 29; Nurney v. Fireman's Fund Ins. Co., 63 Mich. 633; 6 Am. St. Rep. 338; Phoenix Ins. Co. v. Badger, 53 Wis. 283; Wood on Insurance, sec. 1015. But the authorities are all agreed that whether such conditions be absolute and precedent, or merely optional, they may be waived. In the policy before us, arbitration is not made absolute in ³⁷⁹ the first instance. It is only when the parties fail to agree that it must be resorted to. Whether or not arbitration became a condition precedent to the right to maintain the action on the failure to agree, we need not determine. It appears from the averments that no award was made. It does not appear who was responsible for the failure of the arbitrators to agree or make an award, but it does appear that, after the failure of the arbitrators to agree, the company adjusted the loss on the building, and prorated a part to the policy in suit and requested plaintiffs to make proof of their loss in that amount, which they did. These facts, we are of opinion,

constitute a waiver of the arbitration. The complaint is sufficient to withstand the demurrer.

The next error discussed by counsel relates to the ruling of the court in sustaining appellees' demurrer to appellant's plea in abatement. This plea in substance avers that James E. Glenn, the assignee of Frank Zimmer, had instituted a suit on the same policy and had made the appellees in this action defendants thereto, and that the appellees had appeared thereto and filed an answer, in which they asked that their rights be protected under the policy, and that such action was pending in the Washington circuit court undetermined.

The complaint in this case shows that the company issued the policy to Koerner and Zimmer and to Frank Zimmer, knowing that the first owned the building and the latter the stock of goods; that their interests were separate and distinct. The policy was, in effect, two distinct contracts of insurance, or two distinct and independent stipulations in the same contract. In an action by Glenn on the policy, Koerner and Zimmer were only nominal parties; they could not obtain any affirmative relief therein unless they filed a counterclaim or cross-complaint ³⁸⁰ against the company. The matters involved in this controversy were not necessarily involved in that action.

The court below sustained a demurrer to the second paragraph of appellant's answer. This ruling is one of the errors assigned. This paragraph avers that Glenn, the assignee of Frank Zimmer, brought a suit on the same policy in the Washington circuit court, against the company, making these appellees parties defendant thereto; that the appellees appeared thereto and filed an answer therein; that the issues joined were submitted and determined and judgment rendered therein, which is in full force. It does not appear that the appellees filed any counterclaim, or obtained or were denied any affirmative relief by the judgment rendered therein. If what we decided with reference to the plea in abatement is correct, there was no error in sustaining the demurrer to this paragraph.

It is also insisted that the court erred in its conclusion of law on the special findings of fact and in overruling the motion for a new trial. A careful consideration of these assignments convinces us that there was no reversible error in these rulings of the court.

Judgment affirmed.

ON PETITION FOR REHEARING.

LOTZ, J. What is said in the case of *Manchester etc. Assur. Co. v. Glenn*, 13 Ind. App. 365, ante p. 225, disposes of all the questions raised on the petition for a rehearing except three; the waiver of the arbitration, the sustaining of the demurrer to the plea in abatement, and the sustaining of the demurrer to the second paragraph of the answer.

We see no occasion for changing our opinion as to ³⁸¹ the waiver of the arbitration. The facts pleaded constitute a waiver.

As to the rulings in sustaining the demurrers to the plea in abatement and the second paragraph of answer, it must be remembered that the contract sued upon by Glenn was a separate and distinct contract from the one in suit. It was a new contract in which Glenn alone was the insured, and in which the appellees had no interest and were not necessary parties. They were not bound to file a cross-action upon another and distinct contract; nor could any judgment rendered therein in the absence of such pleading constitute an adjudication.

Petition overruled.

INSURANCE.—THE INDIVISIBILITY OF A CONTRACT FOR is discussed in *Manchester etc. Assur. Co. v. Glenn*, 13 Ind. App. 365; ante, p. 225, and note.

INSURANCE—ARBITRATION — WAIVER.—If insurance adjusters, in making up proofs of loss, without authority, include therein the amount of loss, this alone will not constitute a waiver on the part of the insurer of a condition in the policy that the amount of loss shall be ascertained by arbitration before suit, but, if the insurer receives such proofs of loss and retains them without objection, then the provision concerning arbitration will be deemed to have been waived: *Everett v. London etc. Ins. Co.*, 142 Pa. St. 332; 24 Am. St. Rep. 499, and especially note. To the same effect see *Vangindertaelen v. Phoenix Ins. Co.*, 82 Wis. 112; 33 Am. St. Rep. 29, and note. See, also, the note to *Continental Ins. Co. v. Wilson*, 23 Am. St. Rep. 724.

MAYNARD v. EAST.

[13 INDIANA APPEALS, 432.]

MECHANICS' LIENS—DESCRIPTION.—A mechanic's lien notice describing the property upon which the lien is claimed as "the north part of lot number twenty (20) in Walnut Hills addition to the city of Anderson, Madison county, Indiana, as well as on the one story frame dwelling-house recently erected thereon by you," is insufficient to sustain an action to foreclose the lien, unless aided by averments such as admit extrinsic evidence in aid of such notice.

MECHANICS' LIENS—DESCRIPTION.—If the description in a mechanic's lien notice is sufficiently definite to enable a person familiar with the locality to identify the premises intended to be described, the description, though too indefinite to convey title, may be rendered sufficient, if it can be aided by extrinsic evidence under proper averments laid in the complaint.

W. S. Diven and E. B. McMahan, for the appellants.

E. D. Reardon and J. R. Thornburg, for the appellees.

⁴³³ REINHARD, C. J. Maynard brought this action against Henry J. Phillips and Dora Phillips, his wife, and Charles W. East and Henry East were made defendants. The defendants, East and East, filed a cross-complaint against the plaintiff, Maynard, and one William S. Diven and his wife, Laura M. Diven, who were made defendants to the cross-complaint and appeared and filed separate demurrers to each paragraph thereof, which were overruled and exceptions taken. The cross-complaint is in four paragraphs, but, in respect of the question to be decided by us, these are not materially different. It is averred therein that Laura M. Diven, through her husband, the said William S. Diven, contracted with Maynard for the erection and construction of certain dwelling-houses upon the property of said Laura, and that the cross-complainants, East and East, sold and furnished to said Maynard certain materials to be used, and which were used, in the erection and construction of said houses. The cross-complaint seeks to foreclose a materialman's lien upon the houses and the real estate upon which the same are situated, it being also averred that proper notices of the intention of said cross-complainants to hold such liens were duly filed. The cross-complaint proceeds upon the theory of an action ⁴³⁴ purely in rem as against said Diven and wife. It does not seek to hold them or either of them personally liable.

The particular objection urged by the Divens against the cross-complaint is, that the descriptions of the real estate upon which the houses were erected, as contained in the cross-complaint and

lien notices, are too uncertain and indefinite, and therefore insufficient. The description in one of the paragraphs and notice therein set forth is as follows: "The north part of lot number twenty (20) in Walnut Hills addition to the city of Anderson, Madison county, Indiana, as well as on the one-story frame dwelling-house recently erected thereon by you." The description contained in another paragraph and exhibit is as follows: "The south part of lot number twenty (20) and the north part of lot number nineteen (19), in Walnut Hills addition to the city of Anderson, Madison county, Indiana, as well as on the frame dwelling-house recently erected thereon by you." The following is the description in the remaining paragraph and notice: "The south part of lot numbered nineteen (19), in Walnut Hills addition to the city of Anderson, Madison county, Indiana, as well as upon the one-story frame dwelling-house erected thereon by you."

There is no attempt to reform the descriptions nor to aid the same by averments such as would admit extrinsic evidence. The description would be clearly insufficient in a complaint to foreclose a mortgage on real estate: *Buck v. Axt*, 85 Ind. 512. When the description is so indefinite as to necessitate the institution of an extrinsic inquiry in order to determine what property was in fact sold or mortgaged, it is insufficient: *Bowen v. Wickersham*, 124 Ind. 404; 19 Am. St. Rep. 106.

Courts have given the mechanic's lien law a liberal ⁴³⁵ construction so as to effectuate the purpose for which it was enacted. It is the rule, in such cases as the present one, that if the description in a lien notice is sufficiently definite to enable a person familiar with the locality to identify the premises intended to be described, the description, though perhaps too indefinite to convey title, may be rendered sufficient, if it can be aided by extrinsic evidence, the proper averments having been laid in the complaint to allow such evidence to be introduced: *Dalton v. Hoffman*, 8 Ind. App. 101, and authorities cited.

From the descriptions given in the cross-complaint and exhibits, it is possible, we think, that a person familiar with the locality might be able to locate the houses, and, if extrinsic facts were averred, the descriptions might be reformed, or at least serve as a basis upon which to formulate another (sufficient) description for the decree of foreclosure and sale. But, standing by themselves, the descriptions in the cross-complaint and notices are wholly insufficient to convey title in a sale upon the decree, for

by them neither the exact location nor the boundary of the real estate to be sold can be determined.

We think the court erred in overruling the demurrer of Diven and wife to each paragraph of the cross-complaint.

As to the appellant Maynard, nothing is said in the brief which shows that he is entitled to a reversal. Indeed, it is difficult to determine from such brief whether the counsel who wrote the same appear for him at all or not.

Judgment reversed as to William S. Diven and Laura Diven, and affirmed as to John A. Maynard.

MECHANICS' LIENS—SUFFICIENCY OF DESCRIPTION.—A description of property sufficient for identification is indispensable to a mechanic's lien: *Fernandez v. Burleson*, 110 Cal. 164; 52 Am. St. Rep. 75, and note with the cases collected.

SCHELLENBECK v. STUDEBAKER.

[13 INDIANA APPEALS, 437.]

PARTNERSHIP—COMMERCIAL—POWER OF PARTNER. In trading or commercial partnerships, each partner has authority to execute negotiable notes and bills of exchange in the firm name.

PARTNERSHIP—NON-TRADING—POWER OF PARTNER. A partner in a nontrading or noncommercial partnership has no implied authority to execute negotiable paper in the firm name, unless it is the common custom or usage, or necessary for the transaction of the business of such firm.

PARTNERSHIP—NONTRADING—RECOVERY OF NOTE OF—BURDEN OF PROOF.—To justify a recovery over the plea of non est factum on a note executed by a partner in a nontrading firm, in the name of the partnership, not only is the burden of proof upon the creditor to show that the execution of the note was within the scope of the partnership business, but he must also go further and show that the note was executed under authority from the partnership, either directly by proof of express authority, or inferentially by proof of usage, custom, or necessity.

PARTNERSHIP—COMMERCIAL.—If the business, according to the usual mode of conducting it, imports, in its nature, the necessity of buying and selling, the firm is properly regarded as a trading or commercial partnership, otherwise it is nontrading or noncommercial.

PARTNERSHIP—NONCOMMERCIAL.—It is not sufficient to constitute a commercial partnership that the firm, in the course of its business, buys certain articles, not to sell again, but simply to use in its business. Such a partnership is noncommercial.

F. J. L. Meyer, for the appellants.

G. E. Clark, for the appellee.

⁴³⁸ GAVIN, J. The appellee sued appellants, Snyder and Schellenbeck, upon a note purporting to be executed by "Emil Schellenbeck & Co." Appellant Snyder filed a sworn answer of non est factum. The jury returned a special verdict, upon which appellee had judgment. Snyder prosecutes this appeal.

The material facts, briefly stated, are these: Schellenbeck executed the note sued on (being commercial paper) in consideration of a team of horses purchased by him from appellee, on whose land he was then farming upon his own account. Upon this land he used the team solely in his own business and never in the firm's business. Schellenbeck and Snyder were also engaged as partners in the dairy business under the firm name of "Schellenbeck & Co.," and were the owners of cattle, cows, and three teams of horses used in delivering the milk produced by the cows. Snyder did not authorize the execution of the note, had no knowledge thereof until after the dissolution of the partnership, and, upon being apprised of it, immediately repudiated and disavowed it. At the time of the execution of the note Schellenbeck represented that he and Snyder were partners, and that the horses were to be used in the partnership ⁴³⁹ business. Appellant "relied upon these representations."

It will be noted that, under this statement of the facts, there was no express authority given by Snyder to execute the note. It does not appear that either the execution of the note or the purchase of the horses was necessary to the transaction of the firm's business, nor is it shown that the execution of such notes was usual in the dairy business generally, or customary in the conduct of that particular dairy. It does affirmatively appear that the firm derived no benefit whatever from the purchase. Under such circumstances, the judgment cannot be sustained, unless the law implies the authority to execute such paper from the existence of the partnership.

It is the law, as declared in Indiana, that one partner is liable for what the other does in the firm name within the general scope of the business of the partnership: *Todd v. Jackson*, 75 Ind. 272; *Jackson v. Todd*, 56 Ind. 406; *Graves v. Kellenberger*, 51 Ind. 66; *Bays v. Conner*, 105 Ind. 415.

By the general scope is meant not only the actual, but the apparent, scope of the partnership: *Porter v. Wilson*, 113 Ind. 350; *Hoffman v. Toll*, 2 Ind. App. 287.

Before the plaintiff can have judgment upon a special verdict, it is essential that every fact necessary to his recovery be con-

tained in such verdict either by direct finding or necessary inference: *Becknell v. Hosier*, 10 Ind. App. 5.

To justify a recovery by the appellee over the plea of non est factum, he was required to establish that the giving of the note was within the general scope of the partnership business: *Graves v. Kellenberger*, 51 Ind. 66; *Lucas v. Baldwin*, 97 Ind. 471; *Summerlot v. Hamilton*, 121 Ind. 87.

⁴⁴⁰ In determining whether or not the act is within the general scope of the partnership business, and therefore such as that the law implies the right to execute the paper, we must look to the character of the partnership. There is a marked distinction between the rules of law governing the members of trading or commercial partnerships and those of nontrading or noncommercial partnerships.

In the former class, each partner is by law regarded as invested with authority from his copartners to execute negotiable notes and bills of exchange in the firm name, the use of such paper having been established as appropriate under the law merchant: *Hedley v. Bainbridge*, 3 Ad. & E., N. S., 315; *Lee v. First Nat. Bank*, 45 Kan. 8; *Friend v. Duryee*, 17 Fla. 111; 35 Am. Rep. 89; *Hayden Milling Co. v. Lewis* (Ariz., Jan. 24, 1891), 32 Pac. Rep. 263; *Sondheim v. Gilbert*, 117 Ind. 71; 10 Am. St. Rep. 23. But, as is said by the supreme court of the United States, this doctrine is "generally limited to partnerships in trade and commerce, and does not apply to other partnerships, unless it is the common custom or usage of such business to bind the firm by negotiable paper or it is necessary for the due transaction thereof": *Dowling v. Exchange Bank*, 145 U. S. 512; *Story on Partnership*, sec. 102

a. Both the adjudged cases and the text-books generally sustain the same rule: *Hedley v. Bainbridge*, 3 Ad. & E., N. S., 315; *Garland v. Jacomb*, L. R. 8 Ex. 216; *Judge v. Braswell*, 13 Bush, 67; *Tanner v. Hyde*, 2 Colo. App. 443; *Walker v. Walker*, 66 Vt. 285; *Lee v. First Nat. Bank*, 45 Kan. 8; *Harris v. Mayor etc.*, 73 Md. 22; 25 Am. St. Rep. 565; *Deardorf v. Thacher*, 78 Mo. 128; 47 Am. Rep. 95; *Smith v. Sloan*, 37 Wis. 285; 19 Am. Rep. 757; *Pease v. Cole*, 53 Conn. 53; 55 Am. Rep. 53; *Ulery v. Ginrich*, 57 Ill. 531; *Levi v. Latham*, 15 Neb. 509; 48 Am. Rep. 361; 1 *Bates on Partnership*, secs. 345, 352.

⁴⁴¹ From these cases last cited, as well as from those referred to in our own state, we think the law to be that under the plea of non est factum the burden is upon the plaintiff to show the authority. This burden is sustained by the presumption of law

when the partnership is a commercial one, but, when it appears that the partnership is of the nontrading class, then it devolves upon him to go further and show such additional facts as are necessary to establish the right, either directly by proof of express authority, or inferentially by proof of usage, custom, or necessity therefor.

In *Kimbrow v. Bullitt*, 22 How. 256, it is said that "wherever the business, according to the usual mode of conducting it, imports, in its nature, the necessity of buying and selling, the firm is then properly regarded as a trading partnership."

By "buying and selling" in this connection we understand buying to resell. It is not sufficient to constitute a trading partnership that the firm should, in the course of its business, buy some articles, such as wagons, horses, feed, etc., not to sell again, but simply for use in its business.

Many kinds of partnerships have been adjudged nontrading. That most nearly analogous to this under consideration is farming: *Tanner v. Hyde*, 2 Colo. App. 443; *Prince v. Crawford*, 50 Miss. 344; *Walker v. Walker*, 66 Vt. 285; *McCrary v. Slaughter*, 58 Ala. 230; *Greenslade v. Dower*, 7 Barn. & C. *634. That this was a nontrading partnership we have no doubt.

Many of the adjudged cases hold that in such partnership one member cannot be deemed to have authority to bind the others by a negotiable note, even though it be given for a debt of the firm. We are not required to and do not go so far, but we simply hold that, under ⁴⁴² the circumstances of this case, there are no facts which establish an express authority or any necessity, usage, or custom justifying the use of the firm name, nor is the partnership such a one as that the law will imply the authority to so do.

We have given consideration to the cases cited by appellee, and do not find them sufficient to overthrow the principles and conclusion above announced. Many of them relate to purchases and not to the execution of negotiable paper.

Judgment reversed, with instructions to render judgment for the appellant, Snyder.

PARTNERSHIP—COMMERCIAL—POWER OF PARTNER.—It is well settled that in the case of commercial or trading partnerships, each partner has undoubted authority to pledge the partnership property, or borrow money in its name for partnership purposes, and draw, negotiate, accept, or indorse bills of exchange and promissory notes and checks and other negotiable securities, or do any other acts incident or appropriate to the firm's business according to the common course and usages of such trade and business: Extended

note to *Baxter v. Rollins*, 48 Am. St. Rep. 438; but it is a universal rule of law that the individual members of nontrading or noncommercial partnerships, which are usually defined to be such as are limited to a single enterprise and are not engaged in trade, have no implied authority to borrow money, and bind the firm therefor by notes given in its name, or to pledge the assets of the partnership as security for money borrowed, in the absence of proof to show the actual necessity or usage for the exercise of such power by the individual members of the firm in conducting its business: *Extended note to Baxter v. Rollins*, 48 Am. St. Rep. 441. The presumption in a nontrading partnership is, that neither partner has authority to bind the firm by a promissory note: *Snively v. Matheson*, 12 Wash. 88; 50 Am. St. Rep. 877.

WESTFIELD GAS & MILLING COMPANY v. NOBLESVILLE AND EAGLETOWN GRAVEL ROAD CO.

[13 INDIANA APPEALS, 481.]

PLEADING.—The contents of a complaint in a former action which are set out in full in the complaint in suit are properly before the court, although the action pending is not founded thereon.

CONTRIBUTION—JOINT TORT FEASORS.—The rule that there is no contribution nor right of indemnity between joint tortfeasors does not apply to a case where one does the act or creates the nuisance and the other does not join therein, but is thereby exposed to liability.

JUDGMENTS—RES JUDICATA—CONTRIBUTION.—A judgment against two defendants sued as severable tortfeasors is conclusive of the liability of each defendant to the plaintiff in an action by one of such defendants to recover from the other the sum he has been compelled to pay under such judgment.

T. J. & R. K. Kane, for the appellant.

W. Fertig, H. J. Alexander, J. A. Roberts, and M. Vestal, for the appellee.

482 GAVIN, J. Appellee sued appellant averring that it had entered upon the line of appellee's turnpike and without leave or license constructed a deep open ditch or trench therein which it had carelessly and negligently left open and unguarded, upon January 2, 1889; that afterward one Abernathy brought suit against appellee and appellant for damages for injuries received by reason of said trench being by them negligently and carelessly left unguarded and open; that said appellant and appellee filed answers of general denial, and went to trial, which resulted in a judgment against both, a part of which appellee had paid. For that sum this suit was brought. This complaint was tested by demurrer.

The complaint in the former action was set out in full in this complaint, not merely attached thereto as an exhibit. Its contents were thus properly brought before the court, although the action was not founded thereon: *Knight v. Flatrock etc. Tp. Co.*, 45 Ind. 134.

The complaint, as it seems to us, clearly and sufficiently shows that the recovery of the judgment resulted from appellant's wrongful act. Under such circumstances, although both the parties might be liable to the injured party, as between themselves they were not in *pari delicto*, and, on well-established principles, the appellant, who was the primary and active wrongdoer, can be compelled to make good to the appellee the loss thereby occasioned to it. The rule that there is no contribution nor right of indemnity between joint tort feors does not apply to a case where one does the act or creates the nuisance and the other does not join therein, but is thereby exposed to liability: *Westfield etc. Co. v. Abernathy*, 8 Ind. App. 73; *Wickwire v. Angola*, 4 Ind. App. 253; *McNaughton v. Elkhart*, 85 Ind. 384; *Churchill v. Holt*, 127 Mass. 165; 34 Am. Rep. 355; *Gray v. Boston etc. Co.*, 114 Mass. 149; 19 Am. Rep. 324; ⁴⁸³ *Lowell v. Boston etc. R. R. Corp.*, 23 Pick. 24; 34 Am. Dec. 33; *Elliott on Roads and Streets*, sec. 656.

It was held in the decision of the main action (*Westfield etc. Co. v. Abernathy*, 8 Ind. App. 73), that the parties to this action were as to *Abernathy* not joint but several tort feors.

Appellant, by answer and by offers of evidence upon the trial, sought to avoid responsibility by showing that it did not dig the trench, and was not, therefore, liable to the plaintiff *Abernathy* in the former action. It insists that this question of its original liability is still open as between itself and appellee, although adjudged and closed as between it and *Abernathy*.

To sustain their contention, counsel rely upon the proposition announced by the authorities that "the party who invokes the doctrine of former adjudication must be one who tendered to the other an issue to which the latter could have demurred or pleaded": *Jones v. Vert*, 121 Ind. 140; 16 Am. St. Rep. 379; *Harvey v. Osborn*, 55 Ind. 535; *Leaman v. Sample*, 91 Ind. 236; *Armstrong v. Harshman*, 61 Ind. 52; 28 Am. Rep. 665.

While this and similar statements of the law may doubtless be regarded as correct when taken in connection with the circumstances of the cases under consideration and in connection with the other language used, we cannot assent to the literal and far-

reaching interpretation which counsel would give them, whereby they claim that, as between the defendants, nothing is settled but everything is left open for future litigation. On the contrary, we are of opinion that while, in the absence of cross-pleadings, the rights of the defendants, as between themselves, are not adjudicated, yet the fact of the liability of each to the plaintiff is adjudicated and determined, both as between themselves and him and between each other.

⁴⁸⁴ If two parties are sued upon a note and judgment taken without cross-pleadings, the question of who should pay the debt as between themselves is left open, but that both are liable to the creditor is adjudicated and can no longer be disputed, even as between themselves: *Dewitt v. Boring*, 123 Ind. 4; *Bulkeley v. House*, 62 Conn. 459; *Freeman on Judgments*, sec. 158; *Lloyd v. Barr*, 11 Pa. St. 41; 2 *Black on Judgments*, sec. 599.

According to the position taken by appellant, that "nothing was adjudicated between the defendants," it was open for appellant to dispute appellee's liability as well as its own, thus leaving the entire lawsuit to be again fought over. Such a position does not seem to us tenable.

The question of both appellee's and appellant's liability was directly in issue in the former cause and must be regarded as settled, but this does not, by any means, prevent the appellant from asserting that, although both it and the appellee were in the wrong, yet, as between themselves, there was no good reason why appellant should indemnify the appellee.

With these views of the law we find no cause for reversal.

Judgment affirmed.

Davis, J., does not participate.

JOINT LIABILITY—CONTRIBUTION BETWEEN JOINT TORT FEASORS.—If several creditors, acting separately and without concert, though simultaneously, sue out attachments against a common debtor, and cause them to be wrongfully levied at the same time and by the same officer on the property which is sold to satisfy their respective demands, they incur a common liability, and each is bound to contribute equally to the satisfaction of a judgment for damages obtained by the owner of the property upon the indemnifying bond of one of the creditors without regard to the amount of their respective debts, due from the debtor: *Vandiver v. Pollak*, 107 Ala. 547; 54 Am. St. Rep. 118. See, also, the extended note to *Cartersville v. Cook*, 16 Am. St. Rep. 254.

GLOBE ACCIDENT INSURANCE CO. v. HELWIG.

[13 INDIANA APPEALS, 539.]

APPELLATE PRACTICE—SUFFICIENCY OF EVIDENCE.

If under the evidence the complaining party is entitled to recover anything, it must be regarded as sufficient to sustain the verdict, in the absence of an assignment of error, that the damages are excessive or the amount too large.

INSURANCE, ACCIDENT—SALARY DURING DISABILITY.

If, by reason of an injury insured against, the insured actually loses time from his business, he is entitled to recover the money value thereof, although his salary is continued during his disability, when, under the policy, he has a right to be indemnified against the loss of the money value of his time during disability arising from accident.

APPELLATE PRACTICE—JOINT ASSIGNMENT OF ERROR.

A joint assignment of error in giving a series of instructions can only be maintained by showing that all of the instructions are erroneous, for, if one of the instructions is correct, the assignment of error must fail.

INSURANCE, ACCIDENT—EVIDENCE OF SUFFERING.

Under a policy of accident insurance indemnifying against loss of the value of time during disability, evidence of the amount of suffering of the insured, and how he slept during the injury is admissible to show how far his discomfort may have interfered with his capacity to work, but it is not admissible as an element of damages.

EVIDENCE—BOOKS—NOTICE TO PRODUCE.

A person cannot be compelled to produce his books for inspection without notice of motion to that effect.

INSURANCE, ACCIDENT—EVIDENCE OF EXTRAHAZARDOUS RISK.

Evidence that the insured under a policy of accident insurance was in a more hazardous class at the time of the accident than that in which he was insured, is not admissible under a general denial.

M. C. Hobbs, G. W. McDonald, and R. Denny, for the appellant.

J. E. McCullough and H. N. Spaan, for the appellee.

⁵³⁹ GAVIN, J. Appeal from the judgment of the general term affirming the judgment of the special term.

⁵⁴⁰ The only errors properly assigned in the general term are: 1. That the court erred in overruling appellant's motion for judgment on the jury's answers to interrogatories; 2. That the court erred in overruling appellant's motion for a new trial.

The first error has not been discussed and must therefore be deemed waived: *Kluse v. Sparks*, 10 Ind. App. 444; *Elliott's Appellate Procedure*, sec. 445. One cause for a new trial questions the sufficiency of the evidence. There is no assignment in the motion that the damages are excessive or the amount of the recovery too large. If, under the evidence, appellee was entitled to anything, it must be regarded as sufficient to sustain the verdict: *Elliott's Appellate Procedure*, sec. 855.

The policy on which the action is founded insured appellee "against the loss of the money value of his time, not exceeding twenty-five dollars per week, nor for more than thirty-two consecutive weeks; if, during the term of this insurance, he shall solely, through external, violent and accidental means, and from no other cause, be so bodily and physically injured as to be immediately totally and continuously disabled from doing anything in and about his usual occupation."

It is earnestly insisted that, under this policy, appellee cannot recover unless he actually lost his wages or salary during the time he was disabled, and that a recovery is not permissible in this case because the appellee's employer donated to him his regular salary for that entire period.

If, by reason of an injury insured against, appellee actually lost the time from his business he was entitled to ⁵⁴¹ recover the money value thereof up to twenty-five dollars per week, even though his pay was continued during his disability. We can see no more reason in holding such payment to inure to appellant's benefit than there would be for refusing to one wrongfully injured by another the right to recover the value of medical services and nursing because gratuitously rendered: *Evansville etc. R. R. Co. v. Holcomb*, 9 Ind. App. 198.

Appellee was injured by having his foot crushed, about 9 o'clock one morning. He was immediately taken home where he remained suffering until about 4 P. M., when he was driven back to his office and gave attention to some matters for perhaps an hour. During the next seven weeks he went each day to his office in a buggy, sat for an hour or so with his foot propped on a pillow, opening letters and discussing the business with traveling men and others who came in. An extra man was employed, who with others performed most of appellee's previous duties, which were those of general manager and superintendent of a chair factory. For all of the seven weeks he was disabled from performing many of his duties, but during most of it able to perform some.

Counsel argue that to bring appellee's injury within the terms of the policy, it must have been such as to disable him from doing any and everything pertaining to his occupation. We are not, under the presentation of the case to us, called upon to determine whether or not this is the correct construction, or whether it would satisfy the terms of the policy, should there be anything relating to his business which he could not do, or whether the policy means that the insured must be substantially, although not lit-

erally disabled from doing any and everything pertaining to his business. The subject is discussed at length in an article in 35 Cent. L. J. 150.

⁵⁴² The authorities cited in *Supreme Lodge etc. v. Edwards* (Ind. App., Nov. 5, 1895), 41 N. E. Rep. 350, may also be applicable to the construction of the policy.

Under the evidence, however, it is clear that appellee was for a short period at least, entirely unable to do anything whatever pertaining to his occupation in the strictest sense in which appellant claims the phrase is used. For the time thus lost he was entitled to be paid by appellant its fair value, not exceeding, of course, the rate fixed in the policy. It cannot, therefore, be held that the evidence was not sufficient to sustain the verdict.

It is next urged that the court erred in giving, of its own motion, instructions Nos. 4 and 5. The assignment in the motion for a new trial is, that "the court erred in giving on its own motion instructions to the jury, Nos. 1, 2, 3, 4, 5." This assignment is joint, and can only be maintained by showing that all of the instructions therein referred to are erroneous. In other words, the assignment under our practice must fail if any one of such instructions is correct. The failure of counsel to discuss the first, second, and third instructions amounts to an admission that they are correct. Therefore, no question is presented for our consideration under this assignment: *Kackley v. Evansville etc. R. R. Co.*, 7 Ind. App. 169; *Buchart v. Ell*, 9 Ind. App. 353; *American etc. Ins. Co. v. Sisk*, 9 Ind. App. 305; *Eddingfield v. State*, 12 Ind. App. 312; *Ladoga v. Linn*, 9 Ind. App. 15.

Another assignment in the motion for a new trial is, that "the court erred in refusing to give the jury the instructions Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, asked for by the defendant."

Under the authorities above stated, if any one of the ⁵⁴³ instructions does not contain a correct statement of the law applicable to the case, no question is presented by this assignment for our consideration. It is not claimed by counsel that the court erred in refusing to give all of the instructions asked by appellant, and, therefore, it is not necessary to further consider this assignment.

Counsel for appellant also insist that the court erred in permitting counsel of appellee to ask him as to his suffering and how he slept during the injury. In view of the statement of the court to the jury that such evidence was not an element of damages, and that it was only admissible in so far as the discomfort may

have interfered with his capacity to do his work, there was no error in this ruling.

Counsel further contend that the court erred in refusing to compel appellee to produce the books of his company to show how the sum of one hundred dollars per week was paid him. It does not appear that any notice of the motion was given to appellee, or that he was present in person or by counsel when the motion was made: Rev. Stats. 1894, sec. 487.

Neither is it suggested how the production of the books would have benefited appellant. It was conceded by appellee that the company continued to pay his salary during the time of his injury. Counsel content themselves with the statement that the ruling was erroneous without any argument or suggestion as to how or why appellant was or could have been benefited by the production of the books. For the reason that no notice is shown to have been given, if for no other, there was no error in the court's ruling.

On the trial, counsel for appellant offered to show by a witness that the class in which appellee was injured ⁵⁴⁴ was more hazardous than the one in which he was insured. No issue was tendered raising any such question, the only answer filed being the general denial.

Had there been any violation of the contract by appellee, whereby his cause of action would have been defeated, it should have been pleaded and an opportunity thus given him to reply thereto.

We find no error in the record.

Judgment affirmed.

INSURANCE — ACCIDENT — CHANGE OF OCCUPATION — MORE HAZARDOUS RISK.—This subject will be found fully discussed in the extended note to North American etc. Ins. Co. v. Burroughs, 8 Am. Rep. 218. See, also, the note to Union Mut. Acc. Assn. v. Frohard, 23 Am. St. Rep. 672.

TRIAL—THE POWER TO COMPEL A PARTY TO PRODUCE BOOKS AND PAPERS AS EVIDENCE is discussed in the extended note to Lester v. People, 41 Am. St. Rep. 388-396.

HOWES v. ROSE.

[13 INDIANA APPEALS, 674.]

APOTHECARIES—CARE REQUIRED OF.—Apothecaries, druggists, and all persons engaged in manufacturing, compounding, or vending drugs, poisons, or medicines, are required to be extraordinarily skillful and to use the highest degree of care known to practical men to prevent injury from the use of such articles and compounds.

APOTHECARIES—NEGLIGENCE.—A druggist who sells a poisonous drug as harmless is not protected from liability for his negligence by the label of a reputable wholesale house from which he purchased it in an unbroken package, if he has broken such package and handled the drug before he made such sale.

APOTHECARIES—NEGLIGENCE—EVIDENCE.—The mere sale of a poisonous drug as harmless does not establish a prima facie case of negligence against the druggist thus selling it, and his actual negligence in making such sale must be proved to justify a recovery.

C. L. and H. E. Jewett, G. H. Voigt, and E. B. Stotsenburg, for the appellants.

J. V. and C. D. Kelso and J. K. Marsh, for the appellee.

675 LOTZ, J. The appellee, plaintiff below, in her complaint alleged that she was ill and in need of medicine, and applied to the appellants, defendants below, at their place of business, for Rochelle salts, a safe and harmless medicine; that instead of furnishing her said salts, the defendants carelessly and negligently furnished, sold, and delivered to her, instead thereof, a quantity of tartaric acid, a noxious, baneful, and poisonous drug, which she administered to herself, believing the same to be Rochelle salts, and suffered pain and injury in consequence thereof.

The special verdict found substantially these facts: On the eighth day of March, 1894, the plaintiff and defendants were residents of the city of Jeffersonville. The defendants were retail druggists, engaged in conducting the business of a retail and prescription drug store in said city. On the sixth day of March, 1894, the defendants ordered of the firm of Renz & Henry, wholesale druggists and chemists, engaged in business at the city of Louisville, Kentucky, a quantity of a drug known as Rochelle salts. The said Renz & Henry were reputable and established wholesale druggists and chemists, **676** and had been engaged in that business for many years. Upon the receipt of defendants' order, Renz & Henry sent to the defendants a package of white powder, resembling Rochelle salts in appearance, and labeled "Rochelle Salts." The package was received at the defendants'

place of business by their clerk, one William Schwamnger. The package was billed on a statement accompanying it as Rochelle salts. The clerk, Schwamnger, was a competent and skilled pharmacist. He opened the package and examined the contents, and, believing the same to be Rochelle salts, placed it in a jar in which Rochelle salts was kept for sale in said store, which jar was labeled Rochelle salts. Rochelle salts is a white powder, and, from the appearance of said drug as received, the defendants and their clerk, Schwamnger, could not tell and did not know but that the same was Rochelle salts. On the eighth day of March, 1894, the plaintiff, desiring to administer to herself a dose of Rochelle salts, applied to the defendants at their place of business for ten cents worth of said salts. The defendants' drug clerk, one Henry Voigt, took from the jar labeled Rochelle salts a portion of the drug purchased of Renz & Henry, and sold and delivered a portion thereof to the plaintiff. At the time the drug was so sold to the plaintiff, the defendants and their clerks believed the same to be Rochelle salts. The plaintiff, believing the drug to be Rochelle salts, dissolved two tablespoonfuls in water and drank the same. The drug so administered by plaintiff was not Rochelle salts, but a drug known as tartaric acid. Tartaric acid is a white powder resembling in appearance Rochelle salts, and, when taken in as large quantities as two tablespoonfuls dissolved in water, causes an irritation of the throat and stomach, and a burning sensation and cramps of the stomach. The effect of such drug on the plaintiff was ⁶⁷⁷ to cause an irritation of the throat and stomach, and to cause her violent pains in the stomach and abdomen for some time after taking the same, and has caused her health to decline. The plaintiff's damages were assessed in the sum of two hundred dollars.

The appellee moved for judgment in her favor on the finding, and the appellants moved for judgment in their favor. The appellee's motion was sustained and appellants' overruled. These rulings are the errors assigned in this court.

In view of the dire consequences that may result from the least inattention or want of care or skill, druggists, apothecaries, and all persons engaged in manufacturing, compounding, or vending drugs and medicines should not only be required to be skillful, but should also be exceedingly cautious and prudent. All persons who deal with deadly poisons, noxious and dangerous substances, are held to a strict accountability.

The highest degree of care known to practical men must be

used to prevent injuries from the use of drugs and poisons. It is for these reasons that a druggist is held to a special degree of responsibility. The care required must be commensurate with the danger involved; the skill employed must correspond with that superior knowledge of the business which the law requires: *Walton v. Booth*, 34 La. Ann. 913; *Cooley on Torts*, 75, 76; *Thomas v. Winchester*, 6 N. Y. 397; 57 Am. Dec. 455.

It is also an established rule that a vendor of provisions for domestic use is bound to know that they are sound and wholesome, at his peril: *Van Bracklin v. Fonda*, 12 Johns. 468; 7 Am. Dec. 339. The vendor, by implication, undertakes that they are sound and wholesome: 2 Blackstone's Commentaries, 165. Ordinarily, a slight inspection or examination of articles of food will determine their soundness. The appellee's complaint does not proceed upon the theory ⁶⁷⁸ of the breach of an implied warranty, but is founded upon a tort, that of negligence. If the cause of action had been put upon the same ground as the sale of food, a different question might have been presented.

The appellants insist that they are protected from liability by the label of the reputable wholesale dealers. If the drug sold had been received and labeled in an unbroken package, and had by them been sold to the appellee in an unbroken package, there would be much force in this contention. But here the package was broken, the contents were handled and put into a jar, and were again dealt out in a small quantity to appellee. The appellants and their agents had opportunities of seeing, knowing, and determining the character of the drug.

It is further insisted that the liability, if any, is against the wholesale dealers or those who improperly labeled the drug: *Thomas v. Winchester*, 6 N. Y. 397; 57 Am. Dec. 455. It is, perhaps, true that an action would lie against the persons who made the first mistake, but it does not follow from this that the appellants are excused. If they were guilty of negligence in making the sale, they must respond.

The appellants further contend that the verdict fails to find the facts from which the legal inference of negligence can be drawn; that for aught that appears the injury was the result of inevitable accident, for which nobody is legally responsible. The case of *Brown v. Marshall*, 47 Mich. 576, 41 Am. Rep. 728, is relied upon in support of this contention. In that case an instruction given by the trial court stated it to be the duty of druggists to know the

properties of the medicines which they sell and to employ such persons as are capable of discriminating and dealing out according to prescription, and, if the defendant's clerk sold and delivered to the ⁶⁷⁹ plaintiff a poisonous instead of a harmless drug, the defendant would be liable for the injury resulting.

It was held that this instruction correctly stated the druggist's duty, but that it was erroneous as applied to the facts, because it ignored the element of negligence. It was further stated in the opinion in that case that there is no liability in such cases, irrespective of the questions of negligence and intentional wrong. In that case, the druggist's clerk sold sulphate of zinc for Epsom salts. The court, by Cooley, J., said: "That such an error might occur without fault on the part of the druggist or his clerks is readily supposable. He may have bought his drugs from a reputable dealer, in whose warehouse they may have been tampered with for the purpose of mischief. It is easy to suggest accidents after they came into his own possession, or wrongs by others, of which he would be ignorant, and against which a high degree of care would not give perfect protection. But how the misfortune occurs is unimportant, if, under all the circumstances, the fact of occurrence is attributable to him as a legal fault. . . . But we do not find that the authorities have gone so far as to dispense with actual negligence as a necessary element in the liability when a mistake has occurred."

The case of *Fleet v. Hollenkemp*, 13 B. Mon. 219, 56 Am. Dec. 563, bears little similarity to the case at bar. The druggist there sold the drugs ordered, but, owing to his carelessness in preparing them, they became poisoned. The same rule would apply under such circumstances as applies in the case of impure or poisoned food or provisions.

In the verdict before us there is no finding of any fact or facts showing that the appellants were guilty of negligence, unless the mere sale of the wrong drug establishes a *prima facie* case, a proposition which the authorities do not seem to support. Appellants might have ⁶⁸⁰ taken every precaution required of them by the law for anything that is found by the jury. The facts constituting the negligence must be established before the plaintiff can have judgment on the special verdict. This was not done in this case.

Judgment reversed, with instructions to grant appellee a new trial, if requested within ninety days.

Apothecaries and Druggists—Liability of.

In the discharge of their functions, druggists, apothecaries, and other persons dealing in drugs, poisons, and medicines, are required, not only to be skillful, but also exceedingly cautious and prudent, in view of the terrific consequences which may attend the least inattention on their part. The highest degree of care known among practical men must be used by them to prevent injury from the use of their compounds, and they are held to a special degree of responsibility corresponding with their superior knowledge and are generally held liable for the slightest negligence: *Walton v. Booth*, 34 La. Ann. 913; *Allan v. State S. S. Co.*, 132 N. Y. 91; 28 Am. St. Rep. 556; *Smith v. Hays*, 23 Ill. App. 244; *Fleet v. Hollenkemp*, 13 B. Mon. 219; 56 Am. Dec. 563; *Brown v. Marshall*, 47 Mich. 576; 41 Am. Rep. 728, *Beckwith v. Oatman*, 43 Hun, 265. In *Simons v. Henry*, 39 Me. 155, 63 Am. Dec. 611, it was held that an apothecary was responsible only for injury resulting from a want of ordinary care and skill, and that the highest degree of skill was not required of him. This case stands alone in such ruling.

Although druggists are held to the exercise of a very high degree of care, and are liable for the slightest degree of negligence, yet the cases are very generally agreed that in actions against apothecaries and druggists for injury arising from their acts, their actual negligence must be alleged and proved. The question is whether the delivery at a drug store of a deleterious drug to one who calls for one that is harmless and a damage resulting therefrom will not merely tend to make out a right of action, but of themselves give a right of action, even though there may have been no intentional wrong and the jury may believe there was no negligence. That such an error might occur without fault on the part of the druggist or his clerks is readily supposable. He may have bought his drugs from a reputable dealer in whose warehouse they have been tampered with for the purpose of mischief. It is easy to suggest accidents after they come to his possession, or wrongs by others of which he would be ignorant, and against which a high degree of care would not give perfect protection. But how the misfortune occurs is not important, if under all circumstances the fact of occurrence is attributable to him as legal fault. The case, it must be conceded, is one in which a very high degree of care may justly be required. People trust not merely their health, but their lives, to the knowledge, care, and prudence of druggists, and in many cases a slight want of care is liable to prove fatal to some one. It is, therefore, proper and reasonable that the care required shall be proportioned to the danger involved. But we do not find that the authorities have gone so far as to dispense with actual negligence as a necessary element in the liability when a mistake has occurred. In the leading case of *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, where a druggist carelessly labeled a poison as a harmless medicine and sold it accordingly, his liability for the consequences was expressly grounded on

actual negligence. So it was in *Norton v. Sewell*, 106 Mass. 143; 8 Am. Rep. 298; *Brown v. Marshall*, 47 Mich. 576; 41 Am. Rep. 728.

The liability of druggists is the same as that governing the liability of professional persons whose work requires special knowledge or skill, and such a person is not legally responsible for an unintentional consequential injury resulting from a lawful act, when the failure to exercise proper care cannot be imputed to him, and the burden of proving such lack of care, when the act is lawful, is upon the plaintiff: *Allan v. State S. S. Co.*, 132 N. Y. 91; 28 Am. St. Rep. 556. "The defendant undertook, when he assumed to put up the prescription for the plaintiff, that he possessed the ordinary skill of a druggist or apothecary, and that he would exercise due and proper care and skill in putting up the medicine required, the degree of care being proportionate to the gravity of the injury that would naturally result from a want of care, and a failure to exercise such due and proper care is the only ground upon which an action can be maintained": *Beckwith v. Oatman*, 43 Hun, 265. In *Fleet v. Hollenkemp*, 13 B. Mon. 219, 56 Am. Dec. 563, a druggist, in compounding a medicine, ground the different ingredients in a mill which had been used for poisonous drugs and did not first properly clean it. He claimed the right to go to the jury on the question of due care, and under instructions that if he used due care, or at least, if he used extraordinary and unusual care he was not liable in a civil action. But the court of appeals said, contrary to the rule laid down by the foregoing cases: "It is absurd to speak of degrees of diligence or of negligence as excusing or not excusing, or as settling the question of liability or no liability, in a case where the vendor of drugs, being required to compound innocent medicines, runs them through a mill in which he knew a poisonous drug had shortly before been ground. If mistake or accident could excuse the sending of a medicine different from that applied for, which we do not admit and cannot readily conceive, there could have been neither mistake nor accident in this case, because the fact of the previous use of the mill was known to the vendors, and they are absolutely responsible for a consequence which that knowledge enabled them and made it their duty to avoid. Even accidents and mistakes should not occur in a business of this nature, and they cannot ordinarily occur without there has been such a degree of culpable, if not wanton and criminal, carelessness and neglect as must devolve upon the party unavoidable and commensurate responsibility." A druggist or apothecary may be held liable in damages for the negligence of himself or his clerk in selling sulphate of zinc for Epsom salts: *Walton v. Booth*, 34 La. Ann. 913; and in such case it is no defense that the subsequent medical treatment was negligent: *Brown v. Marshall*, 47 Mich. 576; 41 Am. Rep. 728. One who furnishes or sells a dangerous medicine or drug to a druggist for the purpose of having the latter sell it to his customers and others is, on the latter making such sales, liable to the same extent as if he had sold it himself without the intervention or aid of such druggist; but in such case the

druggist is not liable unless he knows of the dangerous character of the medicine: *Blood Balm Co. v. Cooper*, 83 Ga. 457; 20 Am. St. Rep. 324.

A manufacturing druggist who sells a poisonous drug labeled as harmless by himself or his agent, is liable in damages to a person, who, without carelessness on his part, and relying on the erroneous label, takes such drug as a medicine, and this whether the injured party is an immediate customer of the defendant or not: *Thomas v. Winchester*, 6 N. Y. 397; 57 Am. Dec. 455. The same rule applies to a manufacture of a hair wash by a chemist or druggist: *George v. Skivington*, L. R. 5 Ex. 1. In *Davis v. Guarnieri*, 45 Ohio St. 470, 4 Am. St. Rep. 548, the facts were that a husband, whose wife expressed a desire for a harmless medicine which she was accustomed to use, called at a drugstore to procure it. The agent of the druggist, without informing himself by whom or for what the medicine was to be used, sold and delivered to such husband a poisonous drug. The husband, supposing it to be what he called for, administered it to his wife, who took it in the belief that it was a harmless medicine, and instantly died from its effects, and it was held that these facts constituted a cause of action against such druggist in favor of the administrator of the deceased. In *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298, the defendant, an apothecary, by his servant, negligently sold as and for tincture of rhubarb two ounces of laudanum to a person who procured it for the purpose of administering it, and who did administer it, as a medicine to his servant, the plaintiff's intestate, from the effects of which he died, and it was held that the apothecary was liable in damages to the plaintiff, the administratrix of such servant.

Druggists are always liable for the negligent mistakes of their clerks or servants in compounding and selling poisonous preparations in place of necessary or harmless compounds asked for: *Davis v. Guarnieri*, 45 Ohio St. 470; 4 Am. St. Rep. 548; *Norton v. Sewall*, 106 Mass. 143; 8 Am. Rep. 298. For a drug clerk's negligent mistake in filling a prescription whereby a poisonous substance is furnished instead of a necessary medicine, the druggist is liable for all the resulting damages, including reasonable and necessary costs of medicine, medical attendance, and costs of the care of the patient made necessary by the negligent act of the clerk, and, in case of death therefrom, the damages may include funeral expenses: *Hargrave v. Vaughn*, 82 Tex. 347. In such case the druggist is liable, although absent from the city at the time that the prescription is negligently compounded by his clerk: *McCubbin v. Hastings*, 27 La. Ann. 713. Where a deadly poison is negligently sold and delivered in place of a harmless medicine called for at a drug store, and an injury to the purchaser results therefrom, the druggist is liable for the injury, although the mistake is made through the negligence of his servant, who is not a registered pharmacist; *Smith v. Hays*, 23 Ill. App. 244. A druggist is liable for the act of his clerk, who in the course of his employment sells a deadly

poison, without labeling it poison and injury results therefrom: *Osborne v. McMasters*, 40 Minn. 103; 12 Am. St. Rep. 698. It is negligence for which a druggist is liable for him to sell poison to one, whether the immediate consumer or not, without labeling it poison: *Fisher v. Golladay*, 38 Mo. App. 531; *Osborne v. McMasters*, 40 Minn. 103; 12 Am. St. Rep. 698. But when a druggist sells poison, fully warning the purchaser of its dangerous character and clearly informing him as to what is a safe dose, and the purchaser is killed by taking an overdose in disregard of such directions, the druggist is not liable for not having labeled the parcel "poison": *Wohlfahrt v. Beckert*, 92 N. Y. 490; 44 Am. Rep. 406. The sale of an article in itself harmless, and which becomes dangerous only by being used in combination with some other article, without knowledge, by the druggist selling it, that it is to be used in such combination, does not render him liable to an action by one who purchases the article and who is injured while using it in dangerous combination with another article, although by mistake the article actually sold is different from that which is intended to be sold: *Davidson v. Nichols*, 11 Allen, 514. In a case where plaintiff went into defendant's drug store and helped himself to what he thought was a dose of extract of dandelion, but which was in fact belladonna, and claimed that he bought and took it under defendant's direction, while the real fact was that the jar was properly labeled and plaintiff could have read it, and his only excuse was that defendant had just made the same mistake in filling an order, it was held that plaintiff was guilty of contributory negligence and could not recover: *Gwynn v. Duffield*, 61 Iowa, 64; 47 Am. Rep. 802; 66 Iowa, 708; 55 Am. Rep. 286. If a druggist is induced, by the representations of a person, that a certain parcel on a shelf is his, to deliver such parcel, the druggist not having compounded it himself, and not knowing the nature of its contents, is not liable if it turns out to be poison instead of a harmless medicine, as supposed at the time of delivery: *Hackett v. Pratt*, 52 Ill. App. 346. If a druggist in good faith recommends a prescription not his own, but as that of another named person, and thereupon is ordered by his customer to fill it, and he does so, charging only for the medicine and compounding it, he is not responsible to the customer for any damage resulting from the use or administration of the remedy by the latter: *Ray v. Burbank*, 61 Ga. 505; 34 Am. Rep. 103.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

STATE v. KLOCK.

[48 LOUISIANA ANNUAL, 67.]

CRIMINAL LAW—PUNISHMENT—VOID SENTENCE.—A void sentence is as nothing, but a sentence, though erroneous, is not a nullity, where the court had jurisdiction of the subject.

HABEAS CORPUS—VALIDITY OF EXCESSIVE SENTENCE.—A whole sentence is not void, on habeas corpus, because of an excess, where the court had jurisdiction of the person and the offense. It is invalid only as to the excess, when such excess is separable, and may be dealt with without disturbing the valid portion of the sentence.

HABEAS CORPUS—DEFICIENCY OF PUNISHMENT IN SENTENCE.—A sentence below the minimum is no ground for discharge on habeas corpus, as the relator has nothing to complain of, upon the ground of deficiency in the punishment imposed.

HABEAS CORPUS—DEFICIENCY IN SENTENCE—ILLUSTRATION.—If the punishment prescribed by statute for an offense is imprisonment, "and" a fine, and the period of imprisonment is a separate portion of the sentence, complete in itself and valid, the prisoner is not entitled to discharge on habeas corpus, because no fine is imposed, as this is a mere irregularity.

Application by Numa Dudoussat for a writ of habeas corpus, to be released from the custody of defendant, the sheriff.

Ambrose Smith, for the petitioner.

M. J. Cunningham, attorney general, Charles A. Butler, district attorney, and Lionel Adams, for the state.

68 BREAU, J. The court in the case of the state of Louisiana v. Numa Dudoussat entered judgment, upon the verdict, condemning him to imprisonment in the state penitentiary, at hard labor, for three years. On appeal to this court, the sentence and judgment were affirmed.

Under the statute, the penalty is imprisonment at hard labor during a period of not less than one year, and not more than five years; and a fine of not less than fifty dollars, and not more than five thousand dollars.

The complaint of the relator is, that the error of the trial judge, in not having imposed a fine as part of the sentence, vitiates the proceedings of both the trial and appellate courts, and makes them void ab initio.

He prays for the writ of habeas corpus, that nullity be pronounced, and that he be released from custody.

Three propositions suggest themselves for the purpose of the discussion as covering the principles which concern us here.

1. That the whole sentence is not void, because of an excess; that it is invalid only as to the excess; 2. That if the sentence is below the minimum, it is not a good ground in se for releasing the prisoner on a habeas corpus; 3. That if the period of imprisonment is a separate portion of the sentence, complete in itself and valid, the prisoner is not entitled to discharge on habeas corpus.

The first proposition is supported by the decision in the United States v. Pridgeon, 153 U. S. 48-63. ⁶⁹ In the cited case the defendant applied to be discharged from custody because the sentence imposed was beyond the power and jurisdiction of the court, and therefore void. The imposition of the sentence was in excess of what the law permits, and none the less the court held that the sentence was legal so far as the power of the court extended, and was only illegal as to the excess. The decision received the unanimous approval of all the members of that exalted tribunal, citing approvingly a number of its own decisions as well as decisions of appellate courts of a number of states.

In another case, *In re Swan*, 150 U. S. 637, 653, that court held, even if the court had exceeded its authority, yet the prisoner could not be discharged on habeas corpus until he had served the sentence it was within the power of the court to impose.

The relator relies upon *Ex parte Lange*, 18 Wall. 163, to which our attention was directed. In that case it is announced that "the error of the court in imposing the two punishments mentioned in the statutes, when it had only the alternative of one of them, did not make the judgment wholly void."

The punishment under the statute was imprisonment for not more than one year or a fine of not less "than ten dollars, nor more than two hundred dollars." The judge sentenced Lange,

under the conviction, to one year's imprisonment and to pay two hundred dollars fine. The defendant paid the fine and filed a petition praying for a writ of habeas corpus. The judgment of the court had been rendered and carried into execution, yet an attempt was made (by the court on habeas corpus) to vacate the judgment and render another for one year's imprisonment, in compliance with the terms of the statute. The defendant had been punished. The supreme court applied the principle of the law, on the application for habeas corpus, that no one can be twice punished for the same crime at the same time; and announced, in substance, that a defendant is not entitled to a discharge where a portion of the sentence is legal, but that the court cannot, even during the term, amend a sentence which has been executed in part, without invading the right of an accused not to be twice vexed or punished for the same offense.

There is considerable distinction between a void judgment apparent on an application for a writ of habeas corpus and those judgments ⁷⁰ which are voidable in a direct proceeding instituted for the purpose of vacating them, setting them aside, or reversing them. A void judgment is as nothing.

Upon this subject Mr. Justice Miller, speaking for the court, said: "An imprisonment under a judgment cannot be unlawful, unless the judgment is an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous": *In re Coy*, 127 U. S. 731, 757. Here the court had general jurisdiction of the subject.

In *re Graham*, 138 U. S. 461, 463, Justice Field said, in regard to a similar question (the defendant was condemned to serve in excess of the time presented) that the prisoner should not have been sentenced, as he was, for a time exceeding ten years. "When the ten years have expired, it is probable the court will order the prisoner's discharge, but until then he has no right to ask the annulment of the entire judgment."

In *Ex parte Van Hagan*, 25 Ohio St. 426, 432, the supreme court of that state held: "The punishment inflicted by the sentence in excess of that prescribed by the law in force was erroneous and voidable, but not absolutely void. The excess can be held void and disregarded": *People v. Baker*, 89 N. Y. 460.

In California a defendant had been sentenced to serve three years. The law's limit was six months. He was discharged at the end of the six months on an application for habeas corpus: *Ex parte Bulger*, 60 Cal. 438. In Texas it was decided a pris-

oner held in custody under judicial proceedings not void cannot obtain relief by habeas corpus: *Ex parte Boland*, 11 Tex. App. 159.

Our immediate predecessors in *State v. Brannon*, 34 La. Ann. 942, held, on appeal, that the whole sentence is not illegal and void because of the excess, and amended the judgment by decreeing it invalid only as to the excess, and the remaining sentence was decreed valid.

The authorities to which we have referred heretofore relate to penalties above the maximum; the error in those cases, if not corrected, would be prejudicial.

Here the question relates to a sentence below the minimum, and the error, if not corrected, would not be prejudicial; it is an error ⁷¹ really in defendant's favor, and is not to be viewed in the same light as the former.

In *Barada v. State*, 13 Mo. 94-96, not on application for habeas corpus, but on writ of error, the court did not annul the sentence, imposing a fine less than the minimum limit, on the ground that it was not an injury to the defendants or to their prejudice.

In Tennessee, again, on appeal in error, the court held that a party cannot assign for error that which is for his own advantage applies as well to criminal as to civil proceedings. The complaint was, that the term of confinement was less than the minimum of the statute; that instead of two years it should have been three years. The error, it was held, was only formal: *Wattingham v. State*, 5 Sneed, 64, 68.

It will be observed that in these last cases having bearing here the question came up on writ of error. We express no opinion, as there is no necessity, in regard to the correctness or incorrectness of thus holding at such a period of the case. We only cite them as authority in support of the position that a party on application for habeas corpus has nothing to complain of, upon the ground of deficiency in the punishment imposed.

This court sustained that view in *State v. Evans*, 23 La. Ann. 525, and held that a judgment will not be reversed on appeal, though the judge a quo assessed a smaller fine on the accused than he was authorized. The interpretation was in favor with Mr. Bishop, as we read his work on Criminal Law: 1 Bishop on Criminal Law, 931.

Mr. Church, on habeas corpus, says: "Where the sentence can be so divided, the invalid part may be discharged, and the pris-

oner ought not to be discharged in habeas corpus, until he has served out the valid portion of the sentence": Church on Habeas Corpus, par. 353.

The right on appeal is not limited as it is on an application for a writ of habeas corpus; the same court, without inconsistency, may, on appeal, remand a case on the ground here for further proceeding, and might decline to release a prisoner on application for a writ of habeas corpus.

Of the many cases we have examined, we have not, as we read them, found an authority sustaining the application here made. In case of a writ of error to the district court of the United States, the 72^d circuit court held that any variation, either in character or extent of the punishment, avoids the judgment: Woodruff v. United States, 58 Fed. Rep. 766, 768.

In habeas corpus proceedings distinction is observed. We quote from the first decision before cited—i. e., United States v. Pridgeon, 153 U. S. 48-63: "In other words, the sound rule is, that a sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and the offense, and only void *as to the excess, when such excess is separable and may be dealt with without* disturbing the valid portion of the sentence. "Many well-considered authorities, in England as well as in this country, hold that where *there is jurisdiction* of the person and of the offense the excess in the sentence of the court beyond the provisions of law is only voidable in proceeding upon writ of error." (The italics are ours.) The court in that case cites, in support of the principle announced: Ex parte Lange, 18 Wall. 163; Sennot's case, 146 Mass. 489, 493; 4 Am. St. Rep. 344; People v. Kelly, 97 N. Y. 212; People v. Liscomb, 60 N. Y. 559; 19 Am. Rep. 211; People v. Jacobs, 66 N. Y. 8; Ex parte Shaw, 7 Ohio St. 81; 70 Am. Dec. 55; Ex parte Van Hagan, 25 Ohio St. 426; In re Graham, 74 Wis. 450; 17 Am. St. Rep. 174; Elsner v. Shrigley, 80 Iowa, 30; Ex parte Max, 44 Cal. 579.

It was argued at the bar that, under the article of the Code of Practice relating to that writ, it is a question of want of power. But may it not be suggested that the power exists to the extent that the court had jurisdiction to render the particular judgment. There is no excess in so far as relates to the particular punishment; it is a question of irregularity in not having imposed a fine.

In two cases of this court, cited supra, the error did not vitiate the proceedings. Without overruling these decisions and disre-

garding the rule established by a long chain of authorities, we cannot release the relator on this writ.

It is therefore ordered and adjudged that the present application be denied and the proceedings for habeas corpus dismissed.

Validity of Sentences Differing from those Authorized by Law.

Sentences below the minimum.—In the event that a verdict of guilty is returned by the jury in a criminal case, the law usually prescribes what the sentence shall be, or, at least, prescribes certain limits within which the sentence must be confined. So, if the statute specifically describes an offense, and specifically prescribes the punishment therefor, all other kinds and degrees of punishment are excluded and unauthorized: *Haney v. State*, 5 Wis. 529. If the court, therefore, in passing sentence, does not follow the statute, but imposes a sentence less than that which it is, by law, directed to impose, the sentence is clearly not warranted by the law; but whether its action is a mere erroneous exercise of jurisdiction, and therefore voidable only, or is beyond and without its jurisdiction, and therefore void, is a question upon which the authorities are divided. The weight of authority, perhaps, is slightly in support of the proposition that a deficient sentence, or one below the minimum prescribed by law, is simply erroneous and voidable, but not absolutely void, that such sentences are "not hurtful to any right of liberty," and that they cannot be successfully attacked, in a collateral way, by means of the writ of habeas corpus: *Freeman on Judgments*, 4th ed., sec. 625; *Church on Habeas Corpus*, 2d ed., secs. 353 a, 365 b; *Ex parte Shaw*, 7 Ohio St. 81; 70 Am. Dec. 55; *Lark v. State*, 55 Ga. 435; *In re Williams*, 39 Minn. 172.

Thus, if one convicted of horse stealing, is sentenced to the penitentiary for only one year, where the law requires the sentence for such an offense to be for a period of not less than three years, the sentence is erroneous, but not void, and the prisoner is not entitled to discharge on habeas corpus: *Ex parte Shaw*, 7 Ohio St. 81; 70 Am. Dec. 55. So, when a convicted person has been sentenced to labor on only a part of the public works, instead of all of them: *Lark v. State*, 55 Ga. 435; or where he has been sentenced for the crime of grand larceny, in the first degree, to one year and three months only in the state prison, when the statute requires that the penalty shall not be less than five years, etc.: *In re Williams*, 39 Minn. 172. And it has been held, on habeas corpus, that if a person has been convicted of an offense for which he cannot be punished by both fine and imprisonment, but such a sentence is imposed, the court before which the conviction was had has power, within a reasonable time, where terms of court have been abolished, to vacate the sentence, and impose one in accordance with law; and a delay of six days is not unreasonable: *Ex parte Gilmore*, 71 Cal. 624.

On the other hand, it has been held that a prisoner sentenced to simple imprisonment for an offense punishable by imprisonment at hard labor may be released on habeas corpus, as imprisonment at

hard labor, when prescribed by statute as a part of the punishment, must be included in the sentence of the person convicted: *Ex parte Karstendick*, 93 U. S. 396; *In re Johnson*, 46 Fed. Rep. 477. In line with this is *Ex parte Bernert*, 62 Cal. 524. There the prisoner was convicted in a police court, which had jurisdiction of the person and of the offense. The punishment prescribed by law was a fine of not less than one hundred dollars, or imprisonment not exceeding thirty days in case the fine was not paid. The court fined the prisoner twenty dollars only, and directed that, in default of payment, he be confined in the county jail for the period of ten days. The statute not having been complied with, this judgment was pronounced not erroneous merely, but void, and the prisoner was discharged on habeas corpus.

It has been held that a party cannot, on appeal, complain that a fine assessed against him is less than the minimum provided for by ordinance: *Harmison v. Lewistown*, 153 Ill. 313; 46 Am. St. Rep. 893; and it is no ground of error that a sentence is less than it might have been, so long as it does not involve a different kind of punishment from that allowed by law: *People v. Rouse*, 72 Mich. 59. If the prisoner wants a wider punishment, the time to ask for it is when sentence is pronounced: *Lark v. State*, 55 Ga. 435. He will not be allowed, on error or appeal, according to many authorities, to complain of an error which does not injure him, and which is unmistakably in his favor; such as a sentence below the minimum: *Lark v. State*, 55 Ga. 435; *People v. Rouse*, 72 Mich. 59; *Wattingham v. State*, 5 Sneed, 64; *People v. Bauer*, 37 Hun, 407; *Barada v. State*, 13 Mo. 94; *Dillon v. State*, 38 Ohio St. 586; *McQuoid v. People*, 3 Gilm. 76; *State v. James*, 37 Conn. 355; as it is a general principle that a defendant cannot assign for error, either in a civil or criminal proceeding, any decision, order, or judgment of a court which is manifestly in his favor: *McQuoid v. People*, 3 Gilm. 76. A judgment that two defendants, indicted jointly, pay a fine of fifty dollars, instead of each one to pay that sum, where the penalty fixed by law is a fine of not less than fifty dollars, does not injure the defendants or prejudice them, and the appellate court will "pay little attention" to the error: *Barada v. State*, 13 Mo. 94. So, if a party convicted of an offense is subject to two distinct and independent punishments, it cannot be alleged for error that one only of the punishments to which he was liable is adjudged against him. The prosecutor may complain of such omission, but not the party convicted: *Kane v. People*, 8 Wend. 203. It has been held that the judgment of the court below in a criminal case will not be reversed on appeal, where the judge a quo simply erred by assessing a smaller fine on the accused than he was authorized by law to impose: *State v. Evans*, 23 La. Ann. 525; that sentencing a prisoner, convicted of grand larceny, to two years' imprisonment in the penitentiary, where the minimum term fixed by statute for that offense is three years, is no ground for a new trial: *Wattingham v. State*, 5 Sneed, 64; and that, if no fine is assessed, where the penalty is fine and imprisonment,

the failure of the judge to discharge his whole duty by imposing both the fine and imprisonment provided by law, will not warrant a reversal. "The sentence in such case being warranted, the defendants is not prejudiced by the error of the court in failing to inflict upon him the additional punishment": *Dillon v. State*, 38 Ohio St. 586. So, where a prisoner was sentenced for a part only of the term fixed by statute, the court said: "The most that can be done for him, therefore, on this appeal is to reverse the judgment for error in the sentence, and remit the record to the court in which the conviction was had to pass such sentence as we direct." As the appellant presented at most but an irregularity, and as the conviction was lawful, though the sentence was unauthorized, the court deemed it proper to affirm the judgment: *People v. Bauer*, 37 Hun, 407.

But other cases hold that if a defendant is sentenced to a punishment different from that prescribed by the statute defining the offense of which he is convicted, he may assign such sentence for error, though it is of less severity than that prescribed by the statute: *Haney v. State*, 5 Wis. 529; *Woodruff v. United States*, 58 Fed. Rep. 766; *Harman v. United States*, 50 Fed. Rep. 921. Thus, if a defendant is sentenced to pay a fine of two hundred dollars for an assault with intent to murder, while the statute prescribes punishment by imprisonment in the state prison not more than five years, nor less than one year, the judgment, not being in conformity with the statute, will, upon a writ of error brought by the defendant, be reversed, upon the ground that the sentence is not the one which the law prescribes, nor one which the law authorizes the court to pronounce: *Haney v. State*, 5 Wis. 529. So, a judgment may be erroneous in part, and valid as to the residue; and, while a fine of four dollars, where the statute requires five, is unwarranted and unauthorized, the remainder of the judgment, as an order to remove a nuisance within thirty days, and to pay the costs of prosecution, is not invalid by reason of the error of the court in respect to the fine, and must be affirmed, on writ of error, though that part of the judgment as to the fine will be reversed: *Taff v. State*, 39 Conn. 82. If a person is convicted, in the federal courts, of mailing obscene papers, and is sentenced to the penitentiary, but not to hard labor, as required by the statutes of the United States, the error is fatal, and authorizes a reversal of judgment: *Harman v. United States*, 50 Fed. Rep. 921. So, where a defendant is convicted for embezzling post-office money order funds, and the statute requires that he shall be imprisoned and fined in a sum equal to the amount embezzled, a sentence of imprisonment, without any fine, is invalid, and will be reversed on writ of error: *Woodruff v. United States*, 58 Fed. Rep. 766. Notwithstanding the want of uniformity prevailing in the state courts as to the effect of a sentence not warranted by law, the rule in the courts of the United States is, that a judgment in a criminal case must conform strictly to the statute, and that any variations from its provisions, either in the character or extent of the punishment inflicted, renders the judgment absolutely void, as to the un-

authorized portion of it: *Harman v. United States*, 50 Fed. Rep. 921; *Woodruff v. United States*, 58 Fed. Rep. 766; *In re Johnson*, 46 Fed. Rep. 477; *United States v. Pridgeon*, 153 U. S. 48.

If a sentence different from that authorized by law is imposed upon a defendant convicted of a criminal offense, and the judgment is reversed for such error, and the cause is remanded to the trial court with instructions to proceed therein according to law, which is the usual course where a reversal is had for such an error, the trial court resumes jurisdiction of the cause, and has authority to resentence the defendant, and to impose the penalty provided by law, notwithstanding part of a void sentence has been executed: *United States v. Harman*, 68 Fed. Rep. 472. In this case, the statute directed that the imprisonment must be "at hard labor," which words were omitted from the sentence. It seems, however, that, in some jurisdictions, the appellate court has power to reform an unauthorized sentence. For example, the appellant was, by the verdict and judgment in a trial court, awarded five years in the penitentiary. The sentence, however, allotted him but two years, and the court, without remanding the case, reformed the sentence to conform to the verdict and judgment: *McDonald v. State*, 14 Tex. App. 504.

Excessive sentences, or those above the maximum, whether void.—An excessive sentence, as we use the term in this note, is one by which a greater punishment is inflicted than that allowed by law. In such a case, it is sometimes held on habeas corpus, issued by the supreme court of the state, that the whole sentence is void ab initio, on the ground that the lower court, in passing sentence, exceeded its jurisdiction, did not act by authority of any provision of law, and that the higher court has no authority to reduce the term of imprisonment so as to bring it within the statutory limit: *Ex parte Page*, 49 Mo. 291; *Ex parte Baldwin*, 60 Cal. 432. There is authority for the proposition that a punishment inflicted by a sentence, in excess of that prescribed by law, being merely erroneous and voidable, but not absolutely void, does not authorize proceedings on habeas corpus, but that an appeal or writ of error is the remedy to correct the error: See *Freeman on Judgments*, 4th ed., sec. 625; *Church on Habeas Corpus*, 2d ed., sec. 373; *Ex parte Van Hagan*, 25 Ohio St. 426, 432; *Sennott's case*, 146 Mass. 489; 4 Am. St. Rep. 344, and authorities there cited.

We find cases, however, in which the defendant has been discharged on habeas corpus, where a sentence above the maximum provided by law has been imposed; where the sentence is not severable into parts, one complete and valid in itself and the other in such form that it may be disregarded; and especially where there is no power to pass the proper sentence, or to remand the case, in order that the trial court may do so: See *Freeman on Judgments*, 4th ed., sec. 625; *Church on Habeas Corpus*, 2d ed., secs. 353 a, 373; *Ex parte McGrew*, 40 Tex. 472; *In re Stewart*, 16 Neb. 193; *People v. Carter*, 48 Hun, 165; *People v. Riseley*, 38 Hun, 280; *Ex parte Long*, 87 Ala. 46; *Ex parte Reynolds*, 87 Ala. 138; *Ex parte Sylvester*, 81 Cal.

199; *Feeley's case*, 12 Cush. 598; *Ex parte Baldwin*, 60 Cal. 432; and where an excessive sentence has been imposed, it has been held to be the duty of the court, on habeas corpus, to exercise its power of declaring the judgment void as to the excess, where that can be separated from the portion of the sentence which is complete in itself and valid: *People v. Baker*, 89 N. Y. 461. See *Ex parte Bulger*, 60 Cal. 438; *In re Graham*, 138 U. S. 461, 463.

A justice of the peace having power to punish only by fine "or" imprisonment cannot lawfully sentence a defendant to fine "and" imprisonment: *In re Stewart*, 16 Neb. 193. So, where a court has power to sentence only to fine "or" imprisonment, and sentences to fine "and" imprisonment, and the fine is paid, the remainder of the punishment is not authorized by law: *Feeley's case*, 12 Cush. 598; *Ex parte Lange*, 18 Wall. 163. A sentence to hard labor, imposed by a municipal court, which has power to punish only by fine or imprisonment, is illegal and void: *Ex parte Reynolds*, 87 Ala. 138; *Ex parte Kelly*, 65 Cal. 154. On conviction of vagrancy before a justice of the peace, a fine of twenty dollars, followed by a sentence that, in default of payment, the defendant is to be detained in custody "until he performs twenty days' hard labor for the county for said fine, and sixty days for said costs," is a nullity: *Ex parte Long*, 87 Ala. 46. If the statute limits the punishment to a fine not exceeding fifty dollars, or imprisonment not exceeding six months, a fine of two hundred and fifty dollars, or imprisonment until it is paid, not exceeding one year, is void: *People v. Riseley*, 38 Hun, 280; so with a fine of one hundred dollars, or imprisonment until it is paid, not exceeding one hundred days: *People v. Carter*, 48 Hun, 165. It has been held in California, on an application for habeas corpus, that the judgment under which the prisoner is detained is a unit, and that, if one portion of it is without the jurisdiction of the court which rendered it, the whole is void. In other words, the court cannot excise the void portion of an excessive sentence from the judgment, and order what remains to be carried into execution: *Ex parte Kelly*, 65 Cal. 154; *Ex parte Baldwin*, 60 Cal. 432. But, in a later case, the prevailing rule as to giving effect to the valid portion of a sentence is adopted, and it is held that if a prisoner is sentenced, for an assault with a deadly weapon, to imprisonment in the state prison for two years, and to pay a fine, and to be imprisoned in the same prison one day for every dollar of the fine, the sentence of imprisonment as a punishment is valid, conceding that the portion of the judgment providing for imprisonment as a means of enforcing the fine is invalid, and should be enforced: *Ex parte Mitchell*, 70 Cal. 1.

The prevailing rule is, that an excessive sentence is merely erroneous and voidable; that the whole sentence is not illegal because of the excess; that it is not void ab initio; and that it is good on habeas corpus, so far as the power of the court extends, and invalid only as to the excess: *People v. Jacobs*, 66 N. Y. 8; *People v. Liscomb*, 60 N. Y. 559; 19 Am. Rep. 211; reversing 3 Hun, 760; 6 Thomp. & C.

258; *Ex parte Mooney*, 26 W. Va. 36; 53 Am. Rep. 59; *In re Crandall*, 34 Wis. 177; *Ex parte Bowen*, 25 Fla. 214; *Ex parte Crenshaw*, 80 Mo. 447; *In re Graham*, 74 Wis. 450; 17 Am. St. Rep. 174; 76 Wis. 366; 138 U. S. 461; *Ex parte Van Hagan*, 25 Ohio St. 426, 432; *In re Pierce*, 44 Wis. 411; *In re Sweatman*, 1 Cow. 144; *People v. Baker*, 89 N. Y. 461; monographic note to *Morrill v. Morrill*, 23 Am. St. Rep. 104, 110, discussing collateral attacks upon judgments; *Sennott's case*, 489, 493; 4 Am. St. Rep. 344; *United States v. Pridgeon*, 153 U. S. 48, 63; *In re Paschal*, 56 Kan. 123. If the sentence can be divided into two parts, one legal and the other not, the prisoner ought not to be discharged on habeas corpus until he has served out the valid portion of the sentence: *Feeley's case*, 12 Cush. 598; *In re Sweatman*, 1 Cow. 144; *People v. Baker*, 89 N. Y. 461; *In re Paschal*, 56 Kan. 123; *In re Swan*, 150 U. S. 653.

In Wisconsin it has been held that a judgment sentencing a person to imprisonment for a longer term than the statute warrants is merely erroneous and not void for want of jurisdiction: *In re Graham*, 74 Wis. 450; 17 Am. St. Rep. 174; followed in *In re Graham*, 76 Wis. 366; and the supreme court of the United States, in affirming the judgment in this case on writ of error, said: "When the highest court of a state holds that a judgment of one of its inferior courts imposing punishment in a criminal case is valid and binding to the extent in which the law of the state authorized the punishment, and only void for the excess, we cannot treat it as wholly void, there being no principle of federal law invaded in such ruling": *In re Graham*, 138 U. S. 461. The whole judgment in a commitment for contempt is not void because it attempts to impose upon the party sentenced the costs of another proceeding, or because it does not specify the amount of such costs: *Ex parte Henshaw*, 73 Cal. 486. Compare *Ex parte Crenshaw*, 80 Mo. 447; or because it includes items of costs and expenses which ought not properly to be allowed: *People v. Jacobs*, 66 N. Y. 8.

If the punishment for a crime is defined and limited by statute and the court has imposed a sentence to the full limit allowed by the statute, it has exhausted its authority in the case, and, if it pronounces a sentence beyond the maximum allowed by law, or proceeds to impose further additional sentences, such increased punishment is void, and affords no justification for the detention of the prisoner after he has served out the full term of imprisonment which the statute empowered the court to impose upon him, and he is then entitled to his discharge on habeas corpus: *People v. Liscomb*, 60 N. Y. 559; 19 Am. Rep. 211; *Ex parte Bulger*, 60 Cal. 438; *In re Graham*, 138 U. S. 461, 463; *Ex parte Bowen*, 25 Fla. 214; *In re Lewis*, 10 Utah, 47. So, where an offense is punishable by imprisonment "or" fine, but both punishments are imposed, the defendant is entitled to his discharge on habeas corpus after one of the alternative punishments has been executed, as the other is void: *Ex parte Lange*, 18 Wall. 163.

But, if the statute authorizes imprisonment in the penitentiary, or imprisonment in jail and a fine, and the court adjudges imprisonment

in the penitentiary and a fine, the defendant is not entitled to discharge on habeas corpus until he has served out the term of imprisonment, as that portion of the sentence is valid *Ex parte Mooney*, 28 W. Va. 36; 53 Am. Rep. 59. If the prisoner is held under two or more judgments, one of which is valid, or under one sentence only, valid in part, he ought not to be discharged until the valid part has been served: *Ex parte Cox*, 29 Tex. App. 84; *Ex parte Ryan*, 17 Nev. 139.

If the statute makes battery punishable by fine, or by imprisonment in the county jail not exceeding six months, or both, and the prisoner is sentenced to three years' imprisonment in the house of correction, he will be released on habeas corpus at the expiration of the period of six months' imprisonment: *Ex parte Bulger*, 60 Cal. 438. Upon the trial of an indictment containing several counts, charging separate and distinct misdemeanors of the same grade, the court has no power, where a general verdict of guilty is rendered, or a verdict of guilty upon two or more specified counts, to impose a sentence or cumulative sentences exceeding, in the aggregate, what is prescribed by statute as the maximum punishment for one offense of the character charged; all excess of punishment beyond this is simply void: *People v. Liscomb*, 60 N. Y. 559; 19 Am. Rep. 211; reversing same case, 3 Hun, 760; 6 Thomp. & C. 258. Under a statute providing that imprisonment to enforce a fine must "not extend, in any case, beyond the term for which the defendant might be sentenced to imprisonment for the offense of which he has been convicted," the prisoner is entitled to a discharge on habeas corpus after the expiration of the maximum term of imprisonment allowed by statute as a punishment for the offense: *Ex parte Erdmann*, 88 Cal. 579. So, where a justice of the peace has reached the limit of his jurisdiction in adjudging that the defendant be imprisoned in the county jail for a period of six months, he has no valid authority to adjudge that the defendant be imprisoned in default of a fine imposed, and to that extent the judgment is void: *In re Lewis*, 10 Utah, 47. So, where one was sentenced to imprisonment for thirty days, and to pay a fine of fifteen dollars, and it was also adjudged that, unless the fine was paid, the prisoner should be imprisoned for the term of four months, where the statute prohibited imprisonment for a longer term than thirty days for the nonpayment of a fine, the sentence of thirty days' imprisonment was, on habeas corpus, held valid; but the award of the four months' imprisonment was held clearly to exceed the jurisdiction of the committing justice, and consequently void and inoperative even for thirty days of the additional term: *In re Sweatman*, 1 Cow. 144. If one has been sentenced, for an offense, to imprisonment for one year and to pay a fine of five hundred dollars, the prisoner to stand committed until the fine is paid, and the imprisonment is authorized for the actual crime alleged, but the fine is void, the prisoner is not entitled to his discharge until the expiration of the year: *People v. Baker*, 89 N. Y. 461. A term of imprisonment is not void because of the additional imposition of "hard labor" during the prisoner's confinement: *United States v. Pridgeon*, 153 U. S. 48, 63; *Ex parte Simmons*, 62 Ala. 416. *Contra*, *In re Pridgeon*, 57 Fed. Rep.

200. An unauthorized and void amendment to a judgment limiting the imprisonment to one day for every three dollars and thirty-three cents of the fine imposed, does not affect the original judgment: *Elsner v. Shrigley*, 80 Iowa, 30.

An appellate court will sometimes, in the exercise of its discretionary powers, on an appeal from a judgment in a habeas corpus case, reverse the judgment of the lower court "back to the conviction—no further," where the lower court has exceeded its authority in fixing the punishment after a lawful conviction, and remand the prisoner for such sentence as is authorized by law: *People v. Kelly*, 97 N. Y. 212; affirming 32 Hun, 536; *Ex parte Herrington*, 87 Ala. 1. If, however, there is no power to remit the case for further judgment, the prisoner will be discharged where the judgment is void, though the conviction is proper: *People v. Carter*, 48 Hun, 165. Upon the defendant's conviction of an offense punishable only by imprisonment in a penitentiary or county jail for not more than one year, or by a fine of not more than five hundred dollars, or by both, a sentence of the prisoner to imprisonment at hard labor in a state prison is void, but the conviction is still valid, and the prisoner is not entitled to his discharge on habeas corpus proceedings, but should be remanded to the sheriff, that the trial court may deal with him according to law: *People v. Kelly*, 97 N. Y. 212, affirming 32 Hun, 536. This course was approved in the case of *In re Bonner*, 151 U. S. 242, where one convicted of larceny upon the high seas, and subject to imprisonment for one year, and the payment of a fine, was sentenced to imprisonment in a state penitentiary. The conviction was held good, but the judgment void, as the law did not allow the court, the imprisonment being limited to one year, to send the prisoner to the penitentiary. It was, therefore, held that the prisoner was entitled to a writ of habeas corpus directing his discharge from the custody of the warden of the penitentiary, but without prejudice to the right of the United States to take any lawful measures to have the petitioner sentenced in accordance with law upon the verdict against him. In this case Mr. Justice Field said: "In all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction, and to try the case, and to render judgment. It cannot pass beyond those limits in any essential requirement in either stage of these proceedings; and its authority in those particulars is not to be enlarged by any mere inferences from the law or doubtful construction of its terms. There has been a great deal said and written, in many cases, with embarrassing looseness of expression, as to the jurisdiction of the courts in criminal cases. From a somewhat extended examination of the authorities, we will venture to state some rules applicable to all of them, by which the jurisdiction as to any particular judgment of the court in such cases may be determined. It is plain that such court has jurisdiction to render a particular judgment only when the offense charged is within the class of offenses placed by the law under its jurisdiction; and when, in taking custody of the accused, and in its modes of procedure to the determination of the question of his

guilt or innocence, and in rendering judgment, the court keeps within the limitations prescribed by the law, customary or statutory. When the court goes out of these limitations, its action, to the extent of such excess, is void. Proceeding within these limitations, its action may be erroneous, but not void. . . .

"The law of our country takes care, or should take care, that not the weight of a judge's finger shall fall upon anyone except as specifically authorized. A rigid adherence to this doctrine will give far greater security and safety to the citizen than permitting the exercise of an unlimited discretion on the part of the courts in the imposition of punishments as to their extent, or as to the mode or place of their execution, leaving the injured party, in case of error, to the slow remedy of an appeal from the erroneous judgment or order, which, in most cases, would be unavailing to give relief. In the case before us, had an appeal been taken from the judgment of the United States court of the Indian Territory, it would hardly have reached a determination before the period of the sentence would have expired, and the wrong caused by the imprisonment in the penitentiary have been inflicted.

"Much complaint is made that persons are often discharged from arrest and imprisonment where their conviction, upon which such imprisonment was ordered, is perfectly correct, the excess of jurisdiction on the part of the court being in enlarging the punishment or in enforcing it in a different mode or place than that provided by the law. But in such cases there need not be any failure of justice; for, where the conviction is correct and the error or excess of jurisdiction has been as stated, there does not seem to be any good reason why jurisdiction of the prisoner should not be reassumed by the court that imposed the sentence in order that its defect may be corrected. The judges of all courts of record are magistrates, and their object should be not to turn loose upon society persons who have been justly convicted of criminal offenses, but, where the punishment imposed, in the mode, extent, or place of its execution, has exceeded the law, to have it corrected by calling the attention of the court to such excess. We do not perceive any departure from principle or any denial of the petitioner's right in adopting such a course. He complains of the unlawfulness of his place of imprisonment. He is only entitled to relief from that unlawful feature, and that he would obtain if opportunity be given to that court for correction in that particular. It is true where there are also errors on the trial of the case affecting the judgment, not trenching upon its jurisdiction, the mere remanding the prisoner to the original court that imposed the sentence, to correct the judgment in those particulars for which the writ is issued, would not answer, for his relief would only come upon a new trial; and his remedy for such errors must be sought by appeal or writ of error. But, in a vast majority of cases, the extent and mode and place of punishment may be corrected by the original court without a new trial, and the party punished as he should be whilst relieved from any excess committed by the court of which he complains. In such case, the original court would only set aside what it

had no authority to do and substitute directions required by the law to be done upon the conviction of the offender.

"Some of the state courts have expressed themselves strongly in favor of the adoption of this course, where the defects complained of consist only in the judgment—in its extent, or mode, or place of punishment—the conviction being in all respects regular. In *Beale v. Commonwealth*, 25 Pa. St. 11, 22, the supreme court of Pennsylvania said: 'The common law embodies in itself sufficient reason and common sense to reject the monstrous doctrine that a prisoner, whose guilt is established, by a regular verdict, is to escape punishment altogether, because the court committed an error in passing the sentence. If this court sanctioned such a rule, it would fail to perform the chief duty for which it was established.'

"It is true that this language was used in a case pending in the supreme court of a state on writ of error, but if then the court would send the case back to have the error, not touching the verdict, corrected and justice enforced, there is the same reason why such correction should be made when the prisoner is discharged on habeas corpus for alleged defects of jurisdiction in the rendition of the judgment under which he is held. The end sought by him—to be relieved from the defects in the judgment rendered to his injury—is secured, and at the same time the community is not made to suffer by a failure in the enforcement of justice against him.

"The court is invested with the largest power to control and direct the form of judgment to be entered in cases brought up before it on habeas corpus. Section 761 of the Revised Statutes of the United States on this subject provides that: 'The court, or justice, or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.' It would seem that, in the interest of justice and to prevent its defeat, this court might well delay the discharge of the petitioner for such reasonable time as may be necessary to have him taken before the court where the judgment was rendered, that the defects for want of jurisdiction, which are the subject of complaint in that judgment may be corrected: *Medley v. Petitioner*, 134 U. S. 160, 174. . . .

"In some cases, it is true that no correction can be made of the judgment, as where the court had, under the law, no jurisdiction of the case—that is, no right to take cognizance of the offense alleged, and the prisoner must then be entirely discharged; but those cases will be rare, and much of the complaint that is made for discharging, on habeas corpus, persons who have been duly convicted will be thus removed": See *In re Pierce*, 44 Wis. 411. "There is no law or justice," says Mr. Justice Jackson, in *United States v. Pridgeon*, 153 U. S. 48, 63, "in giving to a prisoner relief under habeas corpus that is equivalent to an acquittal, when, upon writ of error, he could only have secured relief from that portion of the sentence which was void."

It must be borne in mind, however, that after the valid part of an

excessive sentence has been executed, the sentence cannot be revised by the trial court and a new sentence be imposed, even at the same term of court: *Ex parte Lange*, 18 Wall. 163; and the prisoner, in order to be relieved, on habeas corpus, from an excessive sentence, must clearly show that either the whole sentence, or, at least, that that part of it claimed to be excessive, is clearly in violation of law: *Ex parte Brown*, 63 Ala. 187; *Ex parte Hardy*, 68 Ala. 303.

In some cases, it has been held that an appeal or writ of error is the proper and effectual remedy to obtain relief from a sentence which is in excess of the jurisdiction of the court rendering it, and that relief cannot be had on the writ of habeas corpus, as such sentence is not void, but only voidable: *State v. Tibbetts*, 86 Me. 189; *Ex parte Bond*, 9 S. C. 80; 30 Am. Rep. 20; *Ex parte Van Hagan*, 25 Ohio St. 426, 432; *Ross' case*, 2 Pick. 165; *Sennott's case*, 146 Mass. 489; 4 Am. St. Rep. 344, and authorities there cited; *Ex parte Dunn*, 5 Dowl. & L. 345. Yet, while a writ of habeas corpus has been refused, the defendant having a remedy by writ of error or appeal, there are cases, as shown above in this note, where the writ was issued, notwithstanding the existence of such remedy: See *In re Belt*, 159 U. S. 95. It has been held, on writ of error, that a judgment imposing a greater or less fine or imprisonment than the statute prescribes, may be reversed; but that, where a statute provides for both fine and imprisonment, and one of the penalties is omitted, the error does not afford ground of reversal, if the punishment imposed is authorized: *Dillon v. State*, 38 Ohio St. 586. So, the fact that a sentence, both of fine and imprisonment, was imposed, when only one was authorized, has been held, on appeal, not to entitle the defendant to a new trial. The case should be remanded for proper sentence: *State v. Crowell*, 116 N. C. 1052. On the contrary, a sentence to imprisonment for eight years for a crime the maximum punishment of which is five years, has been held void, on appeal, the judgment reversed, and a new trial awarded: *Lefforge v. State*, 129 Ind. 551. In England, where the inferior court, on a valid indictment, transcends its power in passing sentence, by giving one which the does not authorize, the superior or appellate court will not, on writ of error, either pass the proper sentence, or send back the record to the court below, in order that it may do so, but will reverse the judgment and discharge the prisoner: *King v. Bourne*, 7 Ad. & E. 58; *King v. Ellis*, 5 Barn. & C. 395. In this country, the excess of punishment may be remitted and the valid portion enforced. Thus, if the accused is condemned to unauthorized additional labor, that portion of the sentence is illegal, and will be annulled on appeal: See *State v. Brannon*, 34 La. Ann. 942.

A VOID JUDGMENT is no judgment at all; and every judgment is void which clearly appears on its face to have been pronounced by a court having no jurisdiction of the person, or authority over the subject matter: *Williamson's case*, 26 Pa. St. 9; 67 Am. Dec. 374.

HABEAS CORPUS—JUDGMENTS—ERRORS.—Imprisonment under a judgment is not deemed unlawful, on habeas corpus, unless the

judgment is an absolute nullity, which cannot be if the court had jurisdiction: Note to *Ex parte Gibson*, 91 Am. Dec. 553. A prisoner will not be discharged, on habeas corpus, because of errors in the sentence, imposed by a court of competent jurisdiction: *Sennott's case*, 146 Mass. 489; 4 Am. St. Rep. 344.

BOARD OF ADMINISTRATORS v. McKOWEN.

[48 LOUISIANA ANNUAL, 251.]

OFFICERS—ACTION AGAINST SURETIES ON BOND—PROOF NECESSARY.—In a suit against the sureties on an official bond, to hold them liable for a deficit of public or trust funds, the plaintiff must allege and prove that the deficit occurred during the term of office covered by the bond, where such term is fixed by law.

OFFICERS—APPLICATION OF FUNDS—LIABILITY OF SURETIES.—If an officer elected for a fixed term succeeds himself, and a deficit of funds intrusted to him, and for which he was chargeable, is shown to have occurred during the first term, he will not be allowed to apply moneys subsequently received toward closing up past accounts, thus leaving a deficit at the end of the second term. The fixed liability of the sureties cannot be lifted from them and transferred to others by reason of the fact that a new term has commenced with new sureties.

OFFICERS—NEW TERM AND BOND—EXTENDING LIABILITY OF SURETIES.—If an officer elected for a fixed term succeeds himself, the fact that no second bond is exacted cannot extend the liability of the sureties on the first bond.

Suit against the sureties on an official bond. On September 6, 1892, Charles A. Decker was elected treasurer of the board of trustees of the insane asylum, for the period of one year. On November 6, 1893, he was chosen as his own successor, but did not execute any new bond. It was alleged that the defendants, McKowen and Smith, who had been Decker's sureties on his official bond, verbally consented to remain his sureties on his said bond as treasurer; and that for the remainder of the time that Decker acted as treasurer they recognized him as such, and received and disbursed funds for him as such up to the date of his death. It was also alleged that Decker had in his hands, on September 6, 1893, as treasurer, the sum of forty-five thousand two hundred and ninety-one dollars and thirty-six cents, funds of the said asylum; that, on November 6, 1893, the date on which he was elected his own successor, he had in his hands, as treasurer, seventy-six thousand five hundred and twenty-three dollars and eight cents, of said asylum; and that of said amounts in his hands on September 6, 1893, he had failed to account for the sum of two thousand nine hundred and forty-five dollars. The nature of the defendants' pleadings appear from the opinion. There

was a judgment in favor of the defendants, and the plaintiffs appealed.

W. F. Kernan, for the appellants.

Isaac D. Wall, for the appellees.

253 NICHOLLS, C. J. Plaintiffs, in their brief, first direct our attention to defendants' pleadings with the view of defeating the position taken on their behalf and claimed to be supported by two decisions of this court: *State v. Powell*, 40 La. Ann. 241; *State v. Lake*, 45 La. Ann. 1207; that, being sureties on an official bond to secure the faithful performance of duty of an officer holding an office the term of which is fixed at one year, they were not liable for any default of the principal beyond the term under which the bond is given, and that provisions of law authorizing officers to hold over until their successors are appointed and qualified can only extend the liability of the sureties for such reasonable time as with due diligence would enable the successor to be appointed and qualified.

Plaintiffs say "defendants depend on several special pleas coupled with a general denial—among other pleas they allege that the bond sued on is not a bond at all—that the same is a private writing. They do not depend on the ground that the deficit did not occur during his term of office. It is a rule of law that a special plea waives the general issue and controls it so far as it goes. . . . Accepting their plea that it is not a bond but a private writing, it is nevertheless a legal obligation which they voluntarily signed and which is binding on them. This obligation is not limited to any particular time—to any period of time or term of office. The general rule of law is, that in whatever manner one may bind himself he shall be bound. The defendants, having bound themselves in this manner, are bound thereby, *volenti non fit injuria*." We cannot adopt plaintiffs' view of defendants' 254 pleadings or give to them the consequences claimed. Plaintiffs themselves declare upon the bond as an official bond, and seek to hold defendants liable on an alleged breach of its conditions for a certain sum of money.

Defendants pleaded the general issue, and denied that they were indebted in any sum to plaintiffs. They alleged that the pretended bond sued on was not a bond; that the same was a private writing not executed before a notary or other public officer, and not binding or operative for various assigned reasons. A denial by the defendants that they were liable on the ground of action set up by the plaintiffs, because in order to be so bound cer-

tain features essential in their opinion to fixing liabilities upon them were lacking, viz., an instrument of a certain specified form, is not an admission of liability upon the instrument they did sign, and which they describe simply to sustain their defense. It would be perfectly consistent for defendants to claim that it was the intention of all parties that they should bind themselves as sureties upon an official instrument which would give them the benefit of defenses other and wider than those resulting from a conventional agreement, but that the instrument as signed could not be considered as having that character, but was entirely different from that which it was designed it should be, and therefore not binding at all upon them. We see plainly a denial of liability upon the instrument as an official bond, but we see nowhere an admission of liability upon it, either as a private bond or otherwise. It is expressly averred, on the contrary, that it was no bond at all, and that defendants owed nothing to the plaintiffs. Plaintiffs' position, if true, would be substantially the abandonment of their allegations in order to substitute in lieu thereof defendants' pleadings so as to make them the basis of a judgment against the latter on grounds entirely different from those set up in the petition and to do so by a forced construction of those pleadings. There was no necessity for defendants to allege that the deficit in Decker's account did not accrue during the term of office which the bond covered. It was part of plaintiffs' own case that they should allege and prove that it did occur during that period. The general issue put them on proof of that fact. Plaintiffs allege that on the sixth day of September, 1893, Decker had in his hands the sum of forty-five thousand two hundred and ninety-one dollars and thirty-six cents. . . . That of said amount in his hands on the sixth day of September, ²⁵⁵ 1893, as treasurer, he had failed to account for the sum of two thousand nine hundred and forty-five dollars and sixty-four cents as claimed in the original petition. As plaintiffs had averred that Decker was elected on the 6th of September, 1892, for the period of one year, they, by their allegation, fixed the time of the deficit and the funds with reference to which the deficit took place. The general issue placed plaintiffs on proof of this fact.

We think that the decisions in *State v. Powell*, 40 La. Ann. 241, *Rison v. Young*, 7 Martin, N. S., 298, *Brown v. Gunning*, 19 La. 462, and *State v. Lake*, 45 La. Ann. 1207, support defendants in their contention as to the extent of the legal liability of a surety upon the bond of an officer holding under a fixed term of

office: See, also, authorities collated in Am. & Eng. Ency. of Law, tit. "Bonds," 466 M, note. It remains to be seen whether the principle announced in those cases finds reason for application in the case before us.

The insane asylum at Jackson, Louisiana, was established by Act No. 327, approved March, 1855. Its affairs are administered by a board of administrators. The law directs that the board shall elect annually a treasurer, who shall be *ex officio* secretary, and who shall not be a member of the board, and who shall give bond and security for the faithful performance of his duty, to be approved by the majority of the board (Rev. Stats., sec. 1766). Decker was elected secretary on the 5th of September, 1892. A question was raised as to whether he was elected for a full term or to fill out the unexpired term of a former treasurer (Holcombe), and as to what in law fixes the period of the beginning of a term of office. One side claims that the term commenced on the day of election and continued for one year from that date—the other that it commenced on the tenth day of July, it being asserted that that was the date on which the act establishing the asylum was originally promulgated. There is nothing in the evidence going to show when Holcombe's (the former treasurer) term commenced, or how and when he left the office, and nothing to show the day of the promulgation of the act of the legislature. We do not think a decision on these points one way or the other would materially affect the result of the litigation, for, assuming plaintiffs' contention that the defendants would be responsible for the faithful accounting of all funds which should have been in the hands of Decker on September ²⁵ 6, 1893, to be true, we do not find established the fact that he did not have that amount actually in his hands at that time, or that all funds then in his hands were not properly disbursed and accounted for. Plaintiffs charge there was a deficit in the funds then in his hands to the amount of two thousand nine hundred and forty-five dollars. From that date forward Decker received sums largely in excess of the amount he had in his hands on September 6, 1893, and he also disbursed amounts largely in excess of that sum. No illegal disbursements are charged or shown to have been made, either after or before that date. When, after he had continued to act as treasurer from September 6, 1893, to the date of his death, September 10, 1894, and after he had disbursed during that interval a sum largely in excess of the amount in his hands on the 6th of September, 1893, his accounts were ascertained to be ultimately short to the

amount of two thousand nine hundred and forty-five dollars, we know of no reasoning and no process by which we could reach the legal conclusion that the deficit claimed occurred prior to the 6th of September, 1893, or out of the funds in his hands on or before that day. On the contrary, if the funds with which he was chargeable on the 6th of September, 1893, were then in his hands, we should rather, as a matter resting on mere presumption, presume that subsequent disbursements were drawn from the fund in his hands in the order of their receipt. If Decker had placed his funds in bank at different dates, checking against them from time to time, payments made by the bank would, we think, be referred back and set against the earliest indebtedness to him: *Morse on Banks and Banking*, sec. 355. If the deficit had been shown to have occurred during the first term, and in the funds for which he was then chargeable, he would not have been permitted to have applied moneys subsequently received by him to closing up past accounts, thus leaving the deficit at the end of the second term. The fixed liability of the sureties could not be lifted from themselves and transferred to others simply by reason of the fact that a new term had commenced with new sureties: *Clements v. Boissat*, 26 La. Ann. 244. On page 466 K of the *American and English Encyclopedia of Law*, title "Bonds," it is laid down that: "Sureties are not liable for the default of their principal before the execution of their bond; but when an officer is reappointed and gives a new bond, the sureties are liable for the amount of money shown by his books to be on hand. He is presumed to have the ²⁵⁷ amount charged to him, and the burden of proving the contrary is upon the sureties." In support of this proposition are cited *Bruce v. United States*, 17 How. 437, 443; 4 Myers, Fed. Dec., sec. 522; *United States v. Stone*, 106 U. S. 525; *United States v. Eckford*, 1 How. 250.

In *Pine County v. Willard*, 39 Minn. 125, Am. St. Rep. 622. where a treasurer, on surrendering his office during his second term, failed to account for or pay over all funds then chargeable to him, it was held that the sureties for the second term were prima facie liable, and that to exonerate themselves the burden was on them to show that this deficiency occurred during the former term. In *Morley v. Metamora*, 78 Ill. 394, 20 Am. Rep. 266, where a supervisor was elected his own successor and gave a new bond, it was held the sureties were liable on such bond for any amount which appeared to have been in the hands of such supervisor belonging to the town at the end of the pre-

ceding official term. At the end of his first term, he had made a report, showing a certain amount in his hands belonging to the town, which report was approved; the court was of opinion that the report should be considered as true, and that such amount was in his hands as his own successor, and that the sureties on his bond for the second term were liable for a failure on his part to account for it. The evidence in that case showed that the supervisor had accounted for an amount of money about equal to the amount by him received that year. The defense was, that the defalcation all occurred during the first year, and hence the sureties on the first bond were liable for it. Had Decker furnished a new bond at the termination of his first term, and the present suit had been directed against the sureties on such bond, the principles announced in the cases cited would have applied directly against the sureties so sued. Can the fact that there was no second bond exacted, and no second sureties given who could be held responsible for the last term, extend the responsibilities of the sureties on the first bond? We think not. They were under no obligation to see to it that the treasurer should furnish a second bond—that was a duty devolving upon the board of administrators of the asylum themselves. They cannot make the responsibility for a failure to have had such bond furnished fall on other parties.

We think the judgment appealed from is correct, and it is affirmed.

OFFICERS, AND LIABILITY OF SURETIES ON OFFICIAL BONDS.—Sureties for the fidelity of an officer appointed for a limited term are not liable for his defaults beyond the term of office for which the bond was made. The liability of sureties is limited to the official term: See note to *People v. Van Ness*, 12 Am. St. Rep. 138. An officer may, in effect, take moneys which he has collected during his second term, and with them satisfy a deficiency which existed at the close of a former term, and thus shift the responsibility for such deficiency from the sureties of his first term to those of the second: See monographic note to *Crawn v. Commonwealth*, 10 Am. St. Rep. 854, on the liability of sureties on successive bonds. A bond for the good behavior of an officer holding office for a fixed term, and until "another" officer is appointed, is not in force after the reappointment of such original officer: Note to *King County v. Ferry*, 34 Am. St. Rep. 898.

STEPPE v. ALTER.

[48 LOUISIANA ANNUAL, 368.]

REAL PROPERTY—BUILDINGS—DUTY OF OWNER.—It is an owner's duty to see that his building is in a safe condition, and he is liable for all damages which may result from his neglect of such duty.

REAL PROPERTY—DUTY OF OWNER AS TO BUILDING AFTER A FIRE—INSURANCE CONTRACT TO REPAIR—LIABILITY.—Although an owner's building is in the hands of an insurance company for repairs, after a fire, this does not relieve him of his duty to see that it is in a safe condition. It is especially his duty, after the fire, to see how that occurrence has affected the situation; and he cannot, as between himself and the public, shift this responsibility from himself to the insurance company by leaving the latter to determine the necessity and extent of repairs. He is still liable for the condition of the building, and must respond in damages, if anyone is injured by one of its falling walls.

Suit for damages, by the plaintiff, Emma Steppe, against the defendants, Charles Alter and James O'Rourke. The plaintiff was injured by the falling of a wall, which separated the building of the defendant O'Rourke, at Nos. 82, 84, and 86 South Peters street, from the adjoining building, No. 80 South Peters street, owned by the defendant, Alter. O'Rourke's building was occupied and leased by the Gulf Bag Company, and it was while at work in the employ of that company that the plaintiff was hurled down and buried beneath the ruins or debris of the falling wall. She was severely bruised, had three or four ribs crushed in and broken, her left leg sprained, and her right leg badly broken in two places. She was taken at once to the Charity Hospital, where she remained from about June 20, 1892, until August 4, 1892, and was subsequently removed to the Tours Infirmary, where she remained until January 1, 1893. It appears from the case of *Knoop v. Alter*, 47 La. Ann. 570, that a fire had damaged the defendant's building, No. 80, and that, subsequently to the fire, the front portion, about forty feet of the party wall, between 78 and 80 South Peters street, fell, and the falling of this wall was what caused the plaintiff's injuries. The demand was for twenty-five thousand dollars damages. The suit against O'Rourke was discontinued before the trial. The plaintiff obtained judgment for six thousand five hundred dollars, and the defendant, Alter, appealed.

Semmes & Legendre, Branch K. Miller, and H. H. Price, for the appellant.

Lloyd Posey, Horace E. Upton, and Joseph N. Wolfson, for the appellee.

³⁶⁴ NICHOLLS, C. J. The facts connected with the falling of the wall which gave rise to the present litigation were brought to our attention in the matter of *Knoop v. Alter*, 47 La. Ann. 570. Some testimony not adduced on the Knoop trial was introduced ³⁶⁵ in the present case, but it is not of such a character as to alter our views as to the legal responsibility of the defendant for the consequences of that occurrence. Defendant renews his argument that the Home Insurance Company having under its policy of insurance elected to repair and rebuild the premises No. 80 South Peters, and having taken control and possession of the property, he had no control or direction of the work, that the property and work being under the exclusive control of the company and its agents, under such circumstances the only parties to whom plaintiff could look for redress, if there were fault and injury, would be those engaged in the work. He cites in support of his position, *Camp v. Wardens*, 7 La. Ann. 321; *Gallagher v. Southwestern Exposition Assn.*, 28 La. Ann. 944; *Sweeney v. Murphy*, 32 La. Ann. 628; *Peyton v. Richards*, 11 La. Ann. 62; *Davie v. Levy*, 39 La. Ann. 555; 4 Am. St. Rep. 225.

In the first three of these cases, the plaintiff were "employés" of persons who had contracted with the owner of property for the construction of buildings. The rights and obligations of parties were tested in view of relations of "master and servant" and "fellow-servants," and as viewed from the standpoint of privity of contract.

In *Camp v. Wardens*, 7 La. Ann. 327, Mr. Justice Rost, referring to the effect which the fact of "employment" has in passing upon questions of liability for personal injuries, said: "This did not result from any arbitrary rule; it is deducible from elementary principles of law. There is no contract between the owner of the house and the neighbor or passenger which can at all modify the fundamental rule that every man is bound to use his own property so as to cause no injury to others, and he is accordingly held responsible to them for slight neglect in the use or care of it. The case is different with regard to servants and overseers."

In the case at bar, there were no relations springing from employment of the plaintiff, either by Alter or the Home Insurance Company. She is a stranger or third party as to both.

In *Peyton v. Richards*, 11 La. Ann. 62, plaintiff's slave, while walking along the sidewalk of Camp street, in front of a building which was in process of construction, was killed by the falling of cast-iron columns and entablatures which formed the front of said building. The evidence showed that the property be-

longed to Dr. Farrell, and that John McVittie was the undertaker of the building. McVittie ³⁶⁶ made a special contract with Newton Richards (whom plaintiff had made defendant in the case) to put up the iron front of which McVittie furnished the materials, and Richards made another special contract with one Thompson to do the same work. Thompson himself performed the work, with the assistance of laborers hired and paid by himself. Just as the work was completed, the iron columns and plates fell to the ground, in consequence of not being sufficiently propped with pieces of wood under the horizontal pieces, as was usual and customary. The court held that Thompson, by whose fault, negligence, or unskillfulness the accident happened, was not the servant or overseer of Richards, and that the latter was not liable to the plaintiff. The suit was not directed against the owner of the building.

In *Davie v. Levy*, 39 La. Ann. 555, 4 Am. St. Rep. 225, plaintiff attempted to hold Levy, who was engaged in the business of running a coalyard, responsible for personal injuries received from the act of one Harris (with whom he had contracted for taking coal from a barge on the river to his yard), in improperly constructing, in order to perform his work, a run or bridge over the public street. Defendant was not sued for failure to perform any duty incumbent upon him as owner of the coalyard, but as being substantially the party who had put up the obstruction in the street.

The position of the defendant in the present case is, substantially, that because he had entered into a contract of insurance with an insurance company by which he was to be indemnified to a certain amount in case of fire, the company reserving the right, at its own option, of repairing or rebuilding the property, he was relieved from the obligation as the owner of the property of keeping constantly advised as to its condition and situation as connected with the safety of his neighbors or of the public.

This is a general primary obligation imposed on him by law, of which he cannot divest himself by a contract with others, by which they and not he are to decide and determine the extent and character of his obligations. The contract between himself and those parties may serve as the criterion and measure of rights and obligations between themselves, but does not measure the rights of third persons and determine his liabilities to them. It was defendant's duty, both before the fire and after the fire, to see that his building was in a safe condition. It was specially his duty to examine the ³⁶⁷ building after the fire, to see how

that occurrence had affected its situation. If, at any given moment, a building is unsafe, it is a matter of no moment to the general public whether the danger from it is occasioned by fire, by water, old age, or improper construction. Defendant, in his testimony, says the insurance company took charge of the property immediately without saying anything to him; he did not undertake to repair the building—he did not undertake anything at all; he turned over the property to the company for the purpose of repairing and reconstructing what was necessary; he had nothing to do with the repairs; he held the insurance company responsible; he told them so; he wanted them to make him whole; he never gave any order or direction to anybody employed; he never assumed any control of the work; he told the foreman (Moore) he had nothing to say in regard to the matter; he did not care about hearing anything of it.

Now it is precisely this indifference to the situation and failure to give any orders or direction in regard to the building—this unwillingness to hear anything about the condition of affairs—which has given rise to defendant's present position. He very erroneously believed that the fact that he had taken out a policy of insurance with the Home Insurance Company, and that that company would make repairs, relieved him of all liability in the matter—that he had nothing to say in regard to the matter, and could safely wash his hands of the whole affair. Counsel say that by no rational construction could Alter be made responsible for the builder's want of judgment. We are of the opinion that the error of judgment (if such it was), as to the extent of what was necessary to be done to place the building in safe condition, must be held to be Alter's error of judgment—he had no right, as far as the public was concerned, to transfer to others the duty of determining what should be done for purposes of safety. The company had interests of its own adverse to the owner—it was interested in making the repairs as light as possible, at as small an expense as possible, while the rights of the public exacted that the repairs should be made as full and complete as security to others required. Defendant chose to permit the company and its employes not only to do certain work, but to decide and determine that certain other work need not be done. In adopting the last decision, Alter made it his own. The situation is no wise affected by the fact that there was a contract between the insurance company ³⁶⁸ and Alter. If Alter had in direct terms requested the company to send a man to the building to see what repairs were needed for purposes of safety, and it had sent its

builder, Walther, for that purpose, who reported that everything was safe, when, in point of fact, it was not, unquestionably Alter could not shelter himself behind the erroneous report of the builder: *Howe v. New Orleans*, 12 La. Ann. 482. This is practically what has happened in this case, the case supposed differing only in degree.

In *Gallagher v. Southwestern Exposition Assn.*, 28 La. Ann. 944 (cited by defendant), the court refers to the fact that the whole work had been confided to a contractor. We do not think that expression was accidental, but had in view cases where less work was contracted for than the necessities of the situation demanded for safety. We are of the opinion that the judgment appealed from, decreeing the defendant Alter legally responsible to plaintiff for the personal injuries which she received as set forth in his petition, is correct. The extent of his responsibility is a different matter.

Before the case went to trial, the plaintiff was interdicted by reason of insanity, and her curator was made party as plaintiff. During the trial, testimony was permitted (over defendant's objections) to be introduced to show the insanity of the plaintiff, its character as to probable duration, and its cause. Defendant objected that evidence was not admissible under the pleadings, plaintiff having filed no amended nor supplemental petition setting up the facts which were sought to be proved. During the trial (and over defendant's objection), the judge, the jury, and the clerk, proceeded to the Louisiana Retreat (an institution for the care and custody of insane persons), situated in New Orleans, "for the purpose (so the minutes say) of viewing the plaintiff, and for the purpose of taking the testimony of the Sister in charge." The record shows that the plaintiff was brought in and examined at the retreat, and the testimony of several of the "Sisters" of the institution was there taken. Defendant complains greatly of this proceeding as one intended solely to rouse the sympathy of the jury. He argues that the large amount granted to the plaintiff was greatly due to this visit to the retreat.

The evidence in this case establishes beyond question the physical injuries received by the plaintiff, and traces them to the falling of the wall of No. 80 South Peters street. We think the sufferings ³⁶⁹ which she underwent were undoubtedly very great. We think, independently of any question of insanity, that her ability to provide for her own support and comfort was permanently affected and lessened, if not entirely cut off. We do not think that plaintiff's insanity has been established as having

been the result of injuries received by her at the time of the falling of the wall, with the certainty which the law requires.

It may be that the facts are as plaintiff contends, but the period which intervened between the accident and the insanity was too long, and the existence of producing causes prior to the accident too possible to justify us in considering plaintiff's position on this point legally established. The fact that none of plaintiff's family were placed upon the stand to controvert the theory of plaintiff having been at one time struck on the head by a flat-iron is an unfavorable circumstance. It is true that that theory rests upon the slightest of foundations—the statement of the insane person herself since her insanity to her attending surgeon, but, as he stated in his testimony, such declarations, even coming from an insane person, are frequently true. We think that the antecedent condition of plaintiff as to her mental condition should have been gone into by the plaintiff as part of the proof, and that, in so doing, it would have been very easy to have negatived the existence at any time of such a blow on the head as was stated. We must throw out of consideration, in determining this case, the insanity of the plaintiff. We are of the opinion that the jury did otherwise, and based its verdict to a considerable extent upon that fact.

We would have been forced to reduce the verdict, independently of any consideration of the visit of the judge and jury to the Louisiana Retreat, and of the testimony there taken, but we think it right, however, to say that that visit should not have been made, nor that testimony taken. The physical condition of the plaintiff had been fully proven—it really was not an issue in the case—the fact of her insanity was a conceded fact, and was, besides, established by judgment. The only thing which the jury could “view” through the visit was the fact itself of a depression in the head spoken of by the witnesses, which had been fully testified to. The jury were not experts, and would be no further advanced in their deliberations by seeing this depression than they would be by following the testimony of the experts, which had been taken before them. We agree with ³⁷⁰ the defendant that the visit to the retreat had no good legal reason to be based upon, and that its only effect would be to prejudice the jury against the defendant and cause them to swell the damages. We think a judgment for the sum of four thousand dollars would fully meet the ends of justice and of law.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by reducing the amount for

which judgment is rendered in favor of plaintiff against defendant from six thousand five hundred dollars to four thousand dollars, and, as so amended, that it be affirmed.

REAL PROPERTY — SAFETY OF BUILDINGS OR WALLS — DUTY AND LIABILITY OF OWNER.—While the owner of a building is not an insurer against accidents from its condition, yet, so far as the exercise of ordinary care enables him to do so, he is bound to keep it in such condition that it will not, by any insecurity, or insufficiency, for the purpose to which it is put, injure any person rightfully in, around, or passing it: *Ryder v. Kinsey*, 62 Minn. 85; 54 Am. St. Rep. 623; *Schwartz v. Gilmore*, 45 Ill. 454; 92 Am. Dec. 227. In *Church of Ascension v. Buckhart*, 3 Hill, 193, the walls of a church edifice belonging to the plaintiff in error were negligently permitted to stand after the rest of the building had been destroyed by fire, and a part of the wall afterward fell upon a person passing along the street. It was held that the corporation was liable to respond in damages for the injury: See note to *Kansas City Ry. Co. v. Fitzsimmons*, 31 Am. Rep. 206. But compare note to *Anderson v. East*, 10 Am. St. Rep. 40. For cases holding the owner of land liable for injuries to adjoining property caused by the falling of weakened or defectively constructed walls, see note to *Cork v. Blossom*, 44 Am. St. Rep. 366.

VINCENT v. MORGAN'S LOUISIANA & TEXAS RAILROAD AND STEAMSHIP COMPANY.

[48 LOUISIANA ANNUAL, 983.]

A RAILROAD TRACK is, of itself, a warning of danger.

RAILROADS — CROSSING TRACK—TRAINS.—Persons having occasion to cross a railroad track must bear in mind that, in the management of railroads, special trains are liable to be sent forward at any moment, and that the rule that a person, before attempting to cross a track, must stop, look, and listen to avoid danger, is not confined to certain hours of the day or night, nor limited to particular trains. Hence, the simple fact that the hour for one of the regular trains has passed, and that it is not yet time for another to pass, does not justify a belief that no train is likely to pass.

RAILROADS—CROSSING TRACK—OBSTRUCTIONS NEAR TRACK.—The existence of obstructions, interfering with the view near a railroad track, imposes additional caution upon persons approaching the track, as such persons are as much concealed from the view of the railroad company's employés as the latter are from the former.

RAILROADS—SPEED OF TRAINS—WEATHER CONDITIONS.—As railroad trains are run by schedule, one train conforming itself to the movements of the others, a court will not establish the dangerous rule that weather conditions in one particular neighborhood should control and regulate the speed of the trains in a particular vicinity.

RAILROADS—CROSSING — DEATH — DAMAGES — CONTRIBUTORY NEGLIGENCE.—There can be no recovery of damages for death resulting to one who was guilty of contributory negligence in attempting to cross a railroad track directly in front of a rapidly approaching train.

Action by the plaintiff, in his capacity as natural tutor of a minor, issue of his marriage with his deceased wife, Rose Vincent, who was killed by one of defendant's trains. There was a verdict in favor of the plaintiff for ten thousand dollars, and the defendant appealed.

D. Caffery & Son, for the appellant.

C. H. Mouton and L. O. Hacker, for the appellee.

⁹³³ NICHOLLS, C. J. On the 16th of March, 1893, the wife of Joseph Vincent, the plaintiff, was returning in a buggy to her home near ⁹³⁴ Olivier Station, in the parish of Iberia. Accompanying her was her sister and her sister's child. The public road near Olivier (which is a flag station of defendant's road) runs nearly parallel to the company's tracks, but, when almost opposite to the station, it makes an abrupt turn at or near Veazey's store, and crosses the main track to the other side. The day was cloudy and a strong wind was blowing. Mrs. Vincent was driving. Reaching the turning point in the road, she drove directly to the point of intersection of the road with the track, without stopping, and, as the horse was crossing the track, it was struck by the locomotive attached to a train of cars operated by employes of the defendant company. The horse was killed, the buggy was entirely demolished, and Mrs. Vincent (mortally wounded) died a few minutes after the accident. The sister and her child, after lingering a short time, also died. The train with which the buggy collided was not the regular passenger, but a special train on inspection duty. It was running just before it passed the intersection of the public road with the track at Olivier Station at about forty miles an hour. The whistle of the locomotive was blown at or near the whistling post, four times, according to custom, and again near the crossing. The bell seems to have been also rung. The appliances of the train were in good condition and the employes of the company at their respective posts. We have examined the record carefully, and the examination so made forces us to the conviction that the verdict of the jury and the judgment based upon it are contrary to the law and the evidence. We have found no fact, either of omission or commission on the part of the company's employes, which could give rise to an action of damages against the defendant. We find, on the contrary, that the unfortunate accident, by which the plaintiff's wife came to her death, is directly traceable to heedlessness and want of care and proper caution on the part of the deceased.

Plaintiff's pleadings refer to the train as being a special one,

the speed at which it was running as being dangerous, particularly in view of the darkness of the day; to the speed not having been checked as the cars approached the crossing and to obstructions to the view along the line of road from Veazey's store to the crossing. The evidence shows that along the bar fences, between which the public road ran, were a few scattering trees of small size and also some weeds between eighteen inches and two feet high, but ⁹³⁵ that they left, none the less, in clear view, any train approaching upon plaintiff's track, particularly to those sitting in an elevated buggy, and that the track itself was raised above the general level of the surrounding country. The approach to the main track from Veazey's store being almost perpendicular, all that a person sitting in a buggy would have had to have done in order to ascertain the exact situation was to have looked to the right across the side of the buggy, if the curtain on that side were raised, or if it were down, to have leant forward a little and looked across. It so happened that the curtain on the rightside (the very one which should have been up) had been lowered in consequence of a threatening rain, and the persons inside of the buggy, in spite of that fact, drove forward without attempting in any way to guard against possible danger. Mrs. Vincent, the evidence shows, lived near the railroad, had often crossed this identical track, and was familiar with the surroundings. The distance between the store and the crossing was considerable, and furnished ample time and opportunity for examination and discovery, but no precautions, it seems, were taken. In order to reach the track, it was necessary to move up an incline leading to the track, but no halt was made when almost the slightest touch upon the reins could have held the horse in check. We are satisfied the track was reached before a suspicion of danger entered the minds of any of the party. Did the simple fact that the hour for one of the regular trains had passed, and that for the other had not been reached, warrant the belief that no train was likely to pass? It has been held that it does not; that parties having occasion to cross a track must bear in mind that, in the management and business of railroads, special trains are liable to be sent forward at any moment, and that the rule that a person before attempting to cross a track must stop, look, and listen to guard against danger is not confined to certain hours of the day or night, nor limited to particular trains. A railroad track of itself has been held to be a warning of danger: *Hinken v. Iowa Cent. Ry. Co.* (Iowa, April 10, 1896), 66 N. W. Rep. 883.

Plaintiff, in respect to the obstruction alleged, overlooks the fact that if such obstructions really masked the view that they themselves were as much concealed from the view of the defendant's employés as the latter were from the persons in the buggy, and that the very fact of the existence of the same imposed additional caution ⁹³⁶ upon parties approaching the track: Beach on Contributory Negligence, sec. 65, p. 203; Patterson's Railway Accident Law, sec. 177.

We do not understand plaintiff's allegations as charging that the employés of the railroad saw the approaching buggy, or that, by the exercise of such reasonable care as was consistent with their duties, they might have seen them any sooner than they did. Their allegations as to the difficulty under which they themselves labored in seeing surrounding objects by reason of the misty cloudy weather and the intervening trees and weeds negative the idea of such a claim having been advanced on their part against the defendant as a cause of action. There is no attempt to show that defendant's employés failed in their duty from the moment the danger was seen up to the time of the accident, nor is there any charge that the defendant was in fault in respect to any of the appliances connected with the train. Their real contentions are, that the whistle was not sounded, the bell was not rung, the train was moving at a dangerously fast rate, and its speed was not slackened as the cars approached the crossing. The signals, as we have said, were properly given, but they were not heard—possibly because the wind was high; possibly because the ladies in the buggy had their hats on, covered with their veils; possibly because, engaged in conversation and apprehending no danger, they gave no heed to what was passing around them. We have no reason to suppose that the accident would have been avoided had the train been moving at a slower rate than it was—it is not so charged. It is referred to as having been dangerously fast. Plaintiff charges that the employés of the defendant had no right to move the train at as fast a rate as it was going on a misty and windy day, and knew, or must have known, of the danger of a collision. We do not find that the train was moving at a faster rate than that at which passenger trains frequently move between regular stations. Olivier was only a flag station, and this particular train had no reason to stop there, or to expect that it would be stopped at that point. The evidence does not show such a condition of things as the allegations charge—the day was dark and somewhat misty and a rain was threatening, but the hour was just after noonday, and all objects were visible. The

evidence discloses the existence of no fact, outside of the alleged fact itself that the wind was high and the day was not bright, tending to show that it was the engineer's duty to slacken the speed at which the train was moving.

937 It has been said in other jurisdictions that trains must be run with speed on dark nights and on misty days, and that doing so raises no inference of negligence in the absence of special facts going to call for particular precaution: *Omaha R. R. Co. v. Wright*, 47 Neb. 886. Trains are run by schedule, one train conforming itself to the movements of the others, and it would be a dangerous rule to establish that weather conditions in one particular neighborhood should control and regulate the speed of the trains in a special vicinity. It is not shown that the lane at Olivier crossing is a much frequented crossing, or that there were grounds for supposing that persons proposing to cross there would not be governed by ordinary rules of caution and prudence.

Appellee presses upon us that the fireman was firing up, as he reached the whistling post, and that he should not have been doing so, but should have desisted until the crossing was passed. That if he had been looking out on the left of the cab he would have seen the buggy approaching the crossing sooner than he did. The fact that the fireman was engaged in putting in coal as the train approached the whistling post was a fact shown by his own testimony, and was not looked to or assigned as furnishing any ground of complaint in the pleadings as we have said. There was no attempt to show that, in firing up at the time he did, he was not at that time doing exactly what was necessary to be done in the line of his duty. If he had been looking out at that time there would have been nothing to indicate, so far as we see from the evidence, that the parties inside the buggy would attempt to cross over the track directly in front of a train rapidly approaching them and directly visible to them had they looked.

We are of the opinion that the deceased was guilty of such contributory negligence in this case as to cut off the claim for damages.

For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the verdict of the jury and the judgment appealed from, based thereon, be and the same are hereby annulled, avoided, and reversed; and it is now ordered, adjudged, and decreed that plaintiff's demand be rejected, with costs in both courts.

RAILROADS—CROSSING TRACK—LOOK AND LISTEN—OBSTRUCTIONS—NEGLIGENCE.—A railroad track is of itself a warning of danger to all who go upon it: *Mynning v. Detroit etc. R. R. Co.*, 64 Mich. 93; 8 Am. St. Rep. 804. The duty of one about to cross a railroad track requires him to look and listen for an approaching train in order that danger may be averted: *Notes to Schexnadrye v. Texas etc. Ry. Co.*, 49 Am. St. Rep. 323; *Greenwood v. Philadelphia etc. R. R. Co.*, 10 Am. St. Rep. 616; *Mynning v. Detroit etc. R. R. Co.*, 8 Am. St. Rep. 814; and greater care is required where a view of the track is partially obstructed: *Note to Mynning v. Detroit etc. R. R. Co.*, 8 Am. St. Rep. 814. Obstructions require him to stop just short of the track and listen: *Beisiegel v. New York Cent. R. R. Co.*, 90 Am. Dec. 741. One in full possession of his faculties, who undertakes to cross a railroad track when a train of cars is about passing, and is struck by it, is *prima facie* guilty of negligence: *State v. Maine Cent. R. R. Co.*, 76 Me. 357; 49 Am. Rep. 622. One about to cross a railroad track, who fails to stop, look, and listen for approaching trains, is guilty of such negligence as will preclude a recovery for any injury he may receive in consequence of his act, where the evidence shows no negligence on the part of the company: *Pennsylvania R. R. Co. v. Weber*, 76 Pa. St. 157; 18 Am. Rep. 407; *notes to Greenwood v. Philadelphia etc. R. R. Co.*, 10 Am. St. Rep. 616; *Schexnadrye v. Texas etc. Ry. Co.*, 49 Am. St. Rep. 323; *Mynning v. Detroit etc. R. R. Co.*, 8 Am. St. Rep. 814. One who attempts to cross a railroad track in front of an approaching train, which he must have seen had he used his eyesight, and is struck and injured, is guilty of such contributory negligence as will defeat any recovery by him in an action against the railroad company: *Marland v. Pittsburgh etc. R. R. Co.*, 123 Pa. St. 487; 10 Am. St. Rep. 541, and note. It is the duty of a railroad company to run according to its published timetable: See monographic note to *Heirn v. McCaughan*, 66 Am. Dec. 605, on the obligation of a carrier to stop for a passenger at the time advertised.

HENDERSON v. SUN MUTUAL INSURANCE COMPANY.

[48 LOUISIANA ANNUAL, 1031.]

REAL PROPERTY—REPAIR BY INSURANCE COMPANY—DAMAGES EX DELICTO—LOSS OF RENT.—If a fire insurance company exercises an option, in its contract of insurance, to repair damage done to a building by fire, but, owing to the bad materials used, and the careless and unskillful performance of the work by the company's employes and workmen, the structure, while in course of completion, collapses and becomes untenable, the company is liable to the owner for damages *ex delicto*, which may include loss of rent occasioned by the fault and negligence of the defendant's employes in doing the work.

Fenner, Henderson & Fenner, for the appellants.

Denegre, Blair & Denegre and Leovy & Leovy, Carroll & Carroll, for the appellees.

1032 WATKINS, J. This is an action for the recovery of damages *ex delicto*, the charge, substantially, being that plaintiffs' property having been insured by the defendants, a loss by fire

having occurred, and they, having exercised an option of the contract to repair the fire damage done to the building, did the work so faultily that the structure collapsed and became untenable, and hence they have been deprived of its use and enjoyment.

The defendants tendered a plea of no cause of action, and, it having been sustained and the suit dismissed, the plaintiffs have prosecuted this appeal. The proposition for the consideration of this court is, simply whether the truth of plaintiffs' averments being admitted, can a valid and exigible judgment be predicated upon the petition. The petition is elaborate, and appears to have been drawn with care and precision.

It alleges the contract of insurance and a loss occasioned by a fire in the adjoining building, whereby plaintiffs' building was seriously injured during the tenure of the contract. That the defendants exercised the option of the contract of insurance and undertook to repair, rebuild, or replace the property lost or damaged within a reasonable time. That the injury plaintiffs' building sustained by the fire was not of a character or of that extent to make it untenable, but the defendants' employés and workmen performed their work so carelessly and unskillfully that the building collapsed and became untenable on that account, requiring its entire reconstruction.

That at the time of this work of repair, the building was under lease to a responsible tenant at a monthly rental of four hundred and thirty-seven dollars and fifty cents, which was revoked by the demolition of the building, the tenant on that account having declined to pay his rent.

Upon the foregoing averments, the prayer of the petition is for judgment against defendants in solido for the sum of five thousand and seven dollars and sixty cents in money as the resulting damages sustained.

¹⁰³³ This is in no sense a suit for damages *ex contractu* or *ex quasi contractu*; but a suit for damages *ex delicto*. The defendants are not sued for rent, but the contract of rent is pointed out as clearly indicating the measure of the plaintiffs' damages. This is clearly shown by the averment of the petition, to the effect that they notified the defendants "that if the lease was annulled they would be held liable to petitioners for the loss of rent thereby as damages resulting through their fault."

Surely, that is not an appropriate averment in a suit upon a contract. True it is, that there had subsisted and was still subsisting between the parties a contract of fire insurance, but the

defendants had elected to repair the fire damage and place the building in the same good condition it was before the fire. That work had been undertaken and was in progress. There was no objection or demurrer made to that election by the defendants. In that manner the relative rights of the parties had been adjusted. But the building being tenantable and still occupied by the plaintiffs' lessee, an accident occurred, the building collapsed, and the tenant abandoned the leased premises, all on account of the fault and negligence of the defendant's workmen and employés, and the faultiness of their workmanship and material. This suit is for the purpose of recouping the loss sustained through this negligence and fault.

Admitting the foregoing statement of facts, substantially, the judge *a quo* makes the assignment of his reasons for his judgment, viz: "For the purpose of this suit, the contract of insurance is virtually out of the case, and the plaintiffs are in the same position as though they were suing for damages resulting from the careless and unskillful execution, by the defendants, of a contract for the repair of the building in question. . . . The exception, in my opinion, is well taken. The loss sustained by plaintiffs by reason of the cancellation of their contract of lease with Meyer & Brother was not a loss which could be said to have been within the contemplation of the parties to the contract under which the building was being repaired."

In our opinion, the learned judge of the district court has misapprehended, altogether, the scope and purpose of plaintiff's suit. It has nothing whatever to do with the contractual relations of the ¹⁰³⁴ parties growing out of the contract of insurance which was resolved into a building contract. The defendants will carry that engagement to its completion according to its tenor. If they should not, the plaintiffs would have their action for a specific performance, or commensurate damages.

But, in the meanwhile—the necessary repairs being in course of completion—an accident is caused by the faultiness of the materials which are being used, and the carelessness and negligence of the workmen employed, whereby the structure is collapsed, the building rendered untenable, and the lessees unable to continue its occupancy for the purposes of the lease.

In this situation plaintiffs institute suit for the recovery of the damages they have suffered by the loss of a tenant through the fault and negligence of defendants' employés.

The theory of their case is, that defendants could have carried the repairs to completion, fulfilled their contract to their

satisfaction, without disturbing their tenant in the least, provided their employés had exercised due care, and used proper materials; but, having failed to do so, they are bound to reimburse their loss.

With due regard to the appreciation which our learned brother entertained of plaintiffs' petition, we think it states a cause of action.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is now ordered and decreed that the cause be remanded to the court a qua, with directions to the court a qua to reinstate the cause, and take further proceedings according to law. And it is further ordered and decreed that the costs of appeal be taxed against the defendants and appellees, and that all other costs await the final decree of the lower court.

INSURANCE--ELECTION TO REBUILD--DAMAGES FOR BREACH OF CONTRACT.—The election of an insurance company to rebuild makes a new contract, and for any breach of their obligation the insurers are answerable, according to the ordinary rules governing the question of damages: *Brown v. Royal Ins. Co.*, 1 El. & E. 853.

SUCCESSION OF ALLEN.

[48 LOUISIANA ANNUAL, 1036.]

WILLS--DUTY OF EXECUTOR AND HIS RIGHT OF APPEAL.—It is an executor's duty to see that funds of the estate are distributed according to the intention of the testator. He represents all parties, and has, therefore, a right, especially where he is an heir, to appeal, for the common benefit of all, from a judgment, adverse to the heirs, interpreting the will, which he thinks is contrary to the intention of the testator. On such an appeal, all the beneficiaries, legatees, and heirs are necessarily immediate appellees.

WILLS--RULES OF CONSTRUCTION.—The intent of the testator is to be determined from the whole will; and every word shall have effect if it can be done without defeating the general purpose of the will, which is to be carried into effect in every reasonable method.

WILLS.—A GENERAL DESCRIPTION OF PROPERTY, or description of the class or kind, preceded or followed by words of narrower import, if the bequest is not residuary, will be confined to species of property of the same kind with those previously described. The adoption of the more comprehensive meaning would have the effect of rendering the superadded expression nugatory, and make the testator employ additional language, without any additional meaning.

WILLS--PARTIAL INTESTACY.—THE PRESUMPTION is, that the testator intended to dispose of his entire estate and not to die partially intestate.

WILLS—RESIDUARY LEGATEE.—While no particular form of words is requisite to constitute a residuary legatee, it must appear to have been the intention of the testator that the residuary legatee should take the residue of the estate after payment of debts, and meeting all the appointments of the will.

WILLS—DISPOSITION OF RESIDUUM—HEIRS.—If there is no expression in a will, following the particular description of the property, after the general description, to indicate the intended disposition of the residuum, the testator, as to this part of his estate, must be deemed to have died intestate, and the residuum goes to his legal heirs, a disposition which the law favors, in doubtful cases.

WILLS COMMENCE TO OPERATE, WHEN.—A will speaks from the death of the testator, that being the point of time at which it becomes operative, unless the language used, such as the word "now," or a verb in the present tense, which requires it to be taken at the time it is used. Hence, if instructions are given in a will, to executors, to sell the testator's "Rlenzi plantation," and a designated time is given them in which to act, accompanied by directions that the testator's wife shall receive the proceeds of the plantation, if worked, until it is sold, she is entitled to the net proceeds of the place including crops growing thereon, from the time of the testator's death, until the sale of the place.

WILLS—RIGHT TO THINGS "IMMOVABLE BY DESTINATION"—RESIDUUM.—The legal heirs are not entitled to coal, hay, corn, and fodder placed on a plantation for the use of the place, and consumed in the cultivation of the place, in working the crop, and preparing the same for market, as such things are "immovable by destination," but timber and old iron, not essential for the use of the plantation, and not employed for its cultivation, fall into the residuum.

WILLS — CONSTRUCTION — MOLDING LANGUAGE.—If the reading of a whole will produces a conviction that the testator must necessarily have intended an interest to be given, which is not bequeathed by express and formal words, the court will supply the defect by implication, and so mold the language of the testator as to carry into effect, as far as possible, the intention which it is of opinion that he has, on the whole, sufficiently declared.

WILLS — CONSTRUCTION — PUNCTUATION — TAKING PER STIRPES.—Punctuation must give way whenever it interferes with the proper and reasonable construction of a will. Hence, if the testator, by a complete clause in a will, makes a devise to the families of his brother's four children, and this is followed by the distinct words: "And to the five children of my sister Cynthia A. Smith," the devise to his brother's children should be connected with the devise to his sister's children as one continuous sentence; and, it being the evident intention that the five children should be grouped as a family, and that they should participate in the legacy, each set of children takes per stirpes, and not per capita.

LEGACIES—CASH—RESTRICTIONS AS TO AMOUNT—RESIDUUM.—Nieces of a testator, to whom a certain sum of money has been bequeathed in addition to money they have already received, cannot participate in the residuum, as to which the testator dies intestate, where he, in his bequest, wills that they are to have "no interest in any other claim."

LEGACIES — ENGLISH EDUCATION — CERTAINTY — PAROL EVIDENCE.—The legacy of an English education to two small boys, at the expense of the estate, is reasonably certain, and

the court may hear evidence as to the amount necessary for such purpose, because, in doing so, it does not vary or avoid the intention of the testator, or in any way contradict any part of the will.

DISTRIBUTION—WITHHOLDING FUNDS.—Funds ready for distribution should not be withheld from those entitled to the same under the will.

Fenner, Henderson & Fenner, and Thomas A. Badeaux, for R. H. Allen, Jr., Harry Allen, Mrs. J. C. Allen, Mrs. J. C. Latham, and Thomas H. Allen, appellants.

Beattie & Beattie, for Bettie Allen and William F. Collins, executors, appellants.

Clay Knobboch & Son, for Ogden Smith, coexecutor, appellee.

E. D. Le Breton and L. De Poortor, for Mrs. Jennie Boyle, Mrs. Bettie De Berny, and Mrs. Allen B. Baker, legatees, appellees.

Henry Chiapella, for the Turner heirs, opponents, appellees.

C. H. Osterberger and L. F. Suthon, for Gaston Smith and others, opponents, appellees.

1038 McENERY, J. The deceased left the following will: "I give to my Dear wife Bettie Allen all my corporal movables such as furnature, bedding Linin silver plate, China ware &c. all my stock of cattle all my horses and Carriages she is to occupy The Homestead without reservation or distinction till the plantation is disposed of I authorize her to take immediate possession of the same for her own use without Inventory or Controle of any kind. My debts are small I have no children nor forced heirs. I wish the tribunals of La to have nothing to do with my Estate unless somting arises that that can not be avoided I do this for econimy.

"In addition to the above gifts I give to my dier wife Bettie Allen four thousand Dollars worth of City of New Orleans Bonds four per cent. interest Bearing Bonds, with Coupunds. I give her also two thousand Three hundred and fifty Pounds Sterling in the hands of Bearing Bro &c *limited* more or less (see their ac. currents in chst).

"This will be ovr fourteen thousand Dollars for a house I gave her at our marriage not recorded but good. I give to my Wife Bettie Allen one-half of my Rienzi Plantation and one-half of all tools mules &c the names of my Executors &c will be named hereafter. My Executors shall have from one to five years to Sell and clos up the estate as I fear property will be verry low and dull. They can sell part cash part on time 8 per cent. Interest

with Vendors I will that my wife do have one-half of every thing belongin to Rienzi, Except the Claim due me by the U. States that and other Property I will speak of further on.

"I appoint as my Executors Ogden Smith and W F Collins residing on Rienzi plantation I also appoint Mrs Bettie Allen Executrix. I give them full power to sell Rienzi plantation When Ever they find ¹⁰³⁹ a good offer all the property there belonging. When it is sold half of all the proceed Cash Notes &c is to belong to my wife Bettie Allen The other half will be spoken of hereafter As I fear property will be very low I give my Executors five years to work for a good price in the Meantime That they are waiting to sell, the place can be rented or worked so as to pay all Taxes and other Charges, any over that go to Mrs. Bettie Allen's credit. The other half of Rienzi and a claim I hold against the Government of the United States for army supplies I think is about one hundred thousand dollars These two amounts or halves I intend to give to the families of my Brother Thomas H. Allen's four children R. H. Allen Jr for his family's use Thomas H Allen Jr for his wife and children Harry Allen for his wife and children Mrs. Mary Louis wife of J. C. Leatham of New York city.

"And to the five children of my Sister Cynthia A. Smith Gaston Smith, Fred W. Smith Jr., Mrs. Nellie Houchens, Ogden Smith & Thomas A. Smith. My three neices Mrs. Jennie Boyle, Mrs. Bettie De Berny, Mrs. Ellen B. Baker have Received Each five hundred Dollars I will that they receive five hundred dollars more in Cash and have no interest in any other Claim. my Brothrs firm in Memphis Tenn owes me \$17.369 Dollars Seventeen thousand three hundred and Sixty nin dollars loaned them he having surrendered all his Estate to his Credited Which he thinks will pay all he ows. I thirefore Give this sum \$17.369 to The wife of of my Brother for her self and all the dividends on that amount.

"To Mrs. Sallie Cragin I give five hundred dollars to Walter Collins I give two hundred dollars. To my faithful servants Lizzie Harrison and Mat Dickerson I give one hundred and fifty dollars Each.

"To my sister Myra Turner's two sons John B and William Turner I give John B His note for three hundred dollars deducting Interest to Will I have given as much as I intend in Cash.

"I hold Fred W. Smith note for five hundred dollars this note Can be given him without counting Interest as part of his share heretofore given him. My gold Watch and chain I give to my

namsake R. H. Allen, son of Thomas H. Allen Jr of Memphis Tenn to be given him when of age.

“Codicil No. 1 I will that Mrs. Cragin’s two small boys shall be given an English Education at Expense of the Estate I will that my ¹⁰⁴⁰ Executors shal not give bond as I think them honest men I prefer they pay off the cash donations as soon as posible.”

A motion has been filed by the executor, Ogden Smith, who is one of the heirs, to dismiss the appeal from the judgment adverse to the Allen heirs, taken by them.

In Succession of Ames, 33 La. Ann. 1318, this court had occasion to notice the distinction between the functions of an administrator and an executor, giving to the latter, when a creditor, the right of appeal from a judgment adverse to his interest. The reasons assigned for the judgment in that case are conclusive. The executor is the mandatory of the deceased, and a mediator between the parties having an interest in the succession. He represents creditors and heirs, and it is his duty to see that the will is executed according to the wishes and desires of the testator. He is interested in the proper distribution of the funds, and it is his sacred duty to see that they are distributed among those whom the testator intended should be beneficiaries. Representing all parties, he has an undoubted right to appeal for the common benefit of all the parties.

Succession of Nicholson, 5 La. Ann. 359, is directly applicable to this case. In that case, the testator left a sum of money for “the support of asylums in the faith of the Protestant religion especially devoted to the care of aged persons.” There was no institution in the city of New Orleans where the bequest was to be expended, answering to the description in the testament. The St. Anna Asylum devoted to the relief of destitute and helpless children claimed the legacy, as the only institution in the city of New Orleans coming near the terms and conditions of the will. The judgment of the lower court was in favor of the St. Anna Asylum. On appeal by the executor, the judgment was reversed. In this case the court said: “The will is his (executor’s) mandate. He has no power, and is subject to no duty except within its terms and conditions.” The executor, therefore, has the right to appeal from a judgment interpreting the will, which he thinks is contrary to the intentions of the testator. In oppositions to the distributions of a fund there are as many adjudications—separate judgments—as there are oppositions, and the party aggrieved must appeal for relief, and, unless he does so, this court will not amend the judgment as between the appellees made so by the

operation of the appeal, except so far as the judgment between immediate parties to the appeal may affect indirectly ¹⁰⁴¹ their interests. By the appeal of the executor from a judgment adverse to his professed distribution of funds as he interprets the will, all the beneficiaries, legatees, and heirs are necessarily immediate appellees. The motion to dismiss is, therefore, denied.

The executors could not agree on an interpretation of the will, and there were controversies between the legatees and heirs among themselves with the executors. Two of the executors, Mrs. Allen and Collins, filed a provisional account, proposing to settle the bulk of the estate and distribute the funds on hand, and await a further realizing of assets and to make a future and final distribution. The executor Smith filed a final account. Oppositions were filed by the executors to the accounts of each, and there were numerous other oppositions by the heirs.

Collins and Mrs. Allen, executors, propose to turn over to the latter the residuum of the estate. The heirs, including the executor, Ogden Smith, oppose the account, on the ground that as to the residuum the testator died intestate, and it should be distributed among those to whom the law gives it. Mrs. Allen, claiming the residue, opposed the account. The division of the plantation is contested between the children of Thomas H. Allen, and the children of Mrs. Smith, brother and sister of the deceased. There were four Allen and five Smith heirs. Hence the contention of the former, that one-half of the plantation absolutely should go to them, as they deny the bequest to the Smith heirs; and that if they are entitled to a part of the plantation as legal heirs, that the half of the plantation should be divided per stirpes and not per capita.

The executors concur that each of said heirs should receive one-ninth of the half of the plantation. Collins and Mrs. Allen, executors, propose to pay Mrs. Cragin, for her boys, a sum sufficient to educate them. Smith, the executor, and one of the heirs, opposes this item in the will, because of its uncertainty. The executor, Smith, differs with the other executors as to the disposition of the crop of 1894, the former contending that the proceeds should be turned over to the heirs as a part of the estate undisposed of by the testator, and the three nieces named in the will claim a part of the residuum as heirs. Their quality as legal heirs is denied by the executors. Two of them agree that they are entitled each to five ¹⁰⁴² hundred dollars; the others that this sum must be distributed among them.

The Turner heirs oppose the claim of the three nieces, and, as

a consequence of the rejection of their claim, they allege they are entitled to interest, as part of the residuum, to the extent of one undivided third jointly. They oppose the classification of the old iron, coal, corn, and hay, as immovable by destination, and there are many other items in the account of the executor Smith objected to by them. The district judge consolidated the two accounts and the oppositions filed, and treated them as one proceeding. The judgment of the district court was, that the bequest to Mistress Bettie Allen of all testator's corporeal movables did not entitle her to the money found in his house at his death, nor to the money in bank, nor to the sugar on plantation at testator's death, after the payment of the special legacies and debts of the estate, and that these amounts formed an unwilled portion of the estate, to be distributed to the heirs at law of the deceased. leaving out the heirs that were disinherited, the court deciding that the testator's three nieces were disinherited, with the exception of a legacy of five hundred dollars left to each of them.

The lower court further sustained the legacy to give Mrs. Cragin's two small boys an English education, fixing the amount to be paid her, and that the Rienzi plantation was devised one-half to Mistress Bettie Allen, and the other half was to be divided into ninths, one-ninth going to each of the Allen heirs, and to each of the Smith heirs.

It further holds that the crop of sugar and molasses made on the Rienzi plantation in the year 1894, which Ogden Smith proposed to account for (though unsold), could not be accounted for till sold, but that, as the question of its distribution was raised, it should be divided among the devisees of the plantation in the proportion they took said plantation, and not to Mistress Bettie Allen, as she contended for in her opposition.

The lower court upheld the payment of attorney's fees, as proposed by Ogden Smith, executor. And, finally, it decided that the account of Ogden Smith, executor, was not a final account, but that the final account must be recast, and that the question of the distribution of the bounty money due ¹⁸⁴³ by the United States government for the sugar made during the year 1894, should be left open for decision when the money was collected and proposed to be distributed by the executors. From this judgment the executors, W. F. Collins and Mrs. Bettie Allen, the Allen heirs and Mrs. Bettie Allen, personally obtained orders of appeal.

The first question presented is, Is Mrs. Allen appointed residuary legatee under the will? Where general expressions stand im-

mediately associated with less comprehensive words, they have been sometimes restricted to articles ejusdem generis; the specific effects being considered as denoting the species of property which the larger term was intended to comprise: 2 Jarman on Wills, 352.

The circumstance of a specific or pecuniary legacy being given to the one legatee, or of the general bequest being followed by particular portions of the personal property to other persons, has been considered to favor the supposition that such bequest was not to comprise the general residue: 2 Jarman on Wills, 354.

And it has been often, we may say invariably, held that a general description of property, or description of the class or kind, preceded or followed by words of narrower import, if the bequest is not residuary, will be confined to species of property of same kind with those previously described. The adoption of the more comprehensive meaning would have the effect of rendering the superadded expression nugatory, and make the testator employ additional language, without any additional meaning: Jarman on Wills, 356; Goodrich v. Posey, 15 Ind. 392; 2 Blackstone's Commentaries, 384; Lartigue v. Duhamel, 4 Martin, N. S., 665.

The confection of the will shows that the testator was ignorant of grammar and orthography, and the most elementary rules of composition. His uncouth language, inapt and confused expressions must be overlooked and construed into logical conclusions and consistent expressions in the effort to ascertain his intention, which must govern, unless the thing to be done is opposed to some inflexible rule of law.

The rules for the interpretation of testaments are: 1. The technical import of words is not to prevail over the obvious intent of the testator; 2. When technical words are used by the testator, or words of art, they are to have their technical import, ¹⁰⁴⁴ unless it is apparent that they were not intended to be used in that sense; 3. The intent of the testator is to be determined from the whole will; 4. Every word shall have effect if it can be done without defeating the general purpose of the will, which is to be carried into effect in every reasonable method: Civ. Code, 1712; Succession of Blakemore, 43 La. Ann. 850; Louisiana v. McDonogh, 8 La. Ann. 171; Williams v. Western Star Lodge, 38 La. Ann. 620; Succession of Bobb, 41 La. Ann. 250; New Orleans v. Hardie, 43 La. Ann. 253; Baker v. Riley, 16 Ind. 479; Crocker v. Crocker, 11 Pick. 257; Lamb v. Lamb, 11 Pick. 378; Anderegg v. Ross, 13 Ind. 413; Homer v. Shelton, 2 Met. 194; Jackson v. Babcock, 12 Johns. 389; Kelly v. Stinson, 8 Blackf.

389; *Ide v. Ide*, 5 Mass. 500; *De Kay v. Irving*, 5 Denio, 646; *Anable v. Patch*, 3 Pick. 362; *Linstead v. Green*, 2 Md. 82; 1 *Jarman on Wills*, 404-412.

In the will he gives to his wife all his corporeal movables, and follows this general disposition by a specific enumeration of the immovables, such as furniture, bedding, linen, silver plate, chinaware, etc. All of his stock of cattle, horses, and carriages. It will be noticed that after the designation of furniture, etc., the sentence stops, and then in another sentence he disposes of a different species of corporeal movables. There is no ambiguity in this part of the will. No construction can be put upon the language than that the testator intended to limit the corporeal movables to those designated. The words reviewing the general description of the property seem to have been used advisedly by the testator. That he did not intend that his entire personal estate should pass by the general description of corporeal movables is evident from his limiting its application in the words descriptive of particular species of property, and the further fact that large portions of his personal estate are devised to particular legatees. And again to the wife he gives other corporeal movables, such as one-half of all tools, mules, etc. He speaks of the legacy to his wife of one-half of the Rienzi plantation a second time, and uses the expression that she should have one-half of everything belonging to Rienzi, except a claim of one hundred thousand dollars due, as alleged, by the federal government, and the other property he says he will dispose of further on. He had disposed of the Rienzi plantation—all the immovable property he possessed. His other property then was movable, a part of which he had given to his wife, and the other property he proposed to dispose of thereafter. The other property could only have been that which he had not disposed of. It may have been his intention, as is usual in wills, to make his wife the residuary legatee at the ¹⁰⁴⁵ closing of his will. But unfortunately for her he failed to do so, and as to this part of his estate he died intestate. The presumption is, that the testator intends to dispose of his entire estate and not to die partially intestate. Sometimes slight expressions, if they can be construed as his intention to do so, are seized upon as the means of carrying out the supposed intention of the testator.

We have carefully studied the expressions in the will to ascertain if anything could be gleaned by which the testator's intention could be inferred as to the disposition of the residuum of his estate.

We are able to find none, except we are to adopt the construction of the wife's counsel and presume that the testator, who had lived so long on the Rienzi place that he had identified it with his entire fortune and considered everything which had been made upon it as a part of Rienzi. But even then the whole general estate would not go to the wife, as he says: "I will that my wife do have one-half of everything belonging to Rienzi." In case a favorable opportunity is not afforded for the sale of the place, he says his wife shall be credited with the proceeds. But this expression, unexplained by others and standing alone, will not justify the interpretation that she was intended as the residuary legatee. It is an evidence, however, of the intention of the testator that his wife was to receive the net proceeds of the crop until the plantation finally passed from the control of the executors.

No particular form of words, it is true, is requisite to constitute one a residuary legatee. It must appear, however, to be the intention of the testator that the residuary legatee shall take the residue of the estate after payment of debts, and meeting all the appointments of the will: Williams on Executors, 1310, et seq.

Jarman on Wills, volume 3, page 2, says: "In some instances, however, in favor of the restricted construction, founded on subsequent expression, description of a particular species of property, has not been allowed to prevail against the force of the previous general words." In the cases cited for this textual declaration, there was some expression as to the disposition which showed that it was the intention to pass the residue of the estate.

Thus in *Benet v. Bachelor*, 1 Ves. Jr. 63, there was after the previous general words, the expressions "and other, not before bequeathed goods and chattels that he should be in possession at the day of his decease."

¹⁰⁴⁶ In *Campbell v. Prescott*, 15 Ves. 500, the testator gave to his two sons all his sugar house, cupola, and merchandise, stocks, with jewels, plate, household goods, furniture, and all effects whatsoever. In *Michel v. Michel*, 5 Madd. 49, after a bequest of linen, china, household goods, and furniture, the words were followed by "and effects he shall die possessed of."

And in other cases cited there are expressions such as: "and all his other effects; or whatever else I may then be possessed of at my decease," "his wines and property in England." In all these cases "the mere enumeration of particular articles, followed by a general bequest, did not, of necessity, restrict the general be-

quest, because a testator often threw in such specific words, and then wound up the catalogue with some comprehensive expression for the very purpose of preventing the bequest from being so restricted": Jarman on Wills, 362.

Mr. Jarman says (Jarman on Wills, 344): "These cases indicate the disposition of the judges of the present day to adhere to the sound rule, which gives to words of a comprehensive import their full extent of operation, unless some very distinct ground can be collected from the context for considering them as used in a special and restricted sense."

"It is to be observed, however, that in all the preceding cases there was no other bequest capable of operating on the general residue of the testator's personal estate, if the clause in question did not. Where there is such a bequest, it supplies an argument of no inconsiderable weight in favor of the restricted construction, which is then recommended by the anxiety always felt to give to a will such construction as will render every part of it sensible, consistent, and effective."

There was no expression in the will following the particular description of the property after the general description of "all corporeal" movables to indicate that the wife was to have the residuum of his personal estate; nor is there any indications of any intent to make any other legatee the recipient of this residuum. We are forced to the conclusion, from a consideration of the entire instrument, that he intended the balance of his personal estate to go to his legal heirs, a disposition, in doubtful meaning, which the law favors.

The will speaks from the death of the testator, that being the point ¹⁰⁴⁷ of time at which it becomes operative (Canfield v. Bostwick, 21 Conn. 550-551), unless the language used, such as the word "now," or a verb in the present tense which requires it to be taken at the time it is used: 1 Jarman on Wills, 318.

But it will receive the former interpretation if it can reasonably be made to bear it: 2 Cox, 384. It is plain from the terms of the will that the testator intended that the plantation should be sold, and the proceeds distributed as directed by him. Speaking from the time of his death for the future sale of the property, he said to his executors that they should sell the Rienzi plantation and distribute the proceeds, and, until they did sell it, the proceeds should go to the wife. The legatees could not sue immediately after the death of the testator, for a partition in kind, as this would have been contrary to the positive mandate of the testator. The plantation was directed to be

sold in the most positive language. The legatees then were only interested in the proceeds of the sale. The net proceeds belong to the wife from the time of the death of the testator until the sale of the place. No other reasonable interpretation can be given to the language of the testator. If the plantation should have been sold with the growing crop, it would have passed with the place and increased the proceeds.

So long as the plantation remained in the hands of the executors, Mrs. Allen was entitled to the proceeds of the crops. If not sold in accordance with the directions of the testator, it is only at the moment of delivery to the legatees if they choose to hold it in indivision that the growing crops pass to them as part of the immovable.

The testator says that "I will that my wife to have a one-half of everything belonging to Rienzi." This declaration is explanative of the desire that his wife should have one-half of the plantation, mules, tools, etc. The wife, under this declaration, is entitled to one-half of everything on the plantation, attached to the same, immovable by nature or by destination, or by the object to which they are applied: Civ. Code, 462, et seq.

Everything on the plantation, placed there for its service, is immovable by destination if it is essential for the gathering of the crop, preparing the same for market, or for the improvement of the quality of the land, or to feed the stock and cattle necessary for working the same.

The manufacture of sugar is the preparing of the crop of cane for ¹⁰⁴⁸ market. Coal is an essential thing for the running of the machinery of the sugarhouse. Although not mentioned in the code, it is to be classed, if destined during the grinding season for the service of the mill, as immovable by destination. The hay, corn, fodder, and coal were placed on the plantation for the use of the place, and consumed in the cultivation of the plantation, in working the crop, and preparing the same for market. The legal heirs are not entitled to the value of the same. The timber and the old iron were not essential for the use of the plantation and were not employed for the cultivation of the same. They therefore fall into the residuum.

Immediately after the legacy of the one-half of the plantation and a claim the testator held against the federal government is the language: "And to the five children of my sister Cynthi A. Smith, Gaston Smith, Fred. W. Smith, Jr., Mrs. Nellie Huchens, Ogden Smith and Thomas A. Smith." There is no period after the bequest to the Allen heirs, but this as a distinct sentence fol-

lows. We know that the testator was not familiar with the English language; that he was deficient in the use of words, used capitals indifferently, and was not proficient in composition. That he intended that his sister's children should participate in this bequest is evident from the subsequent language in the will bequeathing to Fred. W. Smith his note for five hundred dollars as "part of his share heretofore given him." He had given no "share" except in the bequest to the Allen and the Smith heirs. He evidently had in his mind a bequest to his sister's children.

Following immediately the bequest to the families of his brother, Thomas H. Allen's four children, is the legacy to the children of his sister, and the testator intended to make a continuous sentence and to provide for his sister's children as liberally as he had done for those of his brother.

We are satisfied from the entire context of the will that the testator intended that his sister's children should participate in the legacy of half of the plantation and the claim against the government of the United States.

When the reading of a whole will will produce a conviction that the testator must necessarily have intended an interest to be given, which is not bequeathed by express and formal words, the court will supply the defect by implication, and so mold the language of the testator as to carry into effect, as far as possible, the intention which ¹⁰⁴⁹ it is of opinion that he has on the whole sufficiently declared: *Metcalf v. Farmington Parish*, 128 Mass. 375; *Boston Safe Deposit etc. Co. v. Coffin*, 152 Mass. 95; *Post v. Hover*, 33 N. Y. 599.

Punctuation must give way whenever it interferes with the proper and reasonable construction of a will: 8 Law Rep. 744, notes.

The devise to his brother's children should be connected with the devise to his sister as one continuous sentence. He gives to the families of his brother's four children. They do not take, therefore, per capita, but per stirpes. The number or the names or the children are not mentioned. In the bequest to the sister's children there is no language used which would justify the inference that the testator intended that they should receive differently from the families of his brother's children. The legacy is to the five children of his sister, and, construing this in connection with the bequest to his brother's children's families, it is clear to our minds that the testator intended that these five children should be grouped as a family, and take per stirpes as the children of his brother's families. Each set of children is

therefore entitled to one-fifth: *Hyatt v. Pugsley*, 23 Barb. 299.

To the three nieces named in the will, it says that they are to receive five hundred dollars more in cash, and have no interest in any other claim. They had received five hundred dollars each, and the legacy to them is plain in its meaning, that each was to receive five hundred dollars in addition to that already given to them by the testator in his lifetime. They are to have no interest in any other claim. As to the residuum of the estate, the testator died intestate. They could have no interest in any claim given to other legatees. They could possibly lay claim to nothing else than the residuum of the estate. The testator must have referred to this, for there is no other fund upon which the legatees could assert any right. They are, therefore, excluded from any participation in the residuum of the estate.

Although opposition was made, for uncertainty of that part of the will which directs that a good education should be bestowed upon the two boys of Mrs. Cragin, we do not find the matter discussed in the briefs of counsel. We presume, therefore, that it has been abandoned. But as the accounts of the executors are not final, and ¹⁰⁵⁰ the question may hereafter be raised, we will pass upon this part of the will.

The rule in regard to the inadmissibility of parol evidence to vary, contradict, or to render intelligible the words of a will is not essentially different from that which obtains in regard to contracts. It may be received to show the state of the testator, the nature and condition of his property, his relations to the contestants, and all the surrounding circumstances. But this is done to place the court in the condition of the testator, in order, as far as practicable, to make them the more fully to understand the sense in which he used the language found in his will: 1 Greenleaf on Evidence, pars. 287-289; Jarman on Wills, 349, notes. But parol evidence is not admissible to supply any words or defects in the will: 1 Greenleaf on Evidence, pars. 287-289; Jarman on Wills, 349, notes; *Hyatt v. Pugstey*, 23 Barb. 285; *Abercrombie v. Abercrombie*, 27 Ala. 489.

In this case there is no reason to supply any words or defects in the will. There is no doubt as to the intention of the testator or to the subject matter of the bequest. The testator has defined his object with reasonable certainty, and the court can, from the data furnished by him, ascertain the amount necessary to carry into effect his intention. The judge heard evidence as to the amount necessary to educate the two boys of Mrs.

Cragin, and in thus acting he did not vary or avoid the intention of the testator, or in any way contradict any part of the will: *McCorn v. McCorn*, 100 N. Y. 511; *Reinders v. Koppelman*, 94 Mo. 338; *Caldwell v. Caldwell*, 45 Ohio St. 512; *Werthington v. Klemm*, 144 Mass. 167; *Wilkins v. Allen*, 18 How. 385.

We find no reason to disturb the rulings of the district judge on this issue, nor do we find any error in his ruling as to the attorney's fees and the commissions of the executors. The succession is in no condition for final settlement. The crop of 1894 has not been disposed of and the sugar bounty claim uncollected: *Succession of Gardere*, 48 La. Ann. 289.

The judgment appealed from is amended so as to give to Mrs. Bettie Allen the net proceeds of the crop on Rienzi plantation for the year 1894, and to one-half of the plantation, one-fifth interests in same to each of the families of R. H. Allen, Jr., T. H. Allen, Jr., Harry Allen, one-fifth to Mrs. Latham, and one-fifth to the children of Mrs. Cynthia Smith.

In all other respects the judgment is affirmed, the succession to pay costs of appeal.

1051 ON APPLICATION FOR REHEARING.

The applicants for a rehearing have misinterpreted our decree. It does not say, nor was it intended to convey the impression, that the funds ready for distribution should be withheld from those entitled to the same under the will. The succession is to be continued in its administration until the payment of the bounty, when it will be distributed according to law.

All funds ready for distribution must reach their destination without unnecessary delay.

Rehearing refused.

WILLS—CONSTRUCTION—INTENTION.—In the construction of wills, the intention of the testator, when apparent, overrides all established rules of interpretation: *Matter of James*, 146 N. Y. 78; 48 Am. St. Rep. 774. The intent of the testator must govern in the construction of his will, if not contrary to some positive rule of law, although, in giving effect to it, some words must be rejected or so restrained in their application as materially to change the literal meaning of the particular sentence: *Whitcomb v. Rodman*, 156 Ill. 116; 47 Am. St. Rep. 181. The intention must be gathered from the whole will and all its parts: *Watkins v. Snadon*, 93 Ky. 501; 40 Am. St. Rep. 203, and note; *Dickison v. Dickison*, 138 Ill. 541, and note; *L'Etourneau v. Henquenet*, 89 Mich. 428; 28 Am. St. Rep. 310; *Phelps v. Bates*, 54 Conn. 11; 1 Am. St. Rep. 92. Every word and sentence in a will must be considered in forming a judicial opinion of it: *Turbett v. Turbett*, 3 Yeates, 187; 2 Am. Dec. 369. General provisions of a will give way to specific provisions: *Dickison v. Dickison*, 138 Ill. 541; 32 Am. St. Rep. 163. General words in a will, following after and coup-

led with words of limited signification, are restricted to the same class of things as the former, except where such general words are in a residuary clause: *Peaslee v. Fletcher*, 60 Vt. 188; 6 Am. St. Rep. 103. It is presumed that a testator intended to dispose of his whole estate: *Whitcomb v. Rodman*, 156 Ill. 116; 47 Am. St. Rep. 181; and courts, in construing a will, should, if possible, avoid any construction which would result in partial intestacy: *Peckham v. Lego*, 57 Conn. 553; 14 Am. St. Rep. 130. The residuary clause in a will is intended to prevent intestacy as to any part of the estate: *Dickison v. Dickison*, 138 Ill. 541; 32 Am. St. Rep. 163; an unexhausted residuum goes to the heir like undisposed of real estate, where lands are devised upon trust for a particular purpose and there is a balance left or the trust fails: *Mahorner v. Hove*, 9 Smedes & M. 247; 48 Am. Dec. 706. Wills have no operation until the death of the testator: *Marsh v. Marsh*, 3 Jones, 77; 64 Am. Dec. 598; *Grimes v. Norris*, 6 Cal. 621; 65 Am. Dec. 545; *Lorieus v. Keller*, 5 Iowa, 196; 68 Am. Dec. 696; monographic note to *Goebel v. Wolf*, 10 Am. St. Rep. 474, on construction of wills. A court, in construing a will, so as to carry out the intention of the testator, has power to reject certain words and to supply others: See monographic note to *Chappell v. Missionary Soc.*, 50 Am. St. Rep. 285, on extrinsic evidence to explain wills. The application of the per capita or per stirpes rule must be controlled by the general intention of the testator: Note to *White v. Holland*, 44 Am. St. Rep. 90; *Risk's Appeal*, 52 Pa. St. 269; 91 Am. Dec. 156.

DAUGHTRY v. KNIGHTS OF PYTHIAS.

[46 LOUISIANA ANNUAL, 1203.]

INSURANCE—MUTUAL BENEFIT ASSOCIATION—SUBSEQUENT BY-LAW—SUICIDE.—Under a contract of life insurance, issued by a mutual company, conditioned to be subject to any laws thereafter to be enacted, the insured is bound by a subsequent by-law forfeiting the policy on account of suicide.

Wise & Herndon and J. Zach. Spearing, for the appellants.

Leonard & Randolph, for the appellee.

¹²⁰³ McENERY, J. F. A. Daughtry, the husband of plaintiff, was a member of the order of the Knights of Pythias, and belonged to the endowment rank. ¹²⁰⁴ He was found dead in a cell of the jail at Shreveport, Louisiana. The widow instituted this suit for the amount of the insurance on the life of her deceased husband. The defense is that the deceased took his own life, and that the policy was forfeited by the laws of the order.

The facts recited in the record show that the deceased took his own life. There is no theory that can be advanced under the facts that could lead to a doubt of death by suicide. There is no basis for a theory that the death of the deceased was caused by accident, or that he met his death at the hands of others.

In *Leman v. Manhattan Life Ins. Co.*, 46 La. Ann. 1189, 49

Am. St. Rep. 348, we held that "when circumstantial evidence alone is relied on to establish suicide, it is at least within bounds to say the evidence must exclude with reasonable certainty any other cause of death." The evidence is such that no other conclusion can be arrived at than that the deceased voluntarily took his own life.

The plaintiff contends that, if it be found that the husband committed suicide, the policy is nevertheless due and payable, because, when the certificate of membership of the endowment rank was issued to him, it contained no provision against death by suicide nor did the laws of the order exclude self-destruction from the risks under the policy of insurance stipulated in the certificate; that the legislation thereafter forfeiting the policy on account of suicide could not affect a policy or certificate of membership issued prior thereto; that such legislation was *ex post facto*; and, finally, that the legislation did not bear on the contract, but only as to the fitness and qualification of membership, and related exclusively to the discipline of the order.

Orders like the defendant association have multiplied in recent years. They are organized for the mutual benefit of the members, taking care of the sick and afflicted in life and providing for the family of the deceased member after death. Rules and regulations, a constitution, and by-laws are enacted for their government. Every member who joins one of these orders does so with a full knowledge of its laws and usages. He is bound by the constitution and by-laws, and subjects himself to their discipline in order to receive the benefits conferred by the order. There can be no law or regulation enacted after his membership that would destroy the benefit agreed to be conferred upon him by the laws and regulations in force at the ¹²⁰⁵ time he joined the order. His contract of insurance could not be abridged or violated without his consent. But provision is made in the constitution for its amendment, and we see no reason why the members of an association of this kind cannot, like the body politic, change its laws, enact new ones, and discipline its members by police regulations.

In both cases, the members, by their vote, participate in the change by the rule of the majority. In neither case can vested rights be destroyed. The vested right that the deceased had was for his family to receive the sum of three thousand dollars, provided he complied with the laws of the order. There was no vested right in selecting the mode and manner of his death. Had there been no subsequent legislation, there would have

been no prohibition to the payment. But the order had a right, independent of any stipulation or agreement, to say that no member should take his own life and receive for his family the benefit of the life policy. It was a matter of legislation in which each member, through representation, assented. It was a police regulation in the interest of the discipline and welfare of the endowment rank. We understand, from the documents accompanying the transcript, that payments of policies on account of suicides had become so frequent that the endowment fund was endangered. Suppose, in the state of Louisiana, persons should insure themselves and commit suicide, in order that the policy should go to the beneficiaries, and it should become so frequent as to endanger society, would any one doubt the wisdom or the validity of a law which should say that no existing policy, or those thereafter issued, should be paid if the policy holder committed suicide? So in this case, the order of the Knights of Pythias applied a remedy, by declaring the forfeiture of existing and future certificates of membership in the endowment rank on account of the self-destruction of the holder of the certificate.

But, in this case, the holder of the certificate was bound by the stipulations in it. When issued to the husband of plaintiff it contained this agreement: "And in consideration of the payment hereafter to said endowment rank of all monthly payments as required and the full compliance with all the laws governing this rank now in force, or that may hereafter be enacted, and shall be in good standing under said laws," etc.

In the certificate it is stated that if any of the requirements of the ¹²⁰⁶ laws in force governing the endowment rank shall be violated, the supreme lodge of the order shall not be liable for the amount of the policy.

The certificate covers both the laws which may thereafter be enacted, governing the endowment rank, and the good standing of members under the existing regulations.

After this certificate was issued to F. A. Daughtry, a law was enacted by the proper authority, and approved by the supreme lodge, forfeiting the policy on account of suicide. Any law enacted in pursuance of this agreement is the voluntary consent of the members of the order, made for their mutual benefit and by their proper representatives.

In the case of Supreme Commandery etc. v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332, the facts were almost identical with those in the instant case. The syllabus of the case reads: "Un-

der a contract of life insurance issued by a mutual company, conditioned to be subject to any law thereafter to be enacted, the insured is bound by a subsequent by-law forfeiting such policies when the insured should die by his own hands, sane or insane." This case is well supported by sound reasoning and abundant authority, and we accept the doctrine announced.

It is ordered that the judgment appealed from be annulled, avoided, and reversed, and it is now ordered that plaintiff's demand be rejected with costs.

INSURANCE—MUTUAL BENEFIT ASSOCIATION—SUBSEQUENT BY-LAW—SUICIDE.—Under a contract of life insurance, issued by a mutual company, conditioned to be subject to any by-laws thereafter to be enacted, the insured is bound by a subsequent by-law forfeiting the policy on account of suicide: See monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 557, on features of the law especially applicable to mutual or membership life or accident insurance.

CHOPPIN v. DAUPHIN.

[48 LOUISIANA ANNUAL, 1217.]

ESTOPPEL—WITHDRAWAL OF PROMISES.—The principle of estoppel will not permit the withdrawal of promises or engagements on which another has acted.

CEMETERIES — SEPULTURE — ESTOPPEL — INJUNCTION.—If the remains of deceased relatives are placed in a tomb upon the strength of a promise by the owner of the tomb that they shall remain there forever, neither the tomb-owner in life, nor his widow and legatee, after his death, can recall that promise and require the removal of the remains deposited on the faith of this pledge of future sepulture; and an injunction will issue against disturbing them.

J. F. Poché and Clegg & Quintero, for the appellants.

Benjamin Rice Forman, for the appellees.

1217 MILLER, J. The plaintiffs, the son of the late Dr. Choppin and the widow and children of the late Arthur Choppin, sue to enjoin the **1218** defendants from disturbing the remains of Dr. Choppin, Arthur Choppin, and other members of the Choppin family. The petition alleges that the bodies of the deceased members of the family, at the request of the late Dr. Maximillian A. Dauphin, were placed in the tomb constructed by him, with the desire on his part, communicated to and accepted by petitioners, that the tomb should be the last resting place of these remains, and averring that the defendant, the widow and legatee of Maximillian Dauphin, threaten to re-

move the remains, in violation, it is charged, of his obligation and of her duty as his legatee; the petition, besides the injunction to restrain such removal, prays for judgment decreeing the tomb to be forever dedicated to serve as the burial place of the remains interred therein of the deceased members of the family. The answer of Mrs. Dauphin asserts title to the tomb as legatee of her husband; that he never dedicated it for the purpose stated in the petition, denies that plaintiff ever acquired any right to the tomb or "its occupancy" for the purposes of sepulture, and avers that such occupancy was permitted by M. A. Dauphin from kindness to the Choppins, he having married one of the family; the answer disavows the threats imputed to respondent of removing the remains; avers the tomb is expensive to keep; that she has built a tomb to which the remains of her husband have been transferred, and, desirous of selling the tomb for which she has no use, the answer alleges she made the offer of such sale to plaintiffs; hence, it is alleged the injunction issued wrongfully and the prayer is for its dissolution, reserving respondent's right to damages. From the judgment maintaining the injunction the defendant appeals.

Our attention is directed in the briefs for the defendant to the objection to all the testimony offered by plaintiff to show the statements and acts of Maximillian A. Dauphin, importing the obligation on his part that the tomb should be the permanent sepulcher for the remains of the Choppins. The argument of the counsel for the defendant is, that the plaintiffs, asserting an easement or servitude on the tomb or a title to it, can produce no parol proof to support their pretensions. While the petition claims an easement or servitude on the tomb, we must consider all the allegations on which plaintiffs rely. The substantial issue tendered by the petition is, that Mrs. Dauphin, by words and conduct, held out to plaintiffs that the remains of their dead should rest forever in this tomb, on the faith of which ¹²¹⁹ plaintiffs consented to the removal of the remains from other sepulchers, Dr. Dauphin after this consent effecting that removal and causing to be carved on the tomb the names of the dead along with his own name. After all this, the plaintiffs contend neither Dr. Dauphin or his legatee can require the removal of the remains. We do not think the question is one of title, hence is not affected by the rule of proof cited by the plaintiffs, but is to be solved by other tests.

We do not appreciate there is any material contention as to the facts. The friendship between Dr. Choppin and Dr.

Dauphin; the mode of manifesting that friendship chosen by him, of an imposing tomb and his inscription upon it of the names of his friend and of the deceased members of his family, with that of Dr. Dauphin; the fact that he caused the removal of the deceased, Dr. Choppin having died about three years before the tomb was built, the others years before; the avowal of Dr. Dauphin to plaintiff that the tomb was to be devoted to the uses prompted by his affection for the family, and the reliance upon his assurances evinced by the consent of plaintiffs to the transfer of the remains, and that Dr. Dauphin caused their names to be placed with his own on the tomb, are, we think, placed beyond controversy by the record. There is left the legal question so elaborately argued.

We appreciate that servitudes exist only for the benefit of immovable property, or the profit and advantage of the living: Civ. Code, arts. 709, 753, et seq. We do not perceive any basis to sustain any right of plaintiffs in the nature of a servitude of burial in this tomb. We recognize, too, that the title to immovable property in Louisiana must conform to ownership, and its modifications prescribed by the code, articles 490, 492, 533, 636, et seq.: *Police Jury v. McDonogh*, 8 La. Ann. 351; *Succession of McCan*, 48 La. Ann. 145. The title to burial ground admits of none of the modifications established for the advantage of estates or the uses of individuals. The title to this tomb is in the legatees of Dr. Dauphin, as it was in him in his life: *McEnery v. Pargoud*, 10 La. Ann. 497; *Burke v. Wall*, 29 La. Ann. 46; 29 Am. Rep. 316. The plaintiffs assert no title to the property. They demand only the injunction to restrain the removal of the remains. While we recognize the title of the legatee of Dr. Dauphin, the inquiry is, whether, consistently with that title, the plaintiffs, by the acts of Dr. Dauphin, are not entitled to prevent the removal, the subject of discussion.

¹²²⁰ The disturbance of the remains of the dead, except for lawful necessary purposes, is not encouraged. With due regard to the sentiment on that subject as well as public policy, courts have enjoined disinterments and even denied the enforcement of a mortgage upon burial ground: *Brendle v. German Reformed Cong.*, 33 Pa. St. 422; *Thompson v. Hickey*, 8 Abb. N. C., 159, cited in 12 U. S. Dig. No. 124, and other similar types of authority are to be found in the decisions of the courts of other states. It is needless to dwell on the assurances of Dr. Dauphin, and their acceptance by plaintiffs, under which their dead were removed by Dr. Dauphin and deposited in his tomb.

There was, by his words and still more by his conduct, the manifestation of his purpose that the remains of the Choppins should have a final resting place in this tomb, and, on the faith of that purpose so distinctly avowed, these plaintiffs permitted the transfer of the remains of their dead. In our view, after all, this Dr. Dauphin could never have made the demand, so violative of good faith and repulsive in all respects, as that which this suit supposes was advanced by his legatee. The principle of estoppel so often applied in controversies involving pecuniary rights will not permit the withdrawal of promises or engagements on which another has acted. It seems to us that the principle can well be applied to this controversy. To disturb the mortal remains of those endeared to us in life sometimes becomes the sad duty of the living. But, except in cases of necessity, or for laudable purposes, the sanctity of the grave should be maintained, and the preventive aid of the courts may be invoked for that object. The remains contained in the tomb, the subject of this controversy, having been laid away under the assurances of final repose, shown by this record given by the tomb owner, must, in our opinion, hold good against his heir, as they would have been maintained against the owner in life. While the title to the tomb is in the heir, she is, in our view, concluded by the acts and conduct of Dr. Dauphin from disputing the plaintiffs' right to require that the tomb shall remain now as designed by him, the sepulcher for the remains now in it of the deceased members of the Choppin family.

It is claimed plaintiffs had no right to enjoin. The letter from Dr. Dauphin's legatee, that caused the injunction, announced her purpose to sell the tomb, offering it first to plaintiffs. The letter implied the exclusive power of the legatee over the tomb, and to sell involved, as the plaintiffs understood and appreciated, the removal of ¹²²¹ the remains. We think that appreciation was natural. The petition for the injunction asserting the right to the tomb as the sepulcher for the remains was met by the answer, not disclaiming the purpose attributed to the heir in the petition, but denying the right asserted by plaintiffs, and insisting that the remains placed in the tomb by the kindness of Dr. Dauphin were there only by sufferance. If, as we maintain, it was competent for the plaintiffs to require that the remains should continue in the tomb, they had the right to enjoin the removal, and, however intended, the letter sent them, in our view, authorized their apprehension of that removal. The issues and discussion of the controversy have re-

quired from us a decision of the question on the theory that the removal of the remains was proposed on the one hand and resisted on the other. While we are required by the pleadings and discussion to deal with the case as exhibiting this complexion, it is proper to say that no purpose of this removal was ever entertained by Dr. Dauphin, and any such purpose on the part of his heir has been disclaimed in the argument. We think, however, that the plaintiffs, placing a reasonable interpretation on the letter of the heir, were entitled to the injunction.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be affirmed with costs.

ON APPLICATION FOR REHEARING.

The original opinion in this case maintained that cemetery lots did not part with the character of immovable property, because devoted to burial purposes. Under our law, whatever its uses, land is immovable. The code completely effaces the distinction of "things holy, sacred, and religious": Civ. Code, 452, 456; *McEnery v. Pargoud*, 10 La. Ann. 497; *Burke v. Wall*, 29 La. Ann. 46; 29 Am. Rep. 316. The opinion, therefore, necessarily recognizes the title of Mrs. Dauphin, the legatee of her husband, to the lots bought by him and left at his death to her.

The opinion affirmed, of course, there could be no servitude, usufruct, or other modification of ownership of burial lots. There is no servitude, in the legal sense, established on property for the interment of the dead, and the usufructs of the code are for the profit and advantage of the living. There was also the recognition in the opinion of the prohibition in the code enforced in our jurisprudence of every species of tenure of property except ownership ¹²²² in its fullest significance, and its modifications carefully prescribed by the code: Code, arts. 488, 490, et seq., 533, et seq., 646, et seq.; *Police Jury v. McDonogh*, 8 La. Ann. 251; *Succession of McCan*, 48 La. Ann. 145.

The court, then, in this case is dealing with lots, title to which is in the defendant, with no form of subdivision of ownership vested in plaintiff, or in any, save the defendant. Consistently with her title and the absolute exclusion by the law of all tenures of property, except those recognized by the code, the inquiry presented itself, How could this court sustain that right the plaintiffs assert to these lots? In what part of the code is that to find a place? If admitted to the extent asserted, must it not be deemed simply and only of our creation? It is the claim of plaintiffs that Dr. Dauphin, under whose will his wid-

ow, the defendant, inherits these lots, by words, letters, and conduct quite as expressive as language, promised that the tomb he erected on the property should be the final resting place for the remains of his friend, Dr. Choppin, and the remains of the deceased members of the family, as well as for the remains of other members of the connection when their turn came to die. This right, asserted at present and for the future, is to subsist alongside of the title the code recognizes to the property. If admitted, the right is purely of judicial creation. The asserted right carries the use of ownership applied to burial lots, but is entirely foreign to our system.

We were, therefore, thus confronted, in our consideration of this case, with the legal title to this property in the defendant, and another species of interest or form of title, claimed to have been brought into existence by the declarations and conduct of Dr. Dauphin in his lifetime, but not within the recognition of the code. We reached and adhere to the conclusion that the right, at least to the extent asserted, could not be allowed.

But we found there was a basis consistent with our law on which the plaintiff was entitled to part of the relief sought. In the lifetime of Dr. Dauphin, the remains of Dr. Choppin and of the deceased members of the family had been placed in the tomb under the promise on Dr. Dauphin's part they should remain there. In our view, wholly irrespective of any issue of title, neither Dauphin in life or his legatee after his death could recall that promise and require the removal of remains deposited on the faith of this pledge of final sepulture. The petition attributed to defendant the design of removal ¹²²³ of the remains, a purpose never contemplated by Dr. Dauphin and disavowed for his widow in the argument in this court. Still, the plaintiff had issued the injunction on the belief of its necessity, not without reasonable cause, as it appeared to plaintiff. Our purpose was to confine the relief to maintaining the injunction against removing the remains. The decree of the lower court affirmed by us goes beyond the relief proposed in our opinion, and on this rehearing we are asked to make the decree conform to the opinion. After the additional argument on this application, and on the maturest reflection, we remain of the conviction that perpetuating the injunction against disturbing the remains now in the tomb must be the limit of the decree.

It is therefore ordered, adjudged, and decreed that our former judgment in this case be set aside and annulled, and it is now ordered, adjudged, and decreed that the judgment of the lower

court, in so far as it enjoins and prohibits the removal from the tomb of the remains of Dr. Choppin, Mrs. Eliza Choppin, Arthur V. Choppin, and Amedee Choppin, now in the tomb, be affirmed, and the injunction decreed to be perpetuated to that extent; it is further ordered and adjudged that in all other respects the judgment of the lower court be and is hereby avoided, annulled, and reversed, and that appellees pay costs of appeal, those of the lower court to be borne by the appellants.

ESTOPPEL.—A DECLARATION which has been acted upon creates an estoppel. The estoppel operates because the declaration has been acted upon, and not because of its truth or falsity, or the intention with which it was made: *Mitchell v. Reed*, 9 Cal. 204; 70 Am. Dec. 647.

CEMETERIES—INJUNCTION AGAINST REMOVAL OF REMAINS.—The persons having charge of a dead body hold it as a trust which a court of equity will protect: *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227; 14 Am. Rep. 667; and an injunction will issue to restrain any unauthorized interference with graves and the remains therein: See notes to *Craig v. First Presbyterian Church*, 32 Am. Rep. 429; *Evergreen Cemetery Assn. v. New Haven*, 21 Am. Rep. 647; monographic note to *Wynkoop v. Wynkoop*, 82 Am. Dec. 515, on the rights and duties of relatives and others respecting bodies of the dead.

McCONNEL v. LEMLEY.

[48 LOUISIANA ANNUAL, 1433.]

LANDLORD AND TENANT—DILAPIDATED BUILDING—OWNER IS NOT LIABLE FOR INJURY TO GUEST OF TENANT. If a "surprise party" visits the house of a friend for the purpose of spending the evening in social amusement, and are welcomed as guests, one of them who sustains bodily injuries occasioned by the fall of a gallery, cannot recover damages therefor of the owner of the building, who had leased it as a place of residence to the tenant, especially where the owner had, shortly after renting the premises, made all the repairs considered necessary for the safety and security of the building, and where the guests contributed, in some degree, to the accident, by rushing out upon the gallery to watch a fire-engine pass, upon an alarm of fire, after having been warned of the danger of dancing upon the gallery.

LANDLORD AND TENANT—LIABILITY FOR INJURY TO GUESTS OF TENANT—WHAT PRINCIPLE CONTROLS.—The guests of a tenant are not the guests of the landlord. If the tenant is neglectful of the safety of his guests, they have their recourse against him personally, but not against the owner of the building. It is the duty of care the occupant owes his guest, and not the duty the owner of the building owes to the public, that controls the recourse of an injured party.

James Wilkinson, R. H. Lea, and Farrar, Jonas & Kruttschmitt, for the appellant.

Frank E. Rainold and A. G. Brice, for the appellee.

1434 WATKINS, J. Plaintiff seeks to recover ten thousand dollars damage of the defendant, as owner of the house at the corner of Julia and St. Charles streets in the city of New Orleans, it being at the time occupied as a residence, by one W. H. Burgess, as his tenant, under the following circumstances as related in his petition, viz:

"On the 16th of November, 1894, Burgess entertained a party of friends at his home. They had come as a 'surprise party,' and were welcomed by Burgess as guests. Among them was the daughter of plaintiff, and she was made welcome by the host and his wife. A little after 1 o'clock, Miss Virgie McConnell was standing on the veranda, or gallery, that surrounded the dwelling, and on which a number of doors opened. She had stepped upon the gallery for the purpose of enjoying the fresh air, as the evening was a warm one, while the other young ladies were putting on their hats preparatory to leaving. While she was standing on this gallery, which was a structure extending along both the Julia and St. Charles street sides of the house, being about twelve feet wide, with a railing encircling it, the fire bells rang, and about a dozen of the guests came out to watch the fire engine pass. The enginehouse was nearly opposite, and they viewed the preparations of the firemen, and the departure of the engine out Julia street toward the woods. . . .

"The engine had scarcely crossed St. Charles street before the section of the gallery upon which Miss McConnell, with about seven or eight other guests, was standing, suddenly gave way and fell, and precipitated her and others to the hard flag pavement of the sidewalk, a distance of about thirteen feet. Two others fell on top of her. Her right leg was broken above the knee, and she was bruised all over the body. She remained six weeks in bed in the Charity Hospital, suffering excruciating pains and agony, and she could not walk without a crutch for months after the accident. After healing, her injured leg was found to be shorter than the uninjured one. Dr. Schmittle, **1435** who had not measured the extent of the shortening, thought it was between one-quarter to one-half inch; Dr. E. J. Graner, who made a critical examination, testified that it was about one-half inch. Both physicians concur in pronouncing the injury permanent, and that Miss McConnell will be a cripple for life. She will always limp.

"The cause of the falling of the gallery was fully proved. It was rotten to such an extent that no repairs could have rendered it safe. The inspector of public buildings of the city of New

Orleans, Mr. Peeler, made an examination of that portion of the structure that did not give way, and ordered it torn down, as dangerous to human life."

Admitting his ownership of the premises in question and the lease of Burgess, the defendant, for answer, avers that it was rented for the uses and purposes of a residence, and was in thoroughly good condition at the time the accident happened, and that it was amply safe for its usual, ordinary, and contemplated purposes. That there was no defect in said gallery which was apparent to an observer, and that he had effected all the repairs which were necessary a short time before the accident, and, if any further repairs were desired, it was the duty of the tenant to have notified him to make same, and, in default of his so doing, to have made same, and deducted the cost from the amount of rent due or to become due.

He denies that plaintiff's daughter went on the premises with the knowledge or consent of himself, or even with the request or at the invitation of his tenant. He avers that his tenant possessed and used the gallery daily, and had same been in the dangerous condition it is represented to have been, it would have been the duty of the tenant to have warned the young people composing the surprise party of the danger there was of crowding thereon, as they are admitted to have done. That the proximate cause of the accident and of the injury which was inflicted upon plaintiff's daughter was the sudden rushing of the dozen of young ladies out upon the gallery simultaneously, same not having underneath any proper and suitable support, as is usual when it is expected to be resorted to by an unusual assembly of persons.

As matter of law, it was contended by the defendant's counsel that the precept of our code, which provides that the owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it (Rev. Civ. Code, 2322), applies only to ¹⁴³⁶ passers-by upon the public highway, and to neighbors, and not to persons voluntarily entering upon private premises, and there suffering an injury. That a person who thus enters the premises of another, by the permission of the tenant, is, with respect to the owner, a mere licensee, and sustains a relation to him somewhat like that of a subtenant, and can acquire no greater rights than the principal lessee; and, if he enters without permission of the lessee, he is a trespasser, without any privity of contract with respect to the owner, through the medium of the lease. That a tenant cannot recover

damages of the landlord by reason of his failure to make repairs, when the arrearages of rent are sufficient to enable the lessee to make them, in case of the lessor's failure to make same after he has received due notification of the necessity of same being made; and he avers that at the time of the happening of the accident the tenant was in arrears a sufficient amount to have defrayed the cost of the necessary repairs.

On the trial, there was judgment for two thousand five hundred dollars against the defendant, predicated upon the verdict of a jury, from which he has appealed; and in this court plaintiff has demanded that this allowance be increased to five thousand dollars.

The proof at the trial substantially conforms to the foregoing statements pro et con. It shows that shortly after he rented the premises to Burgess, the defendant sent carpenters to the leased premises, with instructions to place it in good order, and that materials were ordered and delivered for that purpose, and used by the carpenters. That all the repairs necessary were voluntarily made by the defendant, and that no demand was subsequently made by the tenant for additional repairs; that at the time of the accident the tenant was in default in making payment of his rent, and was subsequently notified to vacate the leased premises on account of his nonpayment of rent. That the gallery was not in a condition to stand this unusual strain is not denied, but, on the contrary, was generally known among the guests, and that during the course of the evening that the accident happened the visitors were warned and admonished to desist from dancing, as the gallery would not stand the strain it would produce.

That notwithstanding that warning the guests rushed out on the gallery when the fire bell rang, causing it to give way and fall ¹⁴³⁷ beneath their accumulated weight, causing the injury complained of to the plaintiff's daughter.

Plaintiff's counsel puts his client's right of recovery upon the following provision of our code, viz: "The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction": Rev. Civ. Code, 2322. And the further provision, viz: "Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence or his want of skill": Rev. Civ. Code, 2316.

These provisions of the code treat of offenses and quasi offenses toward the general public, and they impose upon the own-

er of a building the general duty of keeping it in such a state of repair and preservation that it will not occasion damage to any one. And, in case of his failure so to do, they declare that he is answerable in damages to one who shall suffer injury in consequence of his neglect, imprudence, or want of skill.

But counsel for the defendant contend that the article first cited must be construed in connection with the provisions of article 670, which are as follows, viz: "Every one is bound to keep his buildings in repair, so that neither their fall, nor that of any part of the materials composing them, may injure the *neighbors or passengers* under the penalty of all losses and damages which may result from the neglect of the owner in that respect." (Our italics.)

These articles have been frequently construed by this court, but in no case of which we are aware have they been applied to a case circumstanced as this case is. They have been construed as applying to persons injured while walking along the street: *Howe v. New Orleans*, 12 La. Ann. 481; *Barnes v. Beirne*, 38 La. Ann. 280; *Tucker v. Illinois Cent. R. R. Co.*, 42 La. Ann. 114. And they have been applied to persons occupying an adjoining building, who have sustained injuries by reason of another building falling against and demolishing it: *Knoop v. Alter*, 47 La. Ann. 570; *Steppe v. Alter*, 48 La. Ann. 363; ante, p. 281.

These are obvious and necessary safeguards the law has provided for the citizens of towns and cities, to whom old and dilapidated, or ¹⁴³⁸ badly designed and constructed buildings are a constant menace, while attending to the ordinary and every-day concerns of life.

But it is not readily perceivable upon what principle of duty or equity these precepts of the code are to be extended to the accidental occupants of a house, having no contractual relations with either the proprietor or his tenant.

But it must be observed that the articles cited do not rest upon contractual relations at all; but the liability of the owner arises *ex delicto* alone. He is held liable because he is deemed guilty of a fault in not keeping his building in such a safe condition as it will not do any member of the public an injury. It is the thing which offends, and the owner suffers the consequences of the offense. The imposition of the penalty results from the idea that the faulty or defective building is an invasion of the security that municipal government guarantees to the citizen or wayfarer in the public thoroughfare of the city.

The reason and spirit of this rule does not seem to apply to the person who seeks admission to the premises or who goes there upon the invitation of the owner or tenant, either on business or pleasure; for, in such case, the ordinary rules of trespass or contract would apply. Visitors are, in a certain sense, members of the family.

Looking at the evidence as we have related it, it is manifest that if the members of the surprise party had passed along the banquette underneath the gallery of defendant's house, and had not entered the building at all, it would not have fallen, and plaintiff's daughter would have suffered no injury; consequently, we must look to some different principle of law on which, if at all, the defendant can be held bound.

In our opinion, the guests of the tenant have no claim against the landlord for damages they have sustained while on the premises. The guests of the tenant are not guests of the landlord. During the term of the lease, the owner may be said to have, for a consideration, parted with his exercise of the right of ownership. If the tenant be neglectful of the safety of his guests, they have their recourse against him personally and not against the owner of the building. In such case, it is the duty of care the occupant owes his guest, and not the duty the owner of the building owes to the public, that controls the recourse of an injured party.

If, on plaintiff's theory, a person, upon invitation of a tenant, ¹⁴³⁹ should enter any old and dilapidated building and suffer injury, and the owner would be responsible, the consequences would be disastrous to landlords; for who could afford to lease property under the circumstances, and take the risk of suffering thousands of dollars in damages for the carelessness or imprudence of tenants on their failure to make, as in instant case, some trifling repairs, the cost of which he could have easily reimbursed himself from the arrearages of rent in his hands.

We are fully convinced that the article of the code on which plaintiff's counsel rely was never intended to govern this kind of a case; and this becomes more evident when we take into consideration the article of the code which counsel for the defendant has cited as being in *pari materia*.

Counsel has also referred us to several pertinent common-law authorities, but we prefer to rest our decision upon the principles of our own statutes. But if, on the other hand, the members of the surprise party were uninvited, and to be treated and considered as trespassers, or mere licensees, the plaintiff's only re-

course must be against the person by whose tacit permission they were on the premises: *O'Connor v. Illinois Cent. R. R. Co.*, 44 La. Ann. 339; *Snyder v. Natchez etc. R. R. Co.*, 42 La. Ann. 302.

But, in any event, the evidence satisfies our minds that the defendant, as owner of the building, has exonerated himself from liability by making all the repairs which he supposed to have been necessary to the safety and security of the building; and if any fault there was on his part, the tenant and his guests contributed, in some degree, to the accident, by not desisting from rushing out upon the gallery as they did after having been warned against the danger of dancing on it. A case for damages is not made out.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is further ordered and decreed that the plaintiff's demands be rejected at his costs in both courts.

LANDLORD AND TENANT — DANGEROUS PREMISES—
LIABILITY FOR INJURY TO THIRD PERSONS.—When leased premises, harmless in themselves, become dangerous merely by the manner of their use by a tenant in possession, the landlord is not liable for injuries arising from such use. A landlord is not responsible for injury to his tenant's guest arising from such a danger as is created by the negligence of such tenant only: *Eyre v. Jordan*, 111 Mo. 424; 33 Am. St. Rep. 543, and note citing cases in which the tenant, not the landlord, was held liable for the dangerous condition of the premises. A tenant, and not the landlord, is liable to third persons for any accident or injury occasioned to them by the premises being in a dangerous condition, unless the landlord has contracted with the tenant to repair, or has let the premises in a ruinous condition, or expressly licensed the tenant to do the acts amounting to a nuisance: *Ahern v. Steele*, 115 N. Y. 203; 12 Am. St. Rep. 778. The liability of the lessor to strangers, and the liability of the tenant to strangers is discussed in the monographic note to *Lowell v. Spaulding*, 50 Am. Dec. 776-783, on the respective liability of the landlord and tenant for nuisances or injuries from failure to repair: Compare note to *Hines v. Willcox*, 54 Am. St. Rep. 832.

CASES
IN THE
SUPREME COURT
OF
MARYLAND.

FAILEY v. FEE.

[83 MARYLAND, 88.]

INSURANCE—BENEFIT SOCIETIES—LIABILITY OF CERTIFICATE.—A certificate of membership in a benefit association, under which the holder is entitled to a specified sum of money if he shall pay all lawful assessments and comply with all laws of the association for a certain time, is a valid contract and not impossible of performance, although the plan adopted by the association for the execution of the contract is impracticable.

INSURANCE—BENEFIT SOCIETIES—RIGHTS OF HOLDERS OF MATURED CERTIFICATES.—Holders of matured certificates of a benefit society are creditors thereof entitled to priority in payment over unmatured certificates and with the right to attach the funds of the society when it becomes insolvent.

INSURANCE — BENEFIT SOCIETIES — INSOLVENCY.—**HOLDERS OF MATURED CERTIFICATES** in a benefit society are creditors thereof, and remain such, although the society subsequently becomes insolvent.

INSURANCE—BENEFIT SOCIETIES—TIME OF PAYMENT OF CERTIFICATES OF MEMBERSHIP.—If the charter of a benefit society provides that benefits shall be paid as directed either by its by-laws or in the certificate of membership, and there is a conflict as to time of payment between the by-laws and the certificate, the provisions of the latter must govern.

CORPORATIONS—FOREIGN—BENEFIT SOCIETIES — INSOLVENCY—RECEIVERSHIP—PAYMENT OF ASSETS.—Debts established in a proceeding for the receivership of an insolvent benefit society in a state other than its domicile, must be paid out of its assets therein in such receiver's hands, before the balance, if any, is paid over to a receiver in the state of the domicile of the society.

E. J. D. Cross and H. R. Preston, for the appellant.

C. J. Wiener, D. K. E. Fisher, and W. A. Fisher, for the appellees.

⁹⁰ FOWLER, J. The Order of the Iron Hall is a beneficial association, and was incorporated under the laws of the state of Indiana. A bill was filed in the superior court of Marion county of that state by Albert R. Baker and others against said corporation for the appointment of receivers and for its dissolution and winding up. On the 23d of August, 1892, the appellant, James F. Failey, was appointed receiver of the said corporation, with power to receive all its property of ⁹¹ every kind within and without the state of Indiana, and, on the same day, Charles J. Wiener and Joseph C. France were duly appointed receivers by the circuit court of Baltimore City, with power to take charge and possession of the property of said corporation in this state. It appears that four of the general officers of the order are citizens of Maryland, residing in the city of Baltimore, and that there are twenty-six of its branch associations established in that city. No objection has been made to the exercise of its jurisdiction by the Maryland court in the appointment of receivers. Some months subsequent to their appointment, the appellant filed his petition in the circuit court of Baltimore City, in which he fully sets forth the decree of the Indiana court by which he was appointed, and prays that the Maryland receivers may be required to account for and hand over to him all the property and funds of said corporation in their possession and under their control. The Maryland receivers answered this petition on the 10th of April, 1894, and in their answer, among other things, they admit that they have in their hands a large sum of money, which they allege was paid to them solely by the branches of said order and the members thereof in this state, and that they are entitled to have the same distributed among such members as reside here, and that the same should not be sent out of this state for distribution, to their prejudice. They also set up in their answer the claims of certain attaching creditors who issued their attachments before the appointment of receivers in either state, and who claim that, as holders of matured certificates, they cease to be members of said order and have become creditors thereof. Subsequently, the circuit court of Baltimore City ordered its receivers to transmit the funds in their hands to the appellant in Indiana, retaining here, however, sufficient to meet the claims of the attaching creditors, whose claims had not then been determined, but were reserved for future adjudication. On the 9th of December, 1895, the circuit court of Baltimore City ordered that the claims of the

attaching ⁹² creditors should be paid in full. From this order James J. Failey, the Indiana receiver, has appealed.

It thus appears that the only question presented is as to the correctness of the allowance of the attachment claims, and this depends mainly upon the further question whether these claimants are to be considered as members of the order, or, being holders of matured certificates, they are to be considered creditors. If they are members they must, as was decided by the court below, go to Indiana and seek payment from the receivers appointed there. From this decision no appeal has been taken, and all of the funds which were in the hands of the Maryland receivers have been transmitted to Indiana, except the sum involved in this particular controversy, which, as we have seen, was ordered to be retained here to pay creditors, and not members, in this state.

The appellant bases his claim to the fund in question upon the following grounds: 1. That the attachments were premature, the benefits claimed under the matured certificates not being payable at the time the attachments were issued; 2. That the holder of a matured certificate does not become such a creditor upon the maturity of his certificate as to enable him to attach the funds of the association when insolvent, nor such a creditor as is contemplated by the rule that requires domestic creditors to be paid before sending the fund out of this jurisdiction; and 3. That the contract with the order relied on by the holders of matured certificates is not capable of performance, and will not, therefore, be recognized or enforced in a court of equity.

We will first consider the nature of the contract which is found in the policy or certificate issued by the order to each of its members, and one of which is held by and is the basis of the claims of each of the appellees. Without setting forth the certificate in full, it is sufficient for the present purpose to say, in general terms, that it provides that the holder shall be a member of the order, entitled to all the rights ⁹³ and privileges properly belonging to his rank and standing, including a benefit of not exceeding one thousand dollars, provided he shall obey all lawful commands of the order, pay all lawful assessments and comply with all the laws and usages of the order, and all laws which may hereafter be enacted, and especially with the conditions set forth in the certificate, which, so far as we need now refer to them, are contained in paragraph 1, which is as follows: "In case the said member shall continue to pay all assessments

and demands which may be legally made against him on this certificate for the full term of seven years from its date, . . . then the said member shall be entitled to a sum not exceeding the principal amount named herein, less the amount he has already received as benefits from the order on account of sickness or other disability or otherwise." We do not think that there is any element of impossibility apparent upon the face of or inherent in the contract as set forth in the certificate. The fact that the business of the order ended disastrously appears, so far as we can judge from the meager information upon this subject given in the record, to have resulted from a combination of circumstances, and it is probable that the impracticability of the plan or scheme of the order set forth in the by-laws had much to do in producing this unfortunate result. The officers in this state representing the order say, in their answer to the bill, that they have confidence in the organization and plans of the order, and believe that the present difficulties are the result simply of local mismanagement, and the appellant, in a statement under oath, shows that the order was not without valuable assets. It is as follows: Cash on hand, \$715,577.33; notes and other securities, \$33,148.68; real estate, \$25,325.00; money deposited in bank, \$713,333.70; reserve fund in various states and Canada, \$1,238,643.18, making a total of nearly \$3,000,000. He says, however, that he believes he would not be able to ⁹⁴ realize more than \$200,000 from the large amount deposited in bank, because of the insolvency, and that it would depend very much upon the decisions of the courts of the various states growing out of suits which followed the appointment of receivers in Indiana as to the amount he would be able eventually to recover from the reserve fund. It would seem, therefore, that the statement made in the bill that the effect of the Indiana suit and the allegation in the answer that the local mismanagement had destroyed the order were not altogether without foundation. But the record does not contain sufficient information as to the actual work done by this order to enable us to say with certainty what was the cause of its downfall. It is true we have the result, but we are not disposed, as the case is now presented, to say that the impossibility of performing the contract set forth in the certificate is the sole cause of that result.

The case of Bordley et al. in the matter of the estate of the Order of Tonti, lately decided in the supreme court of Pennsylvania and not yet reported, adopts the report of the auditor made in the court from which that case was appealed, and supports

the view so strongly urged by the appellants in regard to the nature of the contract. But it seems to us that there is a broad distinction between the contract itself and the mode which the parties may adopt to execute it. The contract may be perfectly valid and capable of execution, while the scheme adopted to execute it may be impracticable, but it does not necessarily follow that the fatal defects of the latter attach to and totally destroy the contractual rights secured by the former. The contract here, is not, as suggested by the appellants, to pay one thousand dollars at the end of the seven years, upon the payment in the mean time by the member of certain assessments which could not, upon any calculation, produce five hundred dollars, but it was to pay a sum, not exceeding a thousand dollars, within seven years, upon the payment during that time of all lawful assessments and the ⁹⁵ performance of the other conditions set forth in the certificate. Of course, if the contract in question were the one suggested, the order could not perform it and live for any extended period, for it is apparent it could not long continue to pay out \$1,000 for every \$500 received. Such a condition of things, as we have already intimated, does not necessarily result from the contract, however much it may be the result of the plan adopted for assessments or other mismanagement complained of by some of the officers. Under such circumstances, especially where, as here, entire good faith is conceded to the appellees, it would seem to be much more reasonable to leave the parties subject to their contract so far as it applies to the changed conditions, than to entirely ignore it.

If, then, we are correct in supposing that the contract is still in existence, what are the rights of the appellees, the holders of matured certificates of membership of the said order? This brings us to the consideration of the second reason upon which the appellant rests his claim, namely, that the appellees, as such holders of matured certificates, do not become such creditors upon the maturity thereof as to attach the funds of the order when insolvent, or to give them any standing to demand that they be paid before sending the fund to Indiana. But the weight of authority is against this view. In 2 Bacon on Benefit Societies and Life Insurance, section 478, it is said: "In mutual companies, claims founded on policies matured before the receivership are to be preferred to claims on policies not matured, for the maturity of the policy changes the status of the policy holder. He stands to the company in the same place that a creditor stands to the firm; he is to be preferred to members of the

firm." The same principle is announced in the case of *Vannatta v. New Jersey etc. Ins. Co.*, 31 N. J. Eq. 19. In the case just cited, it was urged that the holders of unmatured certificates and the holders of unpaid matured certificates should stand upon the same plane, but this contention was thus disposed of: "The difference," said the ⁹⁶ chancellor, "between the cases is, that in the one the claim was, when the decree was made, the claim of a creditor, and in the other there was no claim but that of a member, which was upon the assets, after the payment of creditors." And to the same effect are *Commonwealth v. Massachusetts etc. Ins. Co.*, 112 Mass. 116; 119 Mass. 45; *Mayer v. Attorney-General*, 32 N. J. Eq. 815; *Stamm v. North Western etc. Assn.*, 65 Mich. 317. But in the case of the *Baltimore etc. R. R. Co. v. Baltimore etc. Relief Assn.*, 77 Md. 566, this court expressed a similar view. We there held that a claim which had matured by death before dissolution of the association was a preferred claim. And in regard to claims based upon disability caused by sickness or accident, which, under the constitution and by-laws of that association, entitled a member to the payment of a sum of money as benefits, we said in the same case: "We do not see upon what principle the right of a member to claim for a disability that occurred before the dissolution of the association can be held to terminate with its dissolution."

Some question has been made as to the effect of the insolvency of the order on the claims of the appellees, but it does not appear to us that the validity or status of the claims can be affected by an insolvency which did not exist until after the maturity of the certificates. Being creditors, the insolvency of the order would have no more effect upon their claims than upon those of any other creditors. When the certificates matured, the holders thereupon became creditors, and they remain so notwithstanding the subsequent insolvency of the order.

But again, it was urged that the attachments cannot stand because they were issued on claims of uncertain amounts, the certificates held by the attaching creditors not providing for the payment of any definite sum of money, but for a sum not greater than one thousand dollars. It appears, however, by the agreed statement of facts found in the record, "that, at the time when the receivers were appointed, there was an amount of money in the hands of the order sufficient to pay all the matured certificates at the time when the same ⁹⁷ were due and payable according to their tenor; that the receiver also had an amount sufficient to pay the same, and that, by the law of the order, the

maximum amount named in the certificate would have been payable, and it would have been paid if the receivers had not been appointed and the business brought to an end." Hence, the amount which each attached creditor was entitled to had become certain and fixed before the attachments issued.

Finally, it was urged that the attachments were prematurely issued, because the benefits were not payable at the time those proceedings were instituted. This view is based upon the theory that the time for payment specified in the certificate is controlled by the provisions of a by-law regulating the time of payment, which, it is conceded, was adopted subsequent to the issuing of the certificates. The latter provides that, upon certain conditions, which have been complied with, benefits shall be paid at the end of seven years, while the by-law provides that such benefits shall, when found correct, be adjusted within ninety days from the expiration of the certificate. While it is true the certificate is accepted subject to all laws which might, after its date, be enacted by the order, yet, inasmuch as by the third section of the charter it is provided that benefits shall be paid as may be provided either by the by-laws or in the certificate of membership, the provision as to time of payment when found in the latter should govern. In the recent case of *Cohen v. Order of Iron Hall*, 105 Mich. 283, in construing a similar certificate, it was said: "The reference to the laws of the association in the present case cannot be said to relate to the time of payment, but rather to the affirmative obligations assumed by the holder of the certificate; especially is this so, in view of the fact that the articles of association expressly provide that the amount shall be paid as may be provided in the by-laws or in the certificate. The fundamental law, therefore, recognized the time of payment as fixed by the certificate, and the by-laws subsequently passed applied only to such certificates as by their terms made the ⁹⁸ same payable at the time fixed by the by-law." In addition to this, being creditors, the appellees are entitled to payment whether their attachments are valid or not, and under our ruling in the case of *Day v. Postal Tel. Co.*, 66 Md. 354, it is clear the fund should be distributed by the Maryland receivers to the payment of debts established in this proceeding, and the balance, if any, should be paid over to the Indiana receiver.

It follows that the order appealed from must be affirmed.

Order affirmed with costs.

INSURANCE—MUTUAL BENEFIT SOCIETIES—CERTIFICATES.—The certificate of membership issued to a member of a mutual benefit society is a contract of insurance, and his right to recover upon it does not depend upon the action of the officers of the society, for if he has performed his part of the contract, and is totally disabled by disease or accident, he has a complete cause of action: *Supreme Council v. Forsinger*, 125 Ind. 52; 21 Am. St. Rep. 196. See, also, the extended note to *Lake v. Minnesota etc. Relief Assn.*, 52 Am. St. Rep. 545, 555.

INSURANCE—MUTUAL BENEFIT SOCIETIES.—A CERTIFICATE of membership in a benefit society is to be construed in connection with its constitution and by-laws as if these documents were combined in one. Members are bound to take notice of the by-laws: Extended note to *Lake v. Minnesota etc. Relief Assn.*, 52 Am. St. Rep. 555.

HEIRONIMUS v. SWEENEY.

[83 MARYLAND, 146.]

BANKS AND BANKING—INSOLVENCY—SPECIAL DEPOSITS—DISTRIBUTION OF ASSETS.—A special depositor in a savings bank, whose deposit draws interest, is, in the event of the insolvency of the institution, entitled to be paid in full, both principal and interest, before any distribution is made to regular and ordinary depositors, who are stockholders in the institution.

BANKS AND BANKING—SPECIAL DEPOSITS — COMPOUND INTEREST ON.—A contract between a savings bank and a special depositor, that the interest on his deposit shall remain in the bank and draw interest as new principal, is valid.

BANKS AND BANKING—POWER TO BORROW MONEY.—A savings bank has power, without express authority therefor, to borrow money for the proper conduct of its business, and to pay interest on the money thus borrowed.

BANKS AND BANKING—POWER TO BORROW MONEY—CONTRACTS ULTRA VIRES—ESTOPPEL.—Ordinary depositors, who are stockholders in a savings bank, and who, with full knowledge of the facts, have enjoyed the full benefit of money loaned to the bank by special depositors under contract, are estopped from alleging that such contracts are ultra vires.

W. H. A. Hamilton, B. Schley, E. Hoffman, T. H. Edwards, and A. Neill, for the appellants.

W. J. Witzenbacher and H. K. Douglas, for the appellees.

¹⁵⁵ **BRYAN, J.** By order of the circuit court for Washington county, in equity, receivers were appointed for the Washington County Savings Institution, a corporation. The questions in the present appeal arise on the distribution of the assets. By the by-laws, there were three classes of depositors: weekly depositors, special depositors, and dime or irregular depositors. Weekly depositors were those who agreed to make deposits not less than twenty-five cents, each and every week. Each of such

depositors was furnished with a book containing a duplicate of his account and a copy of the by-laws of the institution. They were liable for fines if they failed to make their deposits at the proper time; and they were entitled to such semi-annual dividends as the earnings of the institution should justify; these dividends were to be declared by the president and directors. They were also members of the corporation, and entitled to vote at any election for directors. These provisions were made by the first, seventh, tenth, and twelfth sections of the by-laws. The seventh section also declares as follows: "All persons who desire may become special depositors for a definite or an indefinite period, and receive such interest on their deposits as the directors of the institution may think proper to allow." Dime or irregular depositors were permitted by sections 15, 16, and 17. They were allowed to deposit at any time any sum not less than one dime, and they were allowed interest on their deposits at the rate of three per ¹⁵⁰ cent per annum, payable semi-annually, provided such deposits should have been made six months previously to the declaration of dividends; and, after having received two semi-annual dividends, they were allowed certificates of deposit bearing four per cent interest.

The assets are not sufficient to pay all of the depositors in full. It then becomes our duty to ascertain the order and proportion in which they ought to be paid. The four appellants all belong to the class of special depositors. Edwards, in November, 1873, deposited one thousand and thirty dollars, and received a certificate from the treasurer, Taggart, signed by him in his official capacity, in the following form:

"Office of the Washington County Savings Ins.

"Hagerstown, November 20, 1873.

"Received from Tyron H. Edwards, one thousand and thirty dollars on special deposit, to draw interest from July 1st, 1873, at the rate of three per cent semi-annually, if not drawn out within one year."

The other three appellants each made a deposit, and each received from the treasurer a certificate of deposit in substantially the same form, with the exception that the amounts and rates of interests were different. Here we see that money was loaned, to be repaid with interest when required by the lender. It is impossible to infer from the transaction that it does not impose the responsibilities and confer the rights which ordinarily arise from an indebtedness. On the other hand, the weekly depositor

is a member of the corporation; he is entitled to vote at any election for directors; he is entitled to such semi-annual dividends as may be earned by the institution, and to an extra dividend every third year from the surplus, if the president and directors think it proper to declare one. They are, in fact and substance, the stockholders who own the assets of the company. When the company goes into liquidation, it is easy to see how the assets ought to be distributed. The debts must be first paid, and, after all liabilities are discharged, the assets must ¹⁵⁷ be distributed among the stockholders according to their holdings. In other words, they must be paid over to the owners.

In the case of the deposit made by Mr. Edwards, after the first installment of interest became due, it was agreed between him and the treasurer that if he would let the semi-annual amounts of interest remain in the institution, these amounts should draw interest as new principal. There was nothing objectionable in such an agreement as this. He had a right to draw his interest when it became due, and he had a right immediately to lend it back to the institution. It came to the same result if they agreed beforehand to adopt this plan of investing the interest. It is, in fact, the usual practice of savings banks, which are conducted on the ordinary plan, to place the interest accrued on the deposit to the credit of the depositor as principal for the purpose of drawing interest, subject, of course, to his right to withdraw it from the bank if he does not wish it to remain. As an illustration of the legality of such a computation of interest we may quote from *Banks v. McClellan*, 24 Md. 63, 87 Am. Dec. 594: "Money due for interest may, by agreement, be changed into principal to bear interest, in futuro, but not otherwise." Other deposits were made by Edwards on the same terms.

It has been argued that these proceedings which we have recited were beyond the powers conferred by the charter, and are, therefore, invalid. This institution was incorporated by the act of 1868, chapter 85. The first section gives it power "to receive and make all deeds, transfers, contracts, conveyances, and grants whatsoever." The third gives the directors power to elect a president and appoint all necessary officers, etc., to provide for the admission of members, to regulate the manner of making and receiving deposits, to provide for the investment of the funds of the corporation, etc., to pass all necessary by-laws, etc. Under the by-laws, the weekly depositors were made members; and the deposits were received from the special depositors. Even if there had been no by-laws authorizing the special ¹⁵⁸

deposits, it cannot be doubted that the corporation had power to borrow money and issue a promissory note or other stipulation for its payment. In *Booth v. Robinson*, 55 Md. 436, it was said that "it is now well settled that corporations, like individuals, may borrow money for the conduct of their affairs without express authority therefor, whenever the nature of their business may render it proper or expedient. And the power to borrow carries with it very generally, unless expressly restrained, the power to secure the loan by mortgage." In *Davis v. West Saratoga etc. Union*, 32 Md. 295, it had already been decided that a building association, without express authority in its charter, had the power to issue promissory notes for the purpose of effecting a loan, or of furnishing evidence of an antecedent debt. And this power was fully recognized in *Jackson v. Meyers*, 43 Md. 452, and in *Muth v. Dolfield*, 43 Md. 466. But it seems to be very unnecessary to discuss the extent of the powers granted by the charter in this respect. These sums of money were received by the corporation and appropriated to its benefit with the knowledge of the stockholders and became portions of the fund which contributed to the increase of their dividends. At least, if not with their express knowledge, under circumstances which gave them every opportunity to know. In one instance, the money has remained in the possession of the corporation for more than twenty-two years, and in all that time the interest on it has been regularly credited to the depositor on its books. The funds of the corporation are now in a court of equity for distribution. If they are not paid over to those persons who furnished these moneys to the corporation on the faith of an express promise to repay, most certainly great wrong and injustice will be done. We will see whether such an anomaly can exist in jurisprudence. In *Maryland Hospital v. Foreman*, 29 Md. 532, it was said: "If a party makes a contract with a corporation, which is simply beyond the powers of the latter, he may recover back the money paid thereon whether the contract be executed or executory." ¹⁵⁹ This was an action at law. In another case, which was also an action at law, the doctrine was stated very distinctly in its application to facts similar to those which present the question before us. A savings bank had, in excess of its chartered powers, discounted a promissory note, and had brought suit against the indorser. It was held that although a corporation in making a contract has acted "in disagreement with its charter," yet "a party who has had the benefit of the agreement cannot question its validity." It was declared that

the decision proceeded on the principle that "it is inequitable to permit one who has received the proceeds and benefit of the contract, to repudiate it on the ground that the corporation from which he has obtained the benefit had no power to make the contract." And the bank's right of recovery was sustained: *United German Bank v. Katz*, 57 Md. 128. This decision was approved in *General German etc. Home v. Hammerbacher*, 64 Md. 606; 54 Am. Rep. 782. In this last case, the contract was decreed to be specifically executed, it being held that even if the contract in question were *ultra vires*, the defendants, under the circumstances of the case, were estopped from setting up such defense. Other courts have held that, although the money obtained under *ultra vires* contracts must be returned to the party to whom it rightfully belongs, yet an action cannot be maintained on the contract itself. Among many cases of this kind we may mention one in *Central Transp. Co. v. Pullman Car Co.*, 139 U. S. 39. But whether an action is brought on the contract or the equitable grounds which show that the plaintiff ought *ex aquo et bono* to recover, the object which the law seeks to accomplish is the same. The very slight degree in which any technical rule will be permitted to interfere with the right of recovery is shown by two cases cited in *Logan County Bank v. Townsend*, 139 U. S. 76. The court comments on these cases in this way: "In *National Bank v. Matthews*, 98 U. S. 621, it appeared that a national bank loaned money upon the security ¹⁶⁰ of a note and a deed of trust of lands, both of which were assigned to it. The statute declared that a national banking association could loan money "on personal security," and could purchase, hold, and convey real estate for certain named purposes, "and for no others," among which was not included the securing of a present loan of money by a deed of trust or mortgage on real property. The court, while assuming that the statute, by clear implication, forbade the bank from making a loan on real estate, refused to restrain the bank from enforcing the deed of trust. The decision went upon these grounds: That the bank parted with its money in good faith; that the question as to the violation of its charter, by taking title to real estate for purposes unauthorized by law, could be raised only by the government in a direct proceeding for that purpose; and that it was not open to the plaintiff in that suit, who had contracted with the bank, to raise any such question in order to defeat the collection of the amount loaned. If any doubt existed as to the scope of the decision in that case, it was removed by *National Bank v. Whitney*,

103 U. S. 99, where it was held that the right of a national bank to enforce a mortgage of real estate taken by it to secure indebtedness then existing, as well as future advances, could not be questioned by the debtor, and that a disregard by the bank of the provisions of the act of Congress upon that subject only laid the association open to proceedings by the government for exercising powers not conferred by law." A vast number of decisions upholding the general principle are collected in Thompson on Corporations. We do not find it necessary to quote more than two of them. "Thus, if a corporation has executed a promissory note for a consideration which it has received and retained, it is bound to pay the note, although it may have been executed in furtherance of a contract which was ultra vires. So, a corporation cannot avoid its obligation to pay money which has been loaned to it, and used by it, under the plea that, in borrowing the money, it exceeded its statutory power to ¹⁶¹ contract debts. or that its officers by whom the loan was negotiated were not properly authorized in the premises": 5 Thompson on Corporations, sec. 6018.

The special depositors ought to be paid in full according to the tenor of their contracts, in priority to the weekly depositors. Edwards is to receive compound interest, and the other appellants simple interest. As the order of the court below was contrary to this result, it will be reversed.

Order reversed with costs in both courts and cause remanded.

SAVINGS BANKS—SPECIAL DEPOSIT.—The rights of depositors in savings banks in case of the insolvency of the bank are discussed in the extended note to *Matter of Franklin Bank*, 19 Am. Dec. 429, 430.

CORPORATIONS—ULTRA VIRES—ESTOPPEL TO PLEAD.—In equity, neither party to a contract ultra vires simply will be heard to allege its invalidity while retaining its fruits: *Manchester etc. R. R. v. Concord R. R.*, 66 N. H. 100; 49 Am. St. Rep. 582, and note. A corporation having received benefits under a contract made by and with it cannot set up a defense thereto that it had no power to do business in the state where the contract was made: *Williams v. Bank*, 71 Miss. 858; 42 Am. St. Rep. 503, and note with the cases collected.

WILLSON v. MAYOR.

[83 MARYLAND, 203.]

CONTRACTS—PENALTY OR LIQUIDATED DAMAGES—AMOUNT OF RECOVERY.—If a sum of money mentioned in a contract is regarded as liquidated damages, the whole sum is recoverable upon default, although the actual damages are nominal, but, if it is regarded as a penalty, only such damages as have been really incurred and are satisfactorily shown can be recovered for a breach of the contract.

DAMAGES—LIQUIDATED.—A reasonable sum stipulated to be paid as liquidated damages for the breach of a contract is to be regarded as such, and not as a penalty, when, from the nature of the covenant, the damages arising from its breach are wholly uncertain and cannot be ascertained upon an issue of fact.

DAMAGES—PENALTY.—A stipulation to pay a specified sum for the nonperformance of a contract is regarded as a penalty, rather than liquidated damages, if the intention of the parties as to its effect is at all doubtful, or is of equivocal interpretation, especially when such damages are easily and exactly ascertainable.

DAMAGES—DEPOSIT, AS PENALTY.—If the intention of the parties is not expressed, and there is nothing in the subject matter of the agreement which imperatively requires that a deposit of money mentioned therein be characterized as liquidated damages, it must be treated merely as a penalty.

DAMAGES—DEPOSIT, AS LIQUIDATED DAMAGES.—If parties contract as a condition of sale of real estate that the deposit money shall be forfeited if the purchaser fail to carry out his contract, neither the whole nor any part of the deposit can be recovered back on the ground that the forfeiture is in the nature of a penalty, and the actual loss to the vendor is less than the amount of the deposit. This rule does not apply with strictness to a contract for the sale of personalty.

DAMAGES—DEPOSIT WHETHER PENALTY OR LIQUIDATED DAMAGES.—If a deposit of money is not made in part performance of a contract, but is collateral thereto and a mere guarantee that its provisions will be observed, and if the deposit is not a part of the thing to be done under or in execution of the contract, but is required solely as a condition precedent to entering into the contract which distinctly relates to something else, it cannot be treated as liquidated damages merely because it is a deposit, and it is either liquidated damages or a penalty as the circumstances of the case indicate.

DAMAGES—DEPOSIT AS PENALTY.—A person to whom is awarded a contract to furnish a city with certain articles of personalty, may recover a certified check deposited with the city under a provision of law requiring all bidders to make such deposit, and providing that if the successful bidder shall enter into contract, with bond, without delay, his deposit shall be returned, when, without fault on his part, such successful bidder to whom the contract is awarded is unable to procure a surety on his bond, and, for this reason, the contract is subsequently awarded by the city to another bidder for a much smaller sum than the former bid. In such case, the deposit must be regarded as a penalty, and not as liquidated damages.

F. Gosnell and E. S. McElroy, for the appellant.

T. G. Hayes, city counsellor, for the appellee.

209 McSHERRY, C. J. The mayor and city council of Baltimore, through the commissioners of public schools, advertised for sealed proposals for furnishing the schools of the city with desks and other necessary appliances. The bids were required to be made out upon forms which contained various stipulations. Amongst these it was provided that "the full name and address of a surety must be written on the proposal, and each proposal must be accompanied by a certified check for five hundred dollars. . . . said check to be payable to the mayor and city council of Baltimore. If the successful bidders enter into contract with bond without delay, their checks will be returned as will those of the unsuccessful bidders. No proposal will be entertained which does not comply with the terms hereof." The appellant filed out one of these forms, specified the prices at which he would furnish the needed supplies, gave the name and address of his surety and inclosed his certified check for five hundred dollars, payable to the appellee. His bid being the lowest, he was awarded the contract; but, through no fault of his own and though he acted in entire good faith, he was unable, in spite of his efforts, to furnish the signature of the surety he had named in his bid, and he failed, without being at all to blame, to secure any other surety on his bond. Thereupon the commissioners readvertised for bids. These they obtained and accepted. The new bids were for sums much less than those named by the appellant in his bid, and, in consequence, the city not only lost no money by the failure of the appellant to furnish a bond and to fulfill his contract, but in fact saved a considerable amount. The appellant then demanded the return of the five hundred dollars which he had deposited with his bid, **210** but the city refused to surrender the money and claimed the right to hold it. Suit was thereafter brought by him against the city for the recovery of the five hundred dollars deposited. The defendant demurred to the declaration, and a judgment was entered pro forma for the city, and the plaintiff appealed.

There is no question of pleading involved. The inquiry is, whether, under the circumstances stated, the appellant is entitled to recover back the five hundred dollars he deposited with his bid. The facts above set forth are all alleged in the declaration, and, being well pleaded, are, of course, admitted by the demurrer.

On the part of the appellant, it is insisted that the five hun-

dred dollars deposit was designed to be, and in reality was, a penalty; whilst, on the part of the city, it is claimed that the sum named was intended to be, and in fact was, liquidated or stipulated damages which, for any breach of the appellant's bid or proposal, was to be retained by the city, without reference to whether the city had actually sustained any injury or not. The distinction between a penalty and liquidated damages is of the utmost importance; and upon the decision in any given case between them depends the question whether a sum stipulated to be paid upon a breach of the contract shall be treated as a debt to be arbitrarily enforced without regard to the actual loss; or whether, on the other hand, it shall be discarded to let in an inquiry as to the extent of the damage really sustained in consequence of an omission or refusal to perform the agreement. If the sum designated is held to be liquidated damages, the only evidence necessary to warrant a recovery of that particular amount is that the contract to which it relates has been broken. But, if the sum is regarded as a mere penal sum, its place in the contract gives it no weight, and a recovery for a breach of the undertaking will be limited to the extent of the loss or injury actually sustained and proved. In the one instance, therefore, the whole of the sum is recoverable, when there has been a default, though the actual damages ²¹¹ be nominal; whilst, in the other, only such damages as have been really incurred and are satisfactorily shown can be assessed and awarded for a breach. It is obvious, then, that the pending controversy turns upon the question whether the five hundred dollars deposit is liquidated damages or a penalty. If it be the former, the plaintiff has no right to recover it back, but, if it be the latter, the city cannot lawfully retain it, except to the extent that actual damage has been sustained.

Whether a sum named in a contract to be paid by a party in default on its breach is to be considered liquidated damages or merely a penalty, is one of the most difficult and perplexing inquiries encountered in the construction of written agreements.

The solution of that question, whilst to some extent controlled by artificial general rules which are not wholly in harmony with the ordinary canons of construction, depends, in a large measure at least, upon the particular facts and circumstances of each separate case. There are to be found both decisions and dicta that are conflicting and irreconcilable; but the general principles which are usually invoked, and which are peculiar to contracts of this character, are nowhere seriously disputed or denied. As just compensation for the injury done is the end which the law

aims to reach, the intention of the parties at the time the contract was entered into is often, though not always, given weight; and whilst the language they have used in the instrument, if they declare that the damages shall be liquidated, is a circumstance that may have its influence (*Geiger v. Western etc. R. R. Co.*, 41 Md. 4), yet even their explicit words will be sometimes disregarded (*Hough v. Kugler*, 36 Md. 195), and the measure of damages will be restricted to such as the evidence shows have been actually sustained, if the entire agreement and the peculiar circumstances of the subject matter of the contract indicate that the reason and justice of the case require this to be done: *Kemble v. Farren*, 6 Bing. 141; *Foley v. McKeegan*, 4 Iowa, 1; 66 Am. Dec. 107; *Watts v. Sheppard*, 2 Ala. 425; *Streeper v. Williams*, 212 48 Pa. St. 450; *Perkins v. Lyman*, 11 Mass. 76; 6 Am. Dec. 158; *Condon v. Kemper*, 47 Kan. 126; 13 L. R. Ann. 671, and notes; *Chamberlain v. Bagley*, 11 N. H. 234; *Davis v. Fenton*, 6 Barb. & C. 216; *Fitzpatrick v. Cottingham*, 14 Wis. 219; *Fisk v. Gray*, 11 Allen, 132; *Green v. Price*, 13 Mees. & W. 701. It is equally well settled that a sum, if it be at all reasonable and is stipulated to be paid as liquidated damages for the breach of a contract, will be regarded as such, and not as a penalty, where, from the nature of the covenant, the damages arising from its breach are wholly uncertain and cannot be ascertained upon an issue of fact. A common instance is the case of agreements between professional men binding a retiring partner, or an apprentice or clerk, not to interfere with the business of the other: *Glassworthy v. Strull*, 1 Ex. 659; *Rawlinson v. Clarke*, 14 Mees. & W. 187; *Mercer v. Irving*, El. B. & E. 563. But a stipulation to pay a specified sum upon the nonperformance of a contract is regarded as a penalty rather than as liquidated damages if the intention of the parties as to its effect is at all doubtful or is of equivocal interpretation: *Shute v. Taylor*, 5 Met. 61; *Dimerch v. Corlett*, 12 Moore P. C. C. 199; *Crisdee v. Bolton*, 3 Car. & P. 240; *Chilliner v. Chilliner*, 2 Ves. Sr. 528; *Coles v. Sims*, 5 De Gex, M. & G. 1. And such a stipulation is generally regarded as a penalty, in the absence of a clear indication of a contrary intention by the parties at the time the contract was executed, where the agreement is certain and the damages for a breach thereof are easily and exactly ascertainable: *Burrill v. Daggett*, 77 Me. 545; *Brown v. Bellows*, 4 Pick. 179. Finally, the tendency of late years has been to regard the statements of the parties as to liquidated damages in the light of a penalty, unless the contrary intention is

unequivocally expressed, so that harsh provisions will be avoided and compensation alone will be awarded: *Gammon v. Hone*, 14 Me. 250; *Leggett v. Mutual Life Ins. Co.*, 53 N. Y. 394; *Brown v. Bellows*, 4 Pick. 179; 2 *Greenleaf on Evidence*, secs. 258, 259.

Now, it will be observed that the contract between the ²¹³ appellant and the appellee, evidenced by the bid filed and accepted, has not a word in it descriptive of the five hundred dollar deposit as either liquidated damages or a penalty. It is clear, therefore, that the parties themselves have not, by any term or provision of the agreement, declared that the deposit shall be either the one or the other, but have left the question at large; and it is equally clear that there is nothing in the subject matter of the agreement which imperatively requires that the deposit be characterized as liquidated damages, especially as the decided inclination of the courts, in doubtful cases even, is to treat the stipulated sum as merely a penalty. Indeed, there is no explicit forfeiture of the deposit at all. The contract provides simply that, "if the successful bidders enter into contract with bond without delay, their checks will be returned"; but it is nowhere expressly declared that a failure to enter into bond shall entitle the city to the whole amount of the deposit or to any part of it, though it is palpably implied that so much of it as will be a just compensation for any loss that may result to the city from the failure of the bidder to furnish the bond was, in view of the whole subject matter, designed by the parties to be applied by the city to its own reimbursement. But beyond this, the exact amount of loss which would result to the city by the failure of a bidder to give the required bond is capable of definite and precise ascertainment. A failure to give the bond is a breach of the contract, and the damages which would result from that breach would be the difference the city paid, if anything, in excess of the amount of the unexecuted bid, and also the expenses of a readvertising for new bids. These elements of damage are neither uncertain nor difficult of ascertainment by a jury, and this fact is one of the recognized tests resorted to for distinguishing between liquidated damages and a penalty: *Geiger v. Western etc. R. R. Co.*, 41 Md. 4. Not only, then, is there no provision expressly declaring this deposit to be liquidated damages, but to treat it as such would require the superaddition by implication of a distinct term to the contract ²¹⁴ which is not permissible, and the reversal of the doctrine that courts lean strongly against upholding a specified sum as liquidated damages where such an interpretation is of doubtful accuracy and leads

to manifest injustice. That an interpretation which treats this deposit as liquidated damages would, to say the least, be of doubtful accuracy, cannot be disputed; that it would be unjust in this particular case in its results is scarcely open to discussion. The appellant is conceded to have acted in perfect good faith; the city has not only not lost anything by his failure to give the bond, but it has actually gained thereby a considerable sum, and it would be unconscionable (*Cutler v. How*, 8 Mass. 257), under these conditions, for it to retain the five hundred dollars as stipulated and liquidated damages for a technical breach which has occasioned no appreciable injury. We discover nothing on the face of the contract, nothing in all the surrounding circumstances or the subject matter, and nothing in the rules of law which will justify us in holding this deposit to be liquidated damages, unless the remaining proposition to be considered sustains the appellee's contention. That proposition is, that where a sum is deposited, either with a third person or with the other party to the contract, it is invariably treated as liquidated damages, and the cases of *Wallis v. Smith*, L. R. 21 Ch. Div. 250, *Hinton v. Sparks*, L. R. 3 Com. P. 161, and some others have been referred to.

In *Wallis v. Smith*, L. R. 21 Ch. Div. 250, the plaintiff entered into a contract with the defendant, who was a builder, to sell him an estate for seventy thousand pounds, which was to be expended by the defendant in building on the estate. The contract contained numerous provisions, and, amongst other things, that a deposit of five thousand pounds should be paid by the defendant into the bankers to the joint account of the plaintiff and defendant, of which five hundred pounds was to be paid on the execution of the contract and the remainder within seven months. If the plaintiff could not make good title, the deposit of five hundred pounds was to be returned, and the plaintiff was to pay the defendant five thousand pounds as liquidated ²¹⁵ damages. And, if the defendant should commit a substantial breach of the contract, either in not proceeding with due diligence to carry out the works or in failing to perform any of the provisions of the contract, then and in either event the deposit of five thousand pounds should be forfeited, and, if it had not been paid, the defendant should forfeit and pay to the plaintiff by way of liquidated damages the sum of five thousand pounds and the agreement should be void, but credit was to be given to the defendant for all moneys actually expended. Whilst it was held that the five thousand pounds was to be treated as liquidated dam-

ages, Sir George Jessel, master of the rolls, described it as "a deposit in part payment of the nominal purchase money." And in *Hinton v. Sparks*, L. R. 3 Com. P. 161, the covenant was, "If the purchaser shall fail to perform his part of the agreement, then the deposit money shall become forfeited in part of the following damages." These cases and others to which allusion might be made relate to a different class of contracts. Where parties contract, as they frequently do by a condition of sale, that the deposit money shall be forfeited if the purchaser fail to carry out his contract, the deposit cannot, nor can any part of it, be recovered back on the ground that the forfeiture was in the nature of a penalty, and the actual loss to the vendor was less than the amount of the deposit. In fact, the cases distinguishing between a penalty and liquidated damages do not apply to a pecuniary deposit, which is, in reality, not a pledge but a payment in part of the purchase money: *Wood's Mayne on Damages*, sec. 245; *Sugden on Vendor and Purchaser*, c. 1, secs. 3, 18. Thus in *Chaude v. Shepard*, 122 N. Y. 397, it appeared that the defendant leased certain premises to the plaintiff, who deposited with him a sum of money under a provision in the lease that the defendant should hold the same as security for the faithful performance by the plaintiff of his covenants in the lease, the same to be applied as payment of rent on the last three months of the term, provided the lease was not sooner terminated by plaintiff's failure to perform, in which last event it was declared that the sum paid should be forfeited and ²¹⁶ become the property of the defendant absolutely. Default being made in the payment of one month's rent, plaintiff was dispossessed by the defendant, who refused to pay back any part of the deposit. In an action to recover the same, less the month's rent, it was held that the provision in reference to the deposit was not intended to give it the character of liquidated damages, but rather as a penalty; that the deposit was a security for the performance of plaintiff's covenants. In the opinion of the court it was said: "It is, however, urged by the learned counsel for the defendant that as the money was actually placed in the possession of the defendant pursuant to the contract at the time of the execution of the lease, the disposition of it is governed by a different rule than that which would have been applicable if the claim to it had been founded upon the executory agreement of the plaintiff to pay it. That would have been so if the money had been paid upon the contract by way of partial performance by the plaintiff." Reference is then made to *Page v. McDonnell*, 55 N. Y.

299; *Lawrence v. Miller*, 86 N. Y. 131; *Havens v. Patterson*, 43 N. Y. 218. And so where there was a sale, and a deposit was made under a covenant providing that, "if the purchaser shall neglect or fail to comply with any of the above conditions, the deposit shall be forfeited as liquidated damages, to be retained by the vendors," it was held that this applied only to a breach of the conditions of sale, and not to a breach of the entire contract to buy: *Icely v. Grew*, 6 Nev. & M. 467; *Essex v. Daniell*, L. R. 10 Com. P. 538. It is stated with great clearness and accuracy by Mr. Brantly in his admirable work on the Law of Contracts, page 192, that "when it is provided that the sum deposited in part performance of the contract is to be forfeited upon failure of the party to complete it, such sum, if not excessive, is liquidated damages." Conversely, if the deposit be not made in part performance of the contract, but be collateral to the contract and a mere guaranty that its provisions will be observed; and, if the making of the deposit is not a part of the thing to be done under or in execution ²¹⁷ of the contract, but is required simply and solely as a condition precedent to entering into the contract which distinctly relates to something else, then, obviously, such a deposit would not be treated as liquidated damages, merely because it is a deposit, but would be either liquidated damages or a penalty as the rules applicable to such a question might cause the court to determine.

We are not prepared to expand the doctrine relating to deposits made on the purchase of land by applying it to contracts of the character now before us. The deposit in the case at bar when made was not part of a sum ultimately payable under the contract to the city by the appellant; nor was it set apart, either in express terms or impliedly, to meet an obligation arising out of a purchase; but it was designed to serve precisely the same purpose that a guaranty or other indemnity would have done—to save the city harmless from any actual loss which might arise or grow out of a failure on the part of a bidder to furnish a bond conditioned for the performance of his accepted proposal. It would introduce a sweeping departure from established principles to hold as an unbending rule applicable alike to all contracts, no matter what their nature or subject, that a deposit made to secure their due performance must invariably be treated as liquidated damages and never as a penalty. Such a rule would, in its application, ignore or arbitrarily override all other principles of interpretation, and would force courts to regard

as liquidated damages sums which obviously would not, according to the canons of construction to which we have alluded, ordinarily be so considered. If the contract now before us falls within the decision in *Wallis v. Smith*, L. R. 21 Ch. Div. 250, and *Hinton v. Sparks*, L. R. 3 Com. P. 161, there is no reason for excluding any other contract from the operation of the same doctrine. Then, no matter how apparent it might be in a given case that the parties intended the deposit to be a penalty, and no matter how obvious it might be that the subject matter of the agreement, the surrounding circumstances attending its execution, and the rules of law applicable ²¹⁸ to its construction did not require or permit that the deposit should be treated as liquidated damages, still the mere naked fact that a deposit had been made, or exacted, would of itself, without more, convert what would otherwise undeniably be a penalty into stipulated damages. We see no reason for giving to a deposit such a far-reaching effect as that, and, without pausing at this place to review the other cases cited at the argument, we hold that the doctrine of *Wallis v. Smith*, L. R. 21 Ch. Div. 250, and *Hinton v. Sparks*, L. R. 3 Com. P. 161, with which we fully concur, has, and in the nature of things, can have, no application to the contract now before us.

Finally, it was insisted that when an agreement is in the alternative to do some particular thing or to pay a given sum of money, the court will hold the party failing to have had his election, and compel him to pay the money. *Pennsylvania R. R. Co. v. Reichert*, 58 Md. 278, *Sedgwick on Damages*, sec. 423, were relied on to support this doctrine. The case in 58 Maryland certainly does lay down the rule contended for, but the state of facts to which the rule was there applied is totally different from the facts of this case. There Reichert owned a coalyard and a trestle connecting it with a railroad. Another railroad company, needing part of his land for the construction of its road, condemned it. The construction of its road required that the trestle should be removed. The jury of condemnation awarded six hundred dollars damages, and further awarded that the condemning road should erect for Reichert another trestle, and then provided in the inquisition that upon its failure to comply it should pay the further sum of fifteen hundred dollars. This inquisition was accepted by both parties and was ratified by their consent. The railroad company then neglected to build the trestle, and Reichert brought suit. This court held that the

award of fifteen hundred dollars was not a penalty. That the jury of inquisition had fixed the sum to be paid if the company failed to construct the trestle, and that the alternative thus given and accepted by the agreement of the parties bound the company to perform the conditions ²¹⁹ upon which it took Reichert's property, or to pay the sum which the jury fixed and the parties agreed to in lieu of a compliance with the inquisition. There is in the pending case no alternative agreement at all—certainly no express or unequivocal one; and, before the doctrine sanctioned in 58 Maryland can be applied, there must by sheer construction be imported into the proposal or bid which the appellant made a term that is not there now—a stipulation either to sign the bond with a surety or to pay five hundred dollars. For the purpose of declaring the deposit to be liquidated damages the contract actually made would have to be changed into a totally different agreement. This, of course, cannot be done.

The other cases cited and relied on by the distinguished counsel for the appellee were *Sanford v. First Nat. Bank* (Iowa, May 22, 1895), 63 N. W. Rep. 459; *Nilson v. Jonesboro*, 57 Ark. 168; *Sanders v. Carter*, 91 Ga. 450. We have no difficulty in distinguishing between these cases and the case at bar. The case of *Sanford v. First Nat. Bank* (Iowa, May 22, 1895), belongs to the same group as *Wallis v. Smith*, 21 Ch. Div. 250. There was a contract for the purchase of a one-half interest in a business, and a deposit of five hundred dollars was made with a bank by the purchaser as a forfeit in case he should fail to comply with the contract of purchase. Under all the circumstances, this deposit was treated as liquidated damages. The case of *Nilson v. Jonesboro*, 57 Ark. 168, merely applies the doctrine that where the loss arising from a breach cannot be measured "by any rule of damages, it is reasonable to suppose that 'the parties' intended to fix by the terms of the contract the precise sum recoverable for its breach." And in *Sanders v. Carter*, 91 Ga. 450, though there was a deposit, it appeared by extrinsic evidence that the subject matter of the agreement was such that the damages resulting from a breach thereof could not be readily or accurately ascertained, which fact must have been in the contemplation of the parties in fixing the amount of the forfeiture, and, no facts being shown which ²²⁰ would indicate that the sum so agreed on was disproportionate, unreasonable, and unjust, the whole amount was treated as liquidated damages.

For the reasons we have given, the pro forma judgment en-

tered on the demurrer for the defendant must be reversed and a new trial will be awarded.

Judgment reversed with costs above and below and new trial awarded.

DAMAGES—PENALTY—AMOUNT RECOVERABLE.—No other sum can now be recovered under a penalty than that which will compensate the plaintiff for his actual loss: *Gower v. Carter*, 3 Iowa, 244; 66 Am. Dec. 71.

DAMAGES—LIQUIDATED.—When from the nature of a contract the damages cannot be calculated with any degree of certainty, a stipulated sum will usually be held to be liquidated damages when so designated in the contract: *Hennessy v. Metzger*, 152 Ill. 505; 43 Am. St. Rep. 267. To the same effect see *Tode v. Gross*, 127 N. Y. 480; 24 Am. St. Rep. 475, and note, and *McCurry v. Gibson*, 108 Ala. 451; 54 Am. St. Rep. 177, and note. See, also, the extended notes to *Williams v. Vance*, 30 Am. Rep. 28, and *Graham v. Bickham*, 1 Am. Dec. 331.

DAMAGES—PENALTY.—If it is doubtful from the whole agreement whether a sum named therein is intended as a penalty or as liquidated damages, it should be construed as a penalty: *Monmouth Park Assn. v. Wallis Iron Works*, 55 N. J. L. 132; 39 Am. St. Rep. 626, and note with the cases collected.

MYERS v. COUNTY COMMISSIONERS.

[83 MARYLAND, 385.]

TAXATION—STOCK IN TRADE.—The average amount of livestock handled by a dealer each week, the greater part of which is imported from other states, and intended for exportation within one day from the time received, is, while in the hands and not in course of transit, subject to taxation as property, within the state at the regular period of assessment for such property.

TAXATION—PROPERTY INTENDED FOR EXPORTATION.—Property brought into the state for the purpose of early exportation therefrom is, while in the hands of the owner and not in course of transit, property permanently within the state, and as such is subject to state taxation thereby.

TAXATION—ASSESSMENT—VALIDITY—WANT OF NOTICE.—An assessment of "new property not valued and returned by the proper assessor," without giving notice of such assessment, as required by statute, is void.

S. S. Field, for the appellant.

D. G. McIntosh and C. R. Mace, for the appellees.

386 PAGE, J. The bill in this case was filed by the appellants to restrain the collection of certain taxes, alleged to be due from them to the appellees. The assessment upon which these taxes were levied is twenty thousand dollars, on the "stock in

trade—capital stock”—of the appellants. Myers & Houseman are cattle dealers. Their principal office is at the Union Stock Yards in Baltimore county. Their gross annual sales amount to about two millions of dollars per annum. Their cattle are mostly purchased in the western states, thence shipped to Baltimore, and there disposed of by the firm—some are shipped to Europe and others are disposed of at home. They also receive and sell cattle on commission. The market days at the Union Stock Yards are Wednesday and Thursday. On the first-named day, the original owners sell to the dealers; and on the next, the dealers retail to the butchers and others, and ship the remainder. On other days, there is no dealing, except when an occasional load arrives from shippers, who are ignorant of the custom of the trade. Of the cattle handled by the firm two-thirds are exported, one-sixth sold to butchers, and the residue are on commission. Of those exported, some are purchased in this state, but the large majority of them come from western states. The course of business is as follows: The cattle are expected to and generally arrive on Wednesday. They are then placed in the pens of the Union Stock Yards; there they remain rarely longer than one day; so that by ³⁸⁷ Thursday evening the pens are empty, and so remain until the following Wednesday. Those intended for export are fed, watered, and rested at the yards, and then placed on the ship. Those fit for export are not of such a class as are offered in the Baltimore market; and none of these are sold there, except when there are more than are wanted for shipment.

The appellants contend that this stock was not liable to taxation, because it cannot be considered as property “within this state”—as the words are employed in the second section of article 81 of the code. That provision is as follows: “All other property of every kind, value, and description within this state shall be valued to the respective owners thereof in the manner prescribed by this code, and shall be assessed and taxed as the property of such respective owners according to such prescribed methods of valuation,” etc.

In *Hopkins v. Baker*, 78 Md. 363, it was held that a stock of goods is to be regarded as “permanently located” (within the meaning of the words as used in article 3 of section 51 of the constitution) at the place where they are to remain until sold. “The separate articles,” the court says, “constituting the stock, may continue the property of the appellees for a day,

a week, a month, a year, or longer, but until they are sold they remain permanently in Baltimore, and are not moved from place to place." The stock in trade of the appellants consisted of cattle, and the evidence shows that while they kept this stock on an average of but one day in the week, they did have, sometime, every week at least twenty thousand dollars worth of cattle on hand, so that, if the week be regarded as the unit of time (and not the day), they may be said to keep on hand all the time an average of twenty thousand dollars worth of cattle. They keep them there for sale; and as they sell, according to the custom and exigencies of the trade, they replenish with other stock. Suppose, instead of not being fortunate enough to sell each week's receipts in one day, it took them ten days to close them out, so that the second week's consignment would be received before ³⁸⁸ the first could all be disposed of, this case would then be substantially like that of *Hopkins v. Baker*, 78 Md. 363, and no sufficient reason could be assigned for holding that the cattle "stock in trade," so held for sale, would not be "within the state" for the purposes of taxation. These cattle are disposed of rapidly, for the simple reason that the expense of keeping them on hand would in a short time destroy the profits of the business. It is an exigency of the trade. Ordinary goods may be kept on the shelf for a considerable period of time without loss, but cattle must be sold. The power of the state to tax an ordinary stock in trade is unquestionable; can it be that the power is lost by any sort of an exigency that the special trade or class of goods may impose upon the trader?

When received by the appellees in Baltimore, they are to be kept an indefinite time until sold. The only disposition to be made of them is to be sold; and that this takes but one day is due to the course of trade, and not to the specific purpose of the firm. They buy and bring to Baltimore, not for the temporary purpose of holding them in Baltimore county one day, but until they are sold, whether it be one day, or one year. Therefore, they are not temporarily there, but permanently for sale; or, in other words, to remain there permanently until sold. There seems to be no reason for holding that these cattle brought into the state by the appellants, residents of the state, for the purpose of supplying their trade, do not have for the purposes of taxation the same status as the goods of a merchant who buys in other states merchandise for the purpose of replenishing his stock—when here they may fairly be "considered as constituting

a part of the mass of the property of the state": *Appeal Tax Court v. Patterson*, 50 Md. 367.

It is said, however, that the assessment is bad, because it includes the cattle exported. This class comprises two-thirds of the cattle handled. It is well settled now by the decisions of the supreme court of the United States that property in transit through the state, or from a point in the ³⁸⁹ state to a point outside, is not within the taxing power of the state. That power lies with Congress, under that provision of the federal constitution which declares that it shall have power "to regulate commerce with foreign nations, and among the several states and with Indian tribes," and it is exclusive in all matters which require or only admit of general and uniform rules: *Cooley v. Board of Wardens*, 12 How. 299; *Brown v. Maryland*, 12 Wheat. 419; *Walling v. Michigan*, 116 U. S. 446. But this provision does not prohibit a state from taxing articles brought from another state, so long as there is no discrimination against the product of other states or the rights of its citizens: *Woodruff v. Parham*, 8 Wall. 123, 147; *Brown v. Houston*, 114 U. S. 622. The mere fact, therefore, that these cattle were purchased in other states, and brought to this state, is *per se* no reason why they cannot be taxed, in the usual manner in which such property is taxed in the state, as a part of the general mass of the property of the state. In *Coe v. Erroll*, 116 U. S. 517, the supreme court said: "They cannot be taxed as exports, that is to say, by reason or because of their exportation, for that would amount to laying a duty on exports, and would be a plain infraction of the constitution, which prohibits any state, without the consent of Congress, from laying any imposts or duties on imports or exports; and although it has been decided that this clause relates to imports from and exports to foreign countries, yet when such imposts or duties are laid on imports or exports from one state to another, it cannot be doubted that such an imposition would be a regulation of commerce among the states, and therefore void as an invasion of the exclusive power of Congress. . . . But if such goods are not taxed as exports, nor by reason of their exportation, or intended exportation, but are taxed as part of the general mass of property in the state, at the regular period of assessment for such property, and in the usual manner, they not being in course of transportation at the time, is there any valid reason why they should not be taxed?": *State Freight Tax Cases*, 15 Wall. 232.

⁸⁹⁰ We cannot hold in this case that at the period of assessment any of these cattle were in course of transportation. In the regular course of business, the cattle purchased by the appellants are shipped to themselves at Baltimore, to be there disposed of as they may deem most advantageous to their own interests. Once at the Union Stock Yards the transportation ceased until, at the pleasure of the appellants, they are again shipped. They are not held there to await a steamer or a train, but for the convenience of the owners, in order that they may determine which of them they will sell in the home market and which they will ship to the foreign, or any other disposition they may choose. After this determination is reached, some are disposed of at home to the butchers, and those destined for other markets are delivered to the carrier for their final journey.

Now it is proposed to tax them here, not because they come from another state, nor as exports; but in the same manner and for the same objects as all other property in the state is taxed. The case of *State v. Engle*, 34 N. J. L. 425, is not such a one as this. There the coal was mined on their own land by a company in Pennsylvania and sent by rail to Elizabethport, to be there shipped by water to other markets for sale; the court says, "The power of the state to tax the subjects of commerce, when their transit for the purposes of commerce has ceased, and they have become incorporated and mixed up with the property of the community, is well settled. But that a tax on property belonging to a citizen of another state in its transit to market in another state, which is delayed within the state, not for the purposes of sale, but merely for separation and assortment for the convenience of shipment to its destination, is a tax on commerce among states, is too plain to require argument." In this case, the place of destination, upon their shipment from the west, is Baltimore county, and in the latter place the owners keep them until they shall have determined what disposition shall be made of them. The property, then, not being in transit, either ³⁹¹ through the state, or from a point in the state to a point outside, is "property within the state" within the meaning of the statute.

But it is contended that, even if this be true, the property is not properly taxed, because the appellants purchased the cattle with the intention to export them, and, therefore, to tax them while in Baltimore county would be within the provision of the constitution of the United States, prohibiting the state from

laying imposts or duties on imports or exports. This question was raised in the supreme court, in the case of *Brown v. Houston*, 114 U. S. 622, but not decided. Justice Bradley, speaking for the court, said: "A duty on exports must either be a duty levied on goods as a condition or by reason of their exportation, or at least a direct tax or duty on goods which are intended for exportation. Whether the last would be a duty on exports is not necessary to determine." The subject came up again for consideration in the case of *Coe v. Erroll*, in 116 U. S. 517. The court, after referring to what had been previously held, proceeded: "But no definite rule has been adopted with regard to the point of time at which the taxing power of a state ceases as to goods exported to a foreign country, or to another state. What we have already said . . . will indicate the view which seems to us the sound one on that subject; namely, that such goods do not cease to be part of the general mass of the property in the state, subject, as such, to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another state or have started upon such transportation in a continuous route or journey. . . . Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state and never put in course of transportation out of the state."

This decision was based on the provisions relating to ³⁹² commerce between the states. But in *Turpin v. Burgess*, 117 U. S. 504, the court declared the same rule applicable, where the goods are to be exported to foreign countries. They say: "A general tax laid on all property alike and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition."

In *Carrier v. Gordon*, 21 Ohio St. 608, the rule is stated as follows: "To say that the simple purchase of the property, with an intention to remove it, would relieve it from liability to taxation, would be to make its liability depend upon the mere intention of the owner. . . . The safer rule is . . . to consider property actually in transit as belonging to the place of its destination, and property not in transit, as property in the place of its situs, without regard to the intention of the owner, or his residence in or out of the state."

It is also objected that cattle sold on commission are included

in this assessment. The evidence does not support this contention. It is true that Mr. Myers testified that one-sixth of the cattle sold by the appellants were commission cattle, but it does not appear that these were included in the assessment. On the contrary, Myers, and also Houseman, expressly affirm that the statement which places their stock in trade—"capital stock"—at twenty thousand dollars, is "a true return of all the property owned by them." And nowhere in the record is there a word that tends to show that in making up the assessment the commission cattle were taken into account. Myers testified that the valuation was of the capital stock or stock in trade. Some criticism was made upon the words "capital stock" as not referring to the amount of stock kept on hand. As used here, we think the words "capital stock" are intended to refer to the stock of the concern, and not its money: *Corson v. State*, 57 Md. 266.

There is, however, a fatal omission in the method by which this assessment was made. We do not think it can ³⁹³ be regarded as a transfer from the tax-books of Baltimore city. It was a new assessment, so far as it affected the taxable basis of Baltimore county, and was, therefore, within the provisions of section 145 of article 81 of the code. By that section, where new property not valued and returned by the proper assessor or collector is to be added, the county commissioners must first notify the owner by "written or printed summons," containing interrogatories, etc., and appointing "a certain day" for him to appear and answer; and, secondly, such notice is to be served at least five days before the day of hearing.

On that day, the owner may appear and answer and present such testimony as he desires or the commissioners deem necessary to be heard.

It is only after the owner has been thus summoned, and has failed to answer in writing on oath, or has appeared and answered orally and the return day has passed, that the county commissioners can add such new property. The section excepts from these provisions such assessments as are made by the proper collector or assessor, whose duty it is to assess and return the same; but this exception does not apply in this case, inasmuch as Van Meeter was merely an agent, with no power to do more than report newly discovered and mixed properties to the commissioners.

In this case a memorandum was made by this agent and the

entry of this upon the tax-books by the direction of the county commissioners constituted the only assessment. This court has said: "Until the property owner is duly notified and given an opportunity to come in and answer as to the valuation of the property proposed to be affected, or had failed to come in after receiving such notice, the commissioners have no authority or power either to increase the valuation of property already valued and assessed, or to add thereto other property not valued and returned to them by the proper assessors or collectors, as provided in the statute. The statute law of the state applicable to the case," the court proceeds to say, "should have been complied with," ³⁹⁴ and the notice given as required": *County Commrs. v. New York Min. Co.*, 76 Md. 557. This notice not having been given as required by the statute, this assessment cannot be upheld.

Decree reversed and the cause remanded.

TAXES.—GOODS BROUGHT FROM ONE STATE TO ANOTHER become lawful objects of taxation in the latter state the moment they reach their destination and are there kept, ready and offered for sale, at any point within the place of destination, and it is immaterial that they remain unloaded on the vessel that brought them, without being consigned to any particular point: *Pittsburgh etc. Coal Co. v. Bates*, 40 La. Ann. 226; 8 Am. St. Rep. 519, and note. A state has the right to tax all personal property found within its jurisdiction: *Denver etc. Ry. Co. v. Church*, 17 Colo. 1; 31 Am. St. Rep. 252, and note. Personal property may be taxed where it is permanently located, although it generally follows the residence of the owner and is there taxable: *Mills v. Thornton*, 26 Ill. 300; 79 Am. Dec. 377, and note. See, also, the extended note to *New Albany v. Meekin*, 56 Am. Dec. 533.

TAXES—ASSESSMENT—NOTICE.—If a statute designates a time when and a place where taxpayers may appear for the purpose of having assessments against them and their property reviewed and corrected, this affords to them adequate notice and an opportunity to be heard, and an assessment made under such statute is not void on the ground that it deprived the taxpayers of their property without due process of law; *People v. Turner*, 117 N. Y. 227; 15 Am. St. Rep. 498.

CASES
IN THE
SUPREME COURT
OF
MASSACHUSETTS.

BROWN v. RUSSELL.

[166 MASSACHUSETTS, 14.]

PUBLIC OFFICERS—MEASURES FOR ASCERTAINING FITNESS OF.—The oath of an applicant for appointment to an office that he is qualified to perform its duties, accompanied with a certificate of three citizens of good repute that they know him to be fully competent to perform such duties, cannot be regarded as a reasonable, impartial, and adequate method of determining the qualifications of applicants for appointment to a public office, if it be necessary, under the constitution of the state, that all persons appointed to such office shall be adjudged by somebody to be qualified to perform its duties.

PUBLIC OFFICERS—VETERANS, CONSTITUTIONALITY OF STATUTE REQUIRING APPOINTMENT OF.—The legislature cannot constitutionally provide that public offices which it has created shall be filled by veterans in preference to other persons, whether the veterans are or are not found or thought to be actually qualified to perform the duties of the offices by some impartial and competent officer or board charged with the duty of making the appointments.

PUBLIC OFFICERS, WHO ARE.—Persons appointed to the detective department of a district police force of a state by the governor for the term of three years, and subject to removal by him, and who have and exercise all the powers of constables, police officers, and watchmen, and whose services the governor may at any time command in suppressing riots and preserving the peace, are public officers, and not mere employés of the state.

Application for writ of mandate to the civil service commissioners of Massachusetts compelling them to restore petitioner to the highest place upon the list of candidates eligible for appointment to a position on the detective force of the district police.

J. B. Warner and J. J. Feely, for the petitioner.

H. M. Knowlton, attorney general, and G. C. Travis, assistant attorney general, for the respondents.

14 FIELD, C. J. In determining the principal question in this case, it is necessary to consider the statutes relating to the civil service, and particularly the statute of 1895, chapter 501. The previous statutes on the subject are Stats. 1884, c. 320; Stats. 1887, c. 437; Stats. 1889, c. 352; Stats. 1889, c. 473; Stats. 1891, c. 140; Stats. 1893, c. 95; Stats. 1893, c. 253; Stats. 1894, cc. 267, 519; Stats. 1895, c. 376. The justices of this court heretofore have had occasion to consider some of these statutes in an opinion given to the house of representatives on February 24, 1885, and in one given to the governor and council on September 22, 1887: See Opinion of the Justices, 138 Mass. 601; 145 Mass. 587.

15 By the statute of 1884, chapter 320, section 2, the civil service commissioners to be appointed under the act were authorized to prepare rules not inconsistent with existing laws or with the provisions of the act, and adapted to carry out the purposes thereof, for the selection of persons to fill certain offices in the government of the commonwealth, and of the several cities thereof, which are required to be filled by appointment, and for the selection of persons to be employed as laborers or otherwise in the service of the commonwealth and of the several cities thereof, and the rules were made subject to the approval of the governor and council; and by section 14 the rules were to be given a general or limited application. The commissioners have prepared rules with reference to what is called the official service of the commonwealth, and of the several cities thereof, and with reference to the labor service, and these rules have been approved by the governor and council. Under the classification of the services made by the rules there are included in the first division, schedule A, clerks and other persons rendering service as copyists, etc., and in schedule B persons employed in the prison, police, and fire departments, and some other officers. The second division includes the labor service. Section 15 of the statute of 1884, as amended by the statutes of 1893, chapter 95, describes the offices which, under existing laws, cannot be made subject to the civil service rules. It is obvious that the civil service statutes and rules relate only to certain subordinate offices and employments which have been created by the legislature.

None of them is an office or employment of which the duties, tenure, or qualifications are prescribed by the constitution.

In the present case, the petitioner is not a veteran, and, after examination, was placed at the head of the list of candidates eligible for certification and appointment to a position on the detective force of the district police of the commonwealth, and he remained at the head of the list until July, 1895, when the commissioners placed one Edward D. Bean at the head of the list, and reduced the petitioner to the second place. Bean had made application as a veteran, under the statute of 1895, chapter 501, section 2, and, having been found to be a veteran, was without examination placed first upon the list; and, so far as appears, he is the only veteran on the list. The district police are appointed by the ¹⁶ governor of the commonwealth, and are subject to removal by the governor: Pub. Stats., c. 103, sec. 1. If the governor makes requisition upon the commissioners for a candidate for appointment to the office of a detective upon this police force, it is made the duty of the commissioners, by the statute of 1895, to certify the name of Edward D. Bean for appointment, and of the governor to appoint him, if he appoints anybody. The governor, perhaps, may refuse to appoint anybody, if he is of opinion that Bean is not qualified to perform the duties of a detective on this force; or he may wait until more veterans than one are on the list of persons eligible to such an appointment, and make his selection from them; or he may appoint Bean, and remove him if he finds him incompetent. But then, if Bean is continued on the list, and is the only veteran on it, or if his application is considered as exhausted by one certification and he makes a new application, the statutes, literally construed, make it the duty of the commissioners to put his name again at the head of the list for appointment, and on requisition by the governor again to certify him for appointment, and so on, toties quoties, so long as he remains on the list.

It is to be noticed that the class of veterans, as defined by the statutes, is not a class which anybody can become qualified to enter by any services which he may perform, or by any attainments which he may acquire, but it is a class fixed and determined by services which were rendered a long time before any of the statutes were passed. It is also to be noticed that the fact of having been a veteran within the meaning of the statute in and of itself has little tendency to show that the applicant is specially qualified to perform the duties of many of the offices

to which the civil service statutes and rules relate. The principal purpose of exempting veterans from submitting to an examination must be that veterans sometimes may be appointed to an office or employment who would be found on examination not qualified to perform the duties of the office or employment which they seek. One, and perhaps the chief, purpose of the exemption must be to reward veterans for their services in the war of the rebellion. The reward is not in the nature of a pension or payment of money, but of an office or employment, the salary or pay of which the veteran is to receive.

¹⁷ The provisions of the statutes exempting veterans are general in their nature, and relate to all the offices or employments that have been or may be included within the civil service rules. From the earliest times most nations have conferred honors and offices upon those who have rendered distinguished service to the state, particularly in war. These honors and offices have been conferred upon persons voluntarily selected, and pensions and rewards sometimes have been given to whole classes of persons, of which the statutes of the commonwealth relating to the "aid to soldiers and sailors and to their families," and the statutes of the United States relating to pensions, are well known examples; but the statute of 1895 under consideration affords the first instance, so far as we know, in this commonwealth, where the appointing power has been compelled to appoint persons of a certain class to office in preference to all other persons, whether they are or are not thought to be qualified for the office by the appointing power, or by some public officer or some impartial and disinterested board of officers or persons invested by law with the power and responsibility of determining the qualifications of the persons to be appointed.

The legislature, in establishing offices not provided for by the constitution, has often required that the persons or some of the persons to be appointed shall possess certain qualifications, or that some of them shall be women and some men, but in all cases, so far as we are aware, the qualifications required bear such a relation to the duties imposed that they tend to secure that kind and degree of knowledge, experience, and impartiality which are requisite for the satisfactory performance of the duties, and it is open to any person to acquire the qualifications required. When women are to be appointed, there is a satisfactory reason in the nature of the office or employment why this should be done. In every such case, some discretion usually has been left to the appointing power in the selection of the particular per-

sons to be appointed. The peculiarity of the civil service statutes and rules, if the statute of 1895, chapter 501, sections 2 and 6, be enforced, is that very little is left to the discretion of the appointing power in the selection of persons if there are veterans who wish to be appointed. The civil service commissioners, in making up the list and in certifying the persons to be appointed, ¹⁸ must proceed in a certain way designated by the statutes and the rules, and the appointments must be made, if at all, from the persons so certified. Before the passage of the statute of 1895, chapter 501, it was in the discretion of the appointing power whether veterans who had been put upon any list without an examination, pursuant to the statute of 1887, chapter 437, should or should not be certified for appointment by the commissioners, and it was also in the discretion of the appointing power whether, if such veterans were certified, they should be appointed. But if veterans make application under the statute of 1895, chapter 501, section 2, they are to be preferred "for certification and appointment in preference to all other applicants not veterans, except women," and, as separate lists are made up for the different offices and employments, appointments from each list must be made from veterans, if any man is appointed, and if there are veterans on the list.

It ought, perhaps, to be considered whether it is intended that veterans who make application for employment in the public service under the statute of 1895, chapter 501, sections 2 and 6, shall not only file a petition in accordance with section 6, but shall also conform in their application to the requirements of the second section of rule 12 of the civil service rules, pursuant to section 2 of the statute. We are of the opinion that it was the intention of the statute that the application under this statute of a veteran who does not wish to submit to an examination should be made in accordance with the requirements of both the second section of rule 12 of the civil service rules, and section 6 of the statute: See Opinion in 145 Mass. 587.

¹⁹ It may, perhaps, be doubted whether it is the intention of the statute of 1895 that, if a veteran makes application pursuant to section 2, his application shall be taken to be conclusively true, or that the commissioners may inquire into the truth of the statements contained in the application. The statute of 1891, chapter 140, gives the commissioners ample power to make investigation in all cases requiring it, and the only question is, What is the intention of the statute of 1895? The commission-

ers must, of necessity, inquire and determine whether an applicant is a veteran according to the meaning of this statute; otherwise he has no right to make the application under section 2. We have, however, found it unnecessary in the present case to determine whether the commissioners may also inquire into the truth of the statements made in the application, to the effect that he has not suffered loss of limb or other physical impairment which incapacitates him from performing the duties of the position which he seeks; that he is a citizen of the United States; that he does ²⁰ not habitually use intoxicating beverages to excess, and is not a vendor of intoxicating liquor, and has not been convicted within one year of any offense against the laws of the commonwealth. Whether they can make these inquiries or not, we are unable to see in the statutes any indication that the legislature intended that the commissioners should examine a veteran who makes application under the statute of 1895, chapter 501, section 2 and 6, with reference to his moral character, or his mental acquirements and capacity to perform the duties of the position which he seeks. If the commissioners were to do this, and were to certify to the appointing officer only such veterans as they found to be of good moral character and mentally as well as physically qualified to perform the duties of the position which they seek, there would be little difference under this statute between the condition of veterans who desire an appointment without having passed any examination, and that of those who submit themselves to an examination. We think the intention of the statute of 1895 is that the sworn statement of the applicant that he is qualified to perform the duties of the position which he seeks, accompanied by a certificate from three citizens of good repute in the community that they know said applicant to be fully competent to perform such duties, is to be taken by the commissioners for the purpose of certification to the appointing power, and by the appointing power as conclusive upon the mental and moral qualifications of the applicant. The certificate of three citizens is not required to be under oath, and it may be made by any three persons of good repute whom the applicant may select; it is not made under any sense of official responsibility, and the persons making it are not required to be impartial or disinterested. They may be the friends or relations or servants of the applicant. The statute of 1895, chapter 501, section 2, provides "that the age limit now established by the civil service rules, with regard to appoint-

ments in the police and prison service and fire departments, may be applied to" appointments under this section; but this seems to be the only clear provision that the commissioners may exclude from certain offices and employments veterans who make the requisite application, accompanied by the requisite statement and certificate, and the exclusion can be made only on account of age, in accordance with the ²¹ age limit established by the civil service rules when the statute of 1895, chapter 501, took effect.

It is the contention of the petitioner that the privileges given to veterans by the statute of 1895, chapter 501, sections 2 and 6, are in violation of the principles which underlie our system of government implied in the constitution of the commonwealth, and also are in violation of certain express provisions of the constitution. The express provisions relied on are found in articles 6 and 7 of the declaration of rights, and reference is also made to article 9. Article 9 is as follows: "All elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments." It is not contended that this article in terms is applicable to the present case. It relates to elections and to inhabitants who have such qualifications as are established by the frame of government. The civil service statutes do not relate to elections or to any offices the qualifications for which are established by the constitution, but the article, so far as it extends, does declare the principle that all persons having the requisite qualifications have an equal right to elect and to be elected to public office.

Article 7 is as follows: "Government is instituted for the common good; for the protection, safety, prosperity, and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men. Therefore, the people alone have an incontestable, unalienable, and indefeasible right to institute government, and to reform, alter, or totally change the same, when their protection, safety, prosperity, and happiness require it."

This article is declarative of the ends of the institution of government. It may be said to be fairly within the intent of this article that public offices, which are the instrumentalities of government, ought not to be created or filled for the profit, honor, or private interest of any one man, family, or class of men, but

only for the protection, safety, prosperity, and happiness of the people, and for the common good.

Article 6 is as follows: "No man, nor corporation or association of men, have any other title to obtain advantages, or ²² particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being in nature neither hereditary, nor transmissible to children, or descendants, or relations by blood, the idea of a man born a magistrate, lawgiver, or judge is absurd and unnatural."

From the conclusion of this article it is manifest that it is mainly directed against hereditary offices and privileges, but it is contended that this is not its whole purpose. It is said that the mention of corporations and associations of men shows that hereditary privileges were not solely intended, because corporations and associations of men have no heirs, although they may be perpetual. We think it obvious that, whatever may be the advantages or particular and exclusive privileges mentioned, they may include advantages and privileges for life or a definite period of time, as well as hereditary advantages and privileges. We think, for example, that a peerage for life, with the privileges which attach to a peerage by English law, cannot be conferred in this commonwealth upon any person, any more than can an hereditary peerage.

It has been argued, on the one hand, that the words "than what arises from the consideration of services rendered to the public," mean or include services which have been rendered to the public in the past, and that if a man, corporation, or association of men has rendered services to the public in the past, it is consistent with this article that he may obtain advantages, or particular and exclusive privileges, in consideration of those services. On the other hand, it is argued that it is only in consideration of services to be rendered to the public therefor, that a man, corporation, or association of men may obtain advantages, or particular and exclusive privileges. This provision is said to have been taken from the declaration of rights in the constitution of Virginia of 1776, section 4, where it reads as follows: "That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary."

In our opinion, the meaning of these words in this article, so far ²³ as they are applicable to public offices, is that only in consideration of services to be rendered to the public therefor can a man, corporation, or association of men obtain advantages or particular and exclusive privileges distinct from those of the community. A person may obtain the advantages or privileges attached to a public office in consideration of his performing the duties of the office. It is for the purpose of rendering service to the public in a public office that advantages and privileges distinct from those of the community may be obtained. The meaning of this article was somewhat considered in *Hewitt v. Charlier*, 16 Pick. 353, and it was held that the statute of 1818, chapter 113, was not in violation of the article. It was there held that the leading purpose of that statute was to guard the public against ignorance, negligence, and carelessness in the practice of physic and surgery, and that the exclusive privileges granted to such persons as shall have been licensed by the officers of the Massachusetts Medical Society, or have been graduated doctors of medicine from Harvard University, were only incidental to the leading purpose of the statute. In that case, as in others where a license is required before anyone can engage in certain professions or pursuits, a service is rendered to the public by the exercise on the part of those licensed by the skill, knowledge, and experience required to obtain a license, and by the exclusion of ignorant and incapable persons from the profession or pursuit. But it may be questioned whether this article of the declaration of rights was intended to apply to private pursuits and employments, and whether it is not to be confined to political and civil rights and privileges.

The original statute of 1884, chapter 320, section 14, clause 6, concerning the civil service, required that the rules should provide "for giving preference in appointments to office and promotions in office (other qualifications being equal) to applicants who served in the army or navy of the United States in time of war and have been honorably discharged therefrom." It may be said that, other qualifications being equal, there are reasons to believe that a veteran soldier or sailor often will make a better civil officer than a person who never has been subjected to the discipline of service in war, and it is distinctly a public purpose to promote patriotism, and to make conspicuous and honorable any ²⁴ exhibition of courage, constancy, and devotion to the welfare of the state, shown in the public service. These

things, we assume, the legislature may take into account in providing for appointments to office where the qualifications are not prescribed by the constitution. The statute of 1887, chapter 437, provides that veterans may be preferred for appointment to office or employment in the service of the commonwealth or the cities thereof, without having passed an examination under the civil service rules. This statute only gives a discretion to the appointing power, which it may or may not exercise, according to the needs of the public service: See, also, Stats. 1889, c. 473. The statute of 1895, chapter 501, section 1, amending the statute of 1884, chapter 320, section 14, clause 6, makes compulsory the certification and appointment of veterans who have been examined and found qualified for the positions they seek in preference to all other persons, but they must submit to the same examination as other persons. The constitutionality of this section of the statute is not now before us.

The purpose of the statute of 1895, chapter 501, sections 2 and 6, is to make the appointment of veterans compulsory, if they desire to be appointed, whether the appointing power or the commissioners think they are or are not qualified to perform the duties of the office or employment which they seek. Section 6 requires a sworn statement of the applicant that he is qualified to perform the duties of the position he seeks, but it is notorious that persons the least qualified to perform the duties of an office often are the readiest to believe that they are qualified to perform them, and this provision cannot be seriously taken as a reasonable and adequate method of ascertaining the qualifications of applicants for office or employment. Probably it was because the legislature felt that this requirement was not adequate that the certificate of three citizens of good repute was also required. But the obvious defect in this requirement is, that the applicant may select the three citizens, and they are not required to have any knowledge of the qualifications required, or to be disinterested or impartial, or to act under any sense of public responsibility. A man cannot properly be a judge in his own case, or make his servants and agents the judges. Such a certificate cannot be regarded as a reasonable, impartial, and adequate method of determining the qualifications of applicants for appointment to ²⁵ office or employment, if it be necessary under the constitution that all persons appointed to office or employment should be adjudged by somebody to be qualified to perform the duties of the office or employment.

The principal question of law in this case, broadly stated, is therefore as follows: Can the legislature constitutionally provide that certain public offices and employments which it has created shall be filled by veterans in preferment to all other persons, whether the veterans are or are not found or thought to be actually qualified to perform the duties of the offices and employments by some impartial and competent officer or board charged with some public duty in making the appointments? If such legislation is not constitutional as regards public offices, the question incidentally may arise whether a distinction can be made between public offices and the employments by the public which are not offices.

Public offices are created for the purpose of effecting the ends for which government has been instituted, which are the common good, and not the profit, honor, or private interest of any one man, family, or class of men. In our form of government, it is fundamental that public offices are a public trust, and that the persons to be appointed should be selected solely with a view to the public welfare. In offices which are created by the legislature, where the method of appointment is not prescribed by the constitution, the legislature, if no limitation is put upon its power by the constitution, can take upon itself the responsibility of selecting the persons to be appointed, or can confer the power of appointment upon public officers or boards, or upon the inhabitants of cities, towns, or districts; but we think that it is inconsistent with the nature of our government, and particularly with articles 6 and 7 of our declaration of rights, that the appointing power should be compelled by legislation to appoint to public offices persons of a certain class in preference to all others, without the exercise on its part of any discretion, and without the favorable judgment of some legally constituted officer or board designated by law to inquire and determine whether the persons to be appointed are actually qualified to perform the duties which pertain to the offices.

There are many employments by the commonwealth, or by ²⁶ the cities and towns of the commonwealth, which do not constitute the employé a public officer. The work of the commonwealth, and of the cities and towns, must be done by agents or servants, and much of it is of the nature of an employment. It is sometimes difficult to make the distinction between a public office and an employment, yet the title of "public officer" is one well known to the law, and it often is necessary to determine

what constitutes a public office. Every copying clerk or janitor of a public building is not necessarily a public officer. With reference to such and similar employments, it may be suggested that, if the legislature can give pensions to veteran soldiers and sailors, it may grant them on condition that the pensioners shall render such service to the commonwealth, or to its cities and towns, as they can; that they may be employed and paid wages or a salary, partly in consideration of the services they render, and partly in recognition of and as a reward for the services which they have rendered to the commonwealth in the past.

We have not found it necessary, however, in the present case, to consider the authority of the legislature to grant pensions or pecuniary rewards for past services to the state, whether the pensions and rewards be absolute or conditional upon the rendering of some service, because, in our opinion, the persons appointed to the detective department of the district police force of the commonwealth, under Public Statutes, chapter 103, and the acts in amendment thereof, are public officers, and not merely employés of the commonwealth. They are appointed by the governor for the term of three years, subject to removal by the governor, and they "have and exercise throughout the commonwealth all the powers of constables (except the service of civil process), police officers, and watchmen, and may be transferred from one district to another; and the governor may, at any time, command their services in suppressing riots and in preserving the peace": Pub. Stats. c. 103, sec. 2. They give bonds to the treasurer of the commonwealth and receive a stated salary from the treasury of the commonwealth. They have and exercise some of the powers of government. We are of opinion that sections 2 and 6 of the statute of 1895, chapter 501, so far as they purport absolutely to give to veterans particular and exclusive privileges distinct from those of the community in obtaining public office, cannot ²⁷ be upheld as enactments within the constitutional power of the general court.

The result is, that the commissioners were not authorized by the statute of 1895, chapter 501, sections 2 and 6, without an examination, to place the name of Edward D. Bean at the head of the list to be certified for appointment upon the detective force of the district police of the commonwealth in preference to all other applicants not veterans or women; and that they should be commanded to strike his name from the list.

Mandamus to issue accordingly.

A QUESTION somewhat similar to that involved in the principal case was considered in the opinion of the supreme court of Massachusetts to the governor and council of that state printed in 166 Mass. 589. The statute there in question differed from that involved in the principal case in this, that no duty was imposed to appoint veterans irrespective of their qualifications for the office to which they were to be appointed. The statute, on the other hand, authorized veterans to apply for examination for any position in the public service classified under the civil service statutes and rules, and provided that, if they passed such examination, they should be preferred in appointment to all male persons not veterans. Justices Allen, Lathrop, and Baker were of the opinion that the statute was unconstitutional, while Justices Field, Holmes, Knowlton, and Morton were of the opinion that it was constitutional. The justices concurring in the dissenting opinion said: "The fact of being a veteran, as defined in the statutes of 1896, chapter 517, does not bear such a relation to the duties of a present office or employment in the civil service of the commonwealth that it can be made a decisive test in the selection of persons for such offices or employments. A veteran may or may not have special fitness for such positions. Certainly, to have served honorably in the army or navy is not the only way in which one can acquire such fitness. However useful the training may be which many of the veterans received in the army or navy, it cannot be laid down as a universal proposition that every veteran who can pass the examination to which all applicants are subjected is better qualified for such office or employment than any other person now is or can become. The appointing power cannot be required to pass by cases of conspicuous fitness, and to accept service of a lower character simply because a veteran applies for the position. In requiring this to be done, the statute sets apart a class of persons who, in consequence of what they did in war, and irrespective of present qualifications, are to be preferred, so that nobody else, however well fitted or however meritorious by reason of valuable or distinguished services in other occupations calling for fidelity and fortitude, can be considered as eligible for appointment, or can become eligible in the future, in competition with them. No matter what may have been the services, training, and discipline, or what may be the natural ability or acquired skill of others, the power of selecting them for public office or employment is cut off. This involves a compulsory disregard of actual fitness and qualifications, to the detriment of the public service. Nor can the fact that a veteran has passed the prescribed examination be made a decisive test in favor of his appointment. This may merely show that he has the minimum qualifications required, but cannot be made to entitle him to a compulsory preference over those who are better qualified. It is, therefore, not within the constitutional power of the legislature to enact that veterans shall be preferred for public office or employment to others who may have higher standing or superior qualifications; and the first and third questions are answered in the negative." Upon the same

topic the majority of the judges expressed their views as follows: "Section 2 of the statute of 1896 authorizes veterans to apply for examination under the civil service statutes and rules, and provides that, if such veterans pass the examination, they shall be preferred in appointment to all male persons not veterans. The effect of the section is, that the veterans must first be found qualified, by any examination in accordance with the civil service statutes and rules, to perform the duties of the office or employment which they seek, and if they are found so qualified, they are to be preferred in appointment to all other persons, except women. The general court may have been of opinion that a person who served in the army or navy of the United States in the time of the war of the Rebellion, and had been honorably discharged therefrom, or who was a citizen of Massachusetts, and had distinguished himself by valiant and heroic conduct in the army or navy of the United States, and had received a medal of honor from the President of the United States, "is a person who has shown such qualities of character that it is for the interests of the commonwealth to appoint him to certain offices or employments in preference to other male persons, if he is found otherwise qualified to perform the duties. The general court may have so thought, on the ground either that such a person would be likely to possess courage, constancy, habits of obedience, and fidelity, which are valuable qualifications for any public office or employment, or that the recognition of the service of veterans in the way provided for by the statute would promote that love of country and devotion to the welfare of the state which it concerns the commonwealth to foster. If such was the opinion of the general court, we cannot say that it was beyond its constitutional power to enact this section. Of the wisdom of such legislation we are not made the judges. The section does not purport to give an absolute preference to veterans without regard to their qualifications, and the constitutionality of similar legislation was not considered in the recent decision of the court of which we are justices: See *Brown v. Russell*, 166 Mass. 14"; ante, p. 357.

The question of the right of the legislature to diminish the number of persons from whom officers can be selected, or, in other words, to arbitrarily limit eligibility to office, was presented to the court of appeals of New York in the case of *Rathbone v. Wirth*, 150 N. Y. 459, but under circumstances entirely different from those involved in the principal case. By a statute of the state of New York it was provided that the police board of commissioners of the city of Albany should consist of four persons, not more than two of whom should belong to the same political party or organization; that at a date designated the common council of that city should meet and elect four persons as such commissioners, for which purpose the commissioners attending should constitute a quorum; that each member should be entitled to vote for not more than two of such persons, and the four receiving the highest number of votes should be police commissioners; that the commissioners thus elected should hold office

until the dates designated in the act, and that on the expiration of their terms of office, four other commissioners should be elected in like manner as the original; that if a vacancy should occur otherwise than by the expiration of a term, it should be filled by appointment of the mayor upon the written recommendation of the majority of the members of the common council belonging to the same political party or organization as the police commissioner whose office should become vacant; and, finally, that no person should be eligible to the office of police commissioner unless, at the time of his election, he should be a member of the political party or organization having the highest or next highest representation in the common council. It will be seen that the object of this act was to keep the police commissioners equally divided between the two parties having the highest representation in the common council, and that it necessarily excluded from the office of police commissioners persons not belonging to either of those parties, and prevented any party, no matter how great its numerical superiority, from having any representation in excess of the party next to it in point of numbers, however small that party should be.

It was claimed that the statute conflicted with various provisions of the constitution of the state. The first of these was section 1 of article 1, declaring that "no member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." The second was section 1 of article 13, providing that "no other oath, declaration, or test shall be required as a qualification for any office of public trust" than the oath or affirmation prescribed in the constitution. The third was section 2 of article 10, requiring that "all city, town, and village officers whose election or appointment is not provided for by this constitution shall be elected by the electors of such city, town, or village, or by some division thereof, or be appointed by such authorities thereof as the legislature may designate for that purpose." Judge Gray, in his opinion in the court of appeals, pronouncing the act unconstitutional, relied chiefly upon the section last cited. He held that this section conferred upon the local or municipal authorities the power to elect or appoint such officers, and that it was not within the authority of the legislature to qualify or hamper the exercise of the power, and thereby to interfere with the right of local self-government, and to cut off the majority of the voters, and the officers and agents represented by them, from the right of selecting officers representing their opinions and desires, and that to hold otherwise gave the minority an equal control with the majority, and, to that extent, interfered with the right recognized as the basis of republican government, that the majority shall control. He said: "The provision of the act under consideration appears as legislation hostile to that freedom of action which the people of Albany have a right to claim, under the constitution, in the management of their affairs. It cannot be denied that legislation of this character has an inimical tendency, and, unless the check of the con-

stitution is strictly enforced by the courts, it may develop a germ of menace to local self-government, to the presence of which we should not suffer ourselves to be blinded by any partisan considerations, or until it becomes too late to extirpate it." He was also of the opinion that in denying the constitutionality of the act he was not confronted with any question of minority representation; for the purpose of the act was to place the political minority in the legislative body "upon an equality with the political majority, and in that feature consists the violation of that fundamental principle of our popular form of government which demands that the majority shall govern. The principle of minority representation recognizes the right of the majority to control. It must be the majority who shall appoint the officers of government, and this extends more clearly to the governmental affairs of localities, perhaps, than to affairs of state government."

As against the claim that there had hitherto been a practical construction of the constitution of the state given by the legislature, and acquiesced in, and acted upon, by the executive and administrative departments of the government, which might sustain the statute here assailed, the learned judge declared that the question was purely one of law, whether the constitutional provision referred to had been violated by the statute, and that while a practical construction of the law is usually accorded force when it relates to the business conducted by the departments of state government, and when the legislation, depended upon to establish it; has been clear and uniform in character for a long period of time, yet that "acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the constitution and appointed judicial tribunals to enforce it." The question, said he, "is no less than this: Having a written constitution, shall we, and may we, disregard one of its commands, and, though the court is set as the people's bulwark against legislation which contravenes constitutional provisions, shall it aid the legislature when overstepping the limits assigned to its action? We cannot dispose of the question as one of legislative discretion; for, if we construe away such an express provision, upon however so plausible a theory, we open the door to future attacks upon the fundamental law which underlies the structure of the state."

Justice O'Brien, in a concurring opinion, inclined to the view that the act assailed also violated the first and second provisions of the constitution hereinbefore referred to, and even if this were not so, that it fell within the implied restraints of the constitution upon the legislative power, and he held that, "Such restraints may be found either in the language employed or in the evident purpose which was in view and the circumstances and historical events which led to the enactment of the particular provision as a part of the organic law. A written constitution must be interpreted as the paramount law of the land according to its spirit and the intent of its framers, as indicated by its terms. In this sense, it is just as

obligatory upon the legislature as upon other departments of the government or upon individual citizens." The judge cited various cases in which legislative restrictions upon the right to hold, and to be elected to, office were held to be in conflict with constitutional limitations similar to those contained in the constitution of New York, among which cases were *Mayor of Baltimore v. State*, 15 Md. 379, 74 Am. Dec. 572, involving a city charter declaring, "that no black Republican or indorser or supporter of the Helper Book shall be appointed to any office under such board" of police commissioners; *People v. Hurlburt*, 24 Mich. 44; 9 Am. Rep. 103; *Attorney General v. Board etc. of Detroit*, 58 Mich. 213; 55 Am. Rep. 675; *Evansville v. State*, 118 Ind. 426, involving statutes requiring members of a common council or of the police and fire departments of a city to be filled by selection from the two leading political parties therein. In summing up his conclusions, he said: "The fatal objection to the bill is, that while professing to comply with the constitution by designating the common council as the appointing authority, it violates it by restrictions upon its action and by the enactment of methods of procedure for a special purpose, which, in their practical operation, confers the power to select upon two political groups in the body, each acting independently of the other. The unity and efficiency of the common council as a deliberative body, representing the people, and as an organ of city authority, is thus destroyed by the distribution of its legitimate powers between two unequal groups or fragments of the whole body. City officers selected in this manner are in no just or proper sense either chosen by the people or appointed by the common council, or any other local authority, and nothing less than this will satisfy the letter or the spirit of the constitution. The act should not be viewed as an expedient for a day, but a permanent law for all time, and, thus considered, it is obvious that the powers conferred upon a minority may be exercised by a single member. Such a situation is, of course, possible and quite conceivable. To say that the two commissioners, elected under such circumstances, held office and exercised the important powers conferred by the bill, either by the choice of the electors, the common council, or any other city authority, would be to state a proposition so glaringly erroneous as to merit no consideration whatever. Their appointment, under such circumstances, would manifestly be due to the fact that, by a legislative edict, all the other members of the common council were prohibited from participation in the choice. It would be quite as competent under such conditions for the legislature to omit mere formalities, without substance, and to name the commissioners in the bill. The principle is the same whether the minority consists of one member or more. When the common council is designated as the appointing authority, but the majority of the members are disqualified and disbarred from voting, and the minority empowered to make the choice, the official organ of the popular will is silenced, and, though the real nature of the proceeding may

be disguised by the observance of forms, yet the appointment in such a case is, in substance, the act of the central and not the local authority and so the constitution is violated: *Menges v. Albany*, 56 N. Y. 374; *Warner v. People*, 2 Deno, 272; 43 Am. Dec. 740; *People v. Angle*, 109 N. Y. 564; *State v. Denny*, 118 Ind. 449; *Clapp v. Ely*, 27 N. J. L. 622."

Andrews, chief justice, and Vann, justice, concurred in pronouncing the statute unconstitutional, upon the ground that a minority of a common council is not a city authority within the meaning of section 2 of article 10 of the constitution.

Justices Haight, Bartlett, and Martin dissented from the conclusions of the other judges in affirming the unconstitutionality of the statute, the two latter writing dissenting opinions. Justice Bartlett, however, admitted that the portion of the statute declaring no person to be eligible to the office of police commissioner unless he should, at the time of his election, be a member of the political party having the highest or next highest representation in the common council, could not be sustained as a constitutional provision, but was of the opinion that this objectionable feature might be disregarded and the remainder of the statute permitted to stand.

Justice Martin referred to a number of statutes of the state which he claimed showed such a course of legislation upon the subject as amounted to a practical construction by the legislature, at least, of the constitution of the state, in favor of the validity of the act assailed, and that this construction "is entitled to controlling weight in its interpretation, and has almost the form of a judicial exposition." He also insisted that the principle involved in the law had been approved in the case of *Rogers v. Common Council of Buffalo*, 123 N. Y. 173, and he was of opinion that it was within the power of the legislature, notwithstanding any provision contained in the constitution of New York, "to provide in what manner the common council should discharge its duties, and to provide for the election of police commissioners in the manner pointed out by the statute. The effect of this provision was to amend the charter of the city of Albany so far as it related to the manner in which the common council should act. As there is no constitutional provision which in any manner prevents the legislature from providing the manner in which that body shall act in the selection of officers, it is quite plain, I think, that this statute is not in conflict with the provision of the constitution under consideration." Whether the part of the statute declaring no person eligible to be elected unless he should be a member of the political party or organization having the highest or next highest representation in a common council was void by the constitution of the state he thought not necessary to be determined, because this provision of the statute might "be eliminated from the act, and still the apparent and manifest object and purpose of the legislature be effected by the statute as it would then remain."

OFFICERS.—WHAT IS PUBLIC OFFICE AND HOW DISTINGUISHED FROM EMPLOYMENT is the subject of the extended note to *Shelby v. Alcorn*, 72 Am. Dec. 179-189.

HUGHES v. GROSS.

[166 MASSACHUSETTS, 61.]

CONTRACT FOR SERVICES, WHEN NOT TERMINATED BY DEATH.—The death of a member of a partnership does not terminate a contract for services entered into between the firm and one of its employés, when the business is carried on by the surviving partner after such death in the same manner as before, and all the parties for some time assumed that the contract had not been terminated.

CONTRACT FOR SERVICE, NEW MEMBER OF PARTNERSHIP NOT BOUND BY.—If a contract of employment is entered into between a business firm and one of its employés, after which one of the members dies, and another person is admitted to his place in the firm, and with the surviving partners continues the business, the new partner is not liable to such employé for a breach of the contract to continue in employment for a fixed period.

PRACTICE—DISCONTINUING AS TO A PARTY IMPROPERLY JOINED.—If an employé sues the surviving partners of a firm and a new partner on a contract of employment made by the former when consisting of such survivors and a partner now deceased, the plaintiff may be allowed a discontinuance as against such new partner, and to take a judgment against the other defendants.

EVIDENCE, RESTRICTING SO AS TO BE HARMLESS.—If a plaintiff, in response to a letter urging reasons for dissatisfaction, writes an answer, and such letter and her answer are admitted only for the purpose of the light it may throw on the conduct of the defendants, and not as evidence of admissions made by them, the reception of such evidence can have done no harm, and therefore does not entitle the defendants to a new trial.

MASTER AND SERVANT—CONTRACT LIMITING RIGHT TO DISCHARGE.—If a contract for services for a year provides that the employé may, at her election, continue it for an additional year, provided she indicates her willingness to do so at a time stated, and provided further that her services have been reasonably satisfactory until the date named, and notice is given to her of any cause of dissatisfaction on or before such date, the refusal to employ her cannot be justified because of grounds of dissatisfaction not existing at the date named or not specified in the notice given to the employé.

Action of contract against Isaac Gross and Bernhard Sommer, copartners, for failure to employ the plaintiff for an additional year, pursuant to the terms of a contract entered into between plaintiff and Gross and Strauss while the latter were partners. This contract, in substance, provided that the plaintiff should be employed for one year from April 25, 1892, as assistant manager of a cloak department, and that the plaintiff, at her election, might continue the employment for an additional year, provided she signified her election to do so on or before April 25, 1893, by giving a notice in writing to that effect, and “provided also that the services of said second party have been reasonably satisfactory to said first party until January 1, 1893; also provided

that said first party gives written notice to said second party of any cause of dissatisfaction on or before January 1, 1893." After the making of the contract, Philip Strauss, one of the parties thereto, died. The business was carried on by the surviving partner for nearly a year, when a new partnership was formed of which the defendant Sommer became a member. The business carried on was of the same character as that prosecuted by the old firm, the new firm having assumed the liabilities and received the assets of the old one. The testimony on the part of the plaintiff tended to show that no complaints of dissatisfaction were made to her until December 28, 1892, at which date she was handed a letter stating that the defendants did not care to employ her under the contract beyond the year named in the contract and ending April 25, 1893, and stating that her services were not reasonably satisfactory for several reasons, none of which were stated. A few days later, the plaintiff received a letter stating five causes of dissatisfaction. In response to this, she made a written reply on January 2, 1893, and received in return another letter four days later insisting on the right to terminate the contract of employment and declining to enter into any further correspondence on the subject. In a letter written by the plaintiff to the defendants, she answered seriatim the five reasons for dissatisfaction urged against her. This answer, being offered in evidence at the trial, was objected to, and was admitted only for the light it might throw on the defendants' reply and subsequent conduct, and not as evidence of admissions. At the trial, the defendants offered evidence for the purpose of showing causes of dissatisfaction other than those stated in their letters. This evidence was excluded on the ground that the defendants could not show any causes of dissatisfaction with the plaintiff not specified in their letters to her. The defendant Sommer asked a ruling that there was no evidence to warrant a verdict against him. This ruling was refused, and the judge ordered the jury to find a special verdict as to whether or not Sommer, as a partner of the new firm, by his acts, conduct, or declarations agreed to assume and adopt the contract between the plaintiff and the old firm of Gross and Strauss. This issue the jury answered in the affirmative. The also found a general verdict for the plaintiff, and the defendants alleged exceptions.

E. N. Hill, for the defendants.

J. Woodbury and J. M. Merriam, for the plaintiff.

⁶⁴ HOLMES, J. This is an action of contract, for refusing to employ the plaintiff a second year. The plaintiff had a verdict, and the case is here on exceptions. The original contract was ⁶⁵ in writing, and was made with two partners, Gross and Strauss, for one year from April 25, 1892, with a conditional right of renewal on the side of the plaintiff for one year more. On November 1, 1892, during the first year of the plaintiff's employment, Strauss died, and the business was carried on by Gross. The first question raised by the exceptions is whether Strauss' death ended the contract. At the end of December, the plaintiff received a notice from Gross that she would not be employed beyond the first year, stating causes of dissatisfaction. There was an answer from the plaintiff, and a reply by Gross. Exceptions were taken to the admission of the plaintiff's letter in evidence, and to the exclusion of evidence of other causes of dissatisfaction beside those mentioned in the notice.

On February 1, 1893, the defendant Sommer became a partner in the business with Gross, the new firm taking the assets and assuming the liabilities of the old one. Thereafter the plaintiff was paid out of the funds of the new firm, and, according to the plaintiff's testimony, was referred to Sommer for further discussion of her relations with the firm, and had several interviews with him, in which he wanted to terminate the contract. Another exception is to the refusal to direct a verdict for Sommer.

We are of opinion that it could not be ruled, as matter of law, that the contract of service was dissolved by the death of a partner. We have no occasion to criticise the decisions in some of our states and in England and Scotland, where an opposite result was reached by a majority of the judges with reference to different kinds of business from the present, except to remark that the argument put forward in Scotland and elsewhere that the only contracting party was the firm, and that the firm had ceased to exist, does not agree with the common law: *Tasker v. Shepherd*, 6 Hurl. & N. 575; *Hoey v. MacEwan*, 5 Ct. of Sess., 3d ser., 814, 815; *Griggs v. Swift*, 82 Ga. 392; 14 Am. St. Rep. 176; *Greenburg v. Early*, 30 Abb. N. C. 300, 303. The common law does not know the firm as an entity: *Hallowell v. Blackstone Nat. Bank*, 154 Mass. 359, 363. A contract with a firm is a contract with the members who compose it. A joint contract to employ the plaintiff is not ended necessarily by the death of one of the contractors: *Martin v. Hunt*, 1 Allen, 418. And there is no universal necessity that death should have a greater effect

when the joint ⁶⁶ contractors are partners: *Fereira v. Sayres*, 5 Watts & S. 210; 40 Am. Dec. 496. If the death naturally would put an end to the business, as it so frequently does, very possibly it might end the employment. We have no need to consider what would be the result if in fact no further business was done except to wind up the affairs of the firm, as was the case in *Griggs v. Swift*, 82 Ga. 392; 14 Am. St. Rep. 176. But this business went on without a break, and both parties seemed to have assumed that the plaintiff's contract was not ended by the death of Strauss.

But the foregoing suggestions are not enough to lay a foundation for the liability of Sommer, even assuming that there was evidence warranting the inference that he was content to be bound unless Gross escaped, and that he made an oral contract on the terms of the written agreement. The declaration is on the written instrument, and the refusal to direct a verdict for Sommer must be taken as made either with reference to the pleadings, in which case Sommer must be shown to be a party to the instrument, or else on the evidence, irrespective of the pleadings, in which case, unless he is to be taken to have signed the writing, the statute of frauds would be a defense under our decisions: *Hill v. Hooper*, 1 Gray, 131; *Freeman v. Foss*, 145 Mass. 361; 1 Am. St. Rep. 467. It appears to us that this difficulty cannot be answered except by attributing an oversubtle meaning to the firm signature and to the acts of the new partners. We cannot read "Gross and Strauss" as not only meaning all those who then were members of the firm, but also as purporting to name in advance all persons who might become members pending the contract. It follows that a verdict for Sommer should have been directed. But there seems to be no reason why the superior court, if it sees fit, should not allow the plaintiff to discontinue as against Sommer and to take a judgment against the other defendant, Gross: *Ridley v. Knox*, 138 Mass. 83, 86; *Fifty Associates v. Howland*, 5 Cush. 214.

The plaintiff's letter, answering the reasons for dissatisfaction given in the notice that she would not be employed beyond the year, was admitted only for what light it might throw on the defendants' reply and subsequent conduct, not as evidence of admissions by the defendants, as in *Sturtevant v. Wallack*, 141 Mass. 119. The defendants' reply excluded any admission. ⁶⁷ Limited as it was limited, the evidence was not improper, and can have done no harm, although not very instructive.

We assume that the plaintiff might have been discharged for any just cause during her employment. But the refusal to embark upon a second year was placed by the contract upon a special ground, and was restricted more than the implied right to discharge for cause. The refusal to go on a second year could be justified only by "written notice . . . of any cause of dissatisfaction on or before January 1, 1893." "Any cause" plainly means "any existing cause," or "any cause relied on." The defendants, therefore, could not be allowed to prove other causes. The exceptions do not show that they offered to prove other causes arising after January 1, 1893, as distinct from other causes coexisting with those alleged in their notice. But we are not prepared to say that the contract would allow a refusal to begin the second year for causes arising between January 1 and April 21, 1893.

Exceptions sustained.

CONTRACT OF SERVICE—DISSOLUTION BY DEATH.—The death of a master with whom a servant has contracted to labor for a specified time, dissolves the contract: *Lacy v. Getman*, 119 N. Y. 109; 16 Am. St. Rep. 806, and note. Death or a disability which renders performance impossible destroys the contract: *Marvel v. Phillips*, 162 Mass. 399; 44 Am. St. Rep. 370. See, also, the extended note to *Chamberlain v. Dunlop*, 22 Am. St. Rep. 812.

PARTNERSHIP — NEW PARTNER'S LIABILITY.—One who buys out the interest of one of the members of a partnership, and forms a new partnership with the remaining members, is not liable at law or in equity for debts previously contracted, unless he agrees to pay them: *Poindexter v. Waddy*, 6 Munf. 418; 8 Am. Dec. 749.

WAY v. ABINGTON MUTUAL FIRE INSURANCE CO.

[166 MASSACHUSETTS, 67.]

INSURANCE AGAINST FIRE, WHAT FIRES INCLUDED WITHIN.—If soot in a chimney is ignited by a fire kindled in a stove, but not for the purpose of igniting the soot, and from the burning of the soot and the obstructed condition of the chimney, smoke is produced, escaping into the room's occupied by the assured, damaging his goods therein, he is entitled to indemnity under a policy insuring against all loss or damage to such property by fire.

Action of contract upon a policy of insurance against all loss or damage by fire to certain of plaintiff's property situated in Boston. The policy was in what is known as the Massachusetts standard form. The proofs of loss stated that the fire "originated from burning soot, puffing out and filling with

smoke the rooms where the property insured was located." The case was referred to an auditor, who reported that the insured property consisted of cigars manufactured and materials to be used in such manufacture, situated in a certain brick building; that the damage to plaintiff's goods was produced by smoke; that the smoke was caused by the plaintiff's foreman emptying into a stove the contents of a waste paper basket, and lighting the same; that though such contents appeared to have been fully consumed and the fire exhausted, it was afterward discovered that the soot in the chimney had taken fire, and the smoke escaping therefrom had inflicted the damages for which indemnity was sought. Judgment for the plaintiff, and the defendant alleged exceptions.

L. S. Dabney, for the defendant.

A. Hemenway and W. H. Preble, for the plaintiff.

⁷³ KNOWLTON, J. It is conceded by the defendant that it is liable for damage caused by smoke to the same extent as if the damage had been caused directly by the fire which produced the smoke. The question before us is whether the fire in the chimney was within the contract of insurance made by the defendant. The policy purports to cover all loss or damage by fire, but the defendant contends that in all such contracts there is an implied exception of such fires as this from which the plaintiff suffered loss.

The facts are not in dispute, and if the defendant's witness had been permitted to testify as an expert, or if the jury had used their common experience and common knowledge to find the facts as the defendant's counsel in his opening contended that they should be found, there would have been no substantial conflict between the statement of the auditor and the facts relied upon by the defendant.

A chimney is not intended to be used as a place in which to kindle fires, or to have fires for use or enjoyment in connection with the occupation of a building. It is intended to carry off the products of combustion. One of the products of combustion in a stove or fireplace connected with a chimney is soot, which will accumulate more or less in the chimney, and will sometimes take fire from the flame in the stove or fireplace. Chimneys are constructed with a view to guard against accidents when such fires occur. Occasional fires in a chimney from the ignition of soot are to be expected. Such fires are ⁷⁴ not

desired. They are not maintained for any useful purpose. In a sense they are accidental, for they are not lighted intentionally, but they start from time to time without human agency when a large quantity of soot has accumulated and the circumstances chance to be favorable to ignition from the fire which is maintained in the place intended for it.

The defendant's counsel contends that the policy was not intended to apply to a fire which is lighted and maintained for the ordinary purposes for which fires are used in buildings, and which is confined within the place that is fitted for such fires. He argues that if a stove should be cracked and spoiled by a fire kindled in it to warm the house, or if a fire in a fireplace should crack the mantel, or scorch valuable furniture left too near it, or injure property by its smoke which the chimney failed to carry off, or if a lamp should throw off soot or smoke in such quantities as to cause damage to property, in every such case, if the fire burned nothing but that which was intended to be burned for a useful purpose in connection with the occupation of the house, and if it did not pass beyond the limits assigned for it, the insurance company would not be liable: See *Austin v. Drew*, 4 Camp. 360; *Holt N. P.* 126; 6 Taunt. 436, 438; *American Towing Co. v. German etc. Ins. Co.*, 74 Md. 25; *Scripture v. Lowell etc. Ins. Co.*, 10 Cush. 356; 57 Am. Dec. 111. We are not disposed to question the soundness of the general principle on which this contention is founded, and we find it by no means easy to determine whether the principle should be extended far enough to cover an occasional fire in a chimney incidental to the ordinary use of a stove, or whether such a fire should be held to be one for whose unexpected injurious consequences an insurance company should be liable. We are inclined to the opinion that a distinction should be made between a fire intentionally lighted and maintained for a useful purpose in connection with the occupation of a building, and a fire which starts from such a fire without human agency in a place where fires are never lighted nor maintained, although such ignition may naturally be expected to occur occasionally as an incident to the maintenance of necessary fires, and although the place where it occurs is constructed with a view to prevent damage from such ignition. A fire in a chimney should be considered rather a hostile fire ⁷⁵ than a friendly fire, and as such, if it causes damage, it is within the provisions of ordinary contracts of fire insurance.

It is doubtless true that in former years in some parts of the

country straw and other combustible materials have sometimes been put in chimneys and set on fire to burn out the soot. But neither at the trial of this case before the jury nor in the argument before us was there any suggestion that such a practice prevails or has ever prevailed in Boston, or that this chimney was constructed with a view to kindling fires in it for such a purpose. What our decision would be if damage was done by smoke from a fire in a chimney intentionally kindled to burn out the soot, it is unnecessary now to determine.

It is also to be noted that there was an accidental obstruction of the flue by the falling of the plaster lining of the chimney, which in some aspects of the case might be deemed an important fact in favor of the plaintiff's claim.

Exceptions overruled.

INSURANCE.—WHAT IS INCLUDED IN A LOSS BY FIRE is fully discussed in the extended notes to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 857, and *Hillier v. Allegheny County etc. Ins. Co.*, 45 Am. Dec. 656.

BROWN v. JARVIS ENGINEERING COMPANY.

[166 MASSACHUSETTS, 75.]

MASTER AND SERVANT, ACTS BEYOND THE SCOPE OF EMPLOYMENT.—The foreman of a gang of men employed in constructing a foundation for a printing press in a building has no authority, while such work is suspended because of the presence of a van containing rolls of paper which must be unloaded and rolled into the basement of the building, to direct the men constituting a part of his gang to assist with such paper, though their so doing may expedite their work. Hence, the common employer of the foreman and of the men under him is not answerable for the negligence of any of the latter while assisting in unloading the paper whereby the driver of the van is injured.

MASTER AND SERVANT, AUTHORITY OF THE LATTER TO ENTER UPON A DIFFERENT EMPLOYMENT.—Men are supposed to be skillful in their particular trades and to be employed because of that reason, and when they are sent to do work within their trade, they carry no implied authority from their master to engage in any other trade, and, if sent to such work, even by their foreman, do not represent their employer, and hence he is not answerable for their negligence.

Tort for personal injuries. Verdict for the plaintiff and the defendant alleged exceptions.

S. H. Tyng, for the defendant.

S. L. Whipple, for the plaintiff.

⁷⁶ LATHROP, J. The defendant had a contract with the Advertiser Company to construct a brick and mortar foundation for a printing press in the basement of the Advertiser Building. It sent three or four of its workmen there to do the work, in charge of and under the direction of one Healey. While the men were at work, the plaintiff, a driver of a van containing rolls of paper, backed up his van to the rear entrance of the building to deliver the paper to the Advertiser Company. It was necessary that the defendant's work should be suspended while the paper was being unloaded and rolled into the basement. One of the defendant's men, without the knowledge or request of the plaintiff, went upon the dray for the purpose of assisting in unloading it, and carelessly set in motion a roll of paper, which rolled from the dray, and struck and injured the plaintiff.

There was evidence tending to show that Healey ordered his men to go out and assist in unloading the van, so that the defendant's work might be suspended as short a time as possible. Healey testified that he gave no such order, and had no knowledge that any of his men were assisting in unloading the van. It further appeared that Healey's duties were to superintend the construction of the foundation for the printing-press, and that the three or four men with him were under his direction and in the employ of the defendant; and that these men were tenders or helpers in carrying brick or mortar. They were paid by the hour, and, when their work was suspended for a time, they received no pay from the defendant. They did not receive any pay for the time the work was suspended during the unloading of the dray, which consumed about one hour's time.

The defendant requested two rulings: 1. That the action could not be maintained; 2. That the foreman of the defendant had no authority to bind the defendant by ordering his men to help unload the rolls of paper from the dray driven by the plaintiff, and, if he did so order any of his men, that the defendant would not be responsible for their acts while engaged in helping unload the van. Both of these instructions the presiding ⁷⁷ judge refused to give, and instructed the jury that if the foreman, for the purpose of carrying forward the work which he was sent to do, and for the benefit and advantage of the defendant, ordered his men to assist in unloading the dray, and one of them did so assist, the defendant would be responsible for any injury he may have suffered by the careless act of the workman who assisted in unloading the van. The jury returned a verdict for

the plaintiff, and the case comes before us on the defendant's exceptions to the refusal of the judge to give the rulings requested, and to the ruling given.

The question of law presented by these exceptions is, whether the evidence would warrant a verdict for the plaintiff, and this depends upon whether the foreman and workmen acted within the scope of their employment. We are of opinion that, on the evidence, a verdict for the plaintiff would not be warranted. The defendant employed these men to construct a foundation in the basement, and did not employ them to unload vans, or to do any other act, although such act might in some way expedite the business of the master. The act of the defendant's servants was not a necessary, or natural, or proper result of anything that the servants were employed to do. If they had volunteered, at the request of the plaintiff, to assist him in unloading the van, the defendant would not have been liable: *Potter v. Faulkner*, 1 Best & S. 800. Here the act of unloading was without the knowledge or request of the plaintiff, and was therefore an act for which the defendant is not responsible: *Bowler v. O'Connell*, 162 Mass. 319; 44 Am. St. Rep. 359; *Harding v. Boston*, 163 Mass. 14; *Driscoll v. Scanlon*, 165 Mass. 348; 52 Am. St. Rep. 523; *Lyons v. Martin*, 8 Ad. & E. 512; *Mitchell v. Crassweller*, 13 Com. B. 237; *Storey v. Ashton*, L. R. 4 Q. B. 476; *Bolingbroke v. Swindon Local Board*, L. R. 9 Com. P. 575; *Stevens v. Woodward*, 6 Q. B. Div. 318; *Rayner v. Mitchell*, 2 C. P. Div. 357; *McKenzie v. McLeod*, 10 Bing. 385.

Even if the act of Healey in directing the men to unload the van was for the purpose of carrying forward the work and for the benefit of the defendant, yet, as this act was not within the scope of his employment, the defendant is not responsible. In the construction of a building it frequently happens that one set of workmen has to wait until another set of workmen gets ⁷⁸ through, but it never has been supposed that this would authorize a foreman of a gang of painters to direct his men to assist carpenters or plasterers, or to attempt to do their work, although the doing of it might in a sense be said to facilitate the carrying forward of the work of painting. Men are employed because they are supposed to be skillful in their particular trades, and, when they are set to do a work within their trade, they carry no implied authority from their master to engage in any other trade. In *Limpus v. London General Omnibus Co.*, 1 Hurl. & C. 526, it was said by Blackburn, J: "It is not universal-

ly true that every act done for the interest of the master is done in the course of the employment. A footman might think it for the interest of his master to drive the coach, but no one could say that it was within the scope of the footman's employment, and that the master would be liable for damage resulting from the willful act of the footman in taking charge of the horses."

In the opinion of a majority of the court, the entry must be exceptions sustained.

MASTER AND SERVANT.—THE ACTS OF A SERVANT BEYOND THE SCOPE OF HIS EMPLOYMENT for which the master is not liable are fully discussed in the extended note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 72, 77, 78, 81, 82.

CITY OF NEWTON v. JOYCE.

[166 MASSACHUSETTS, 83.]

CONSTITUTIONAL LAW, POWER OF LEGISLATURE TO LIMIT USE OF PROPERTY.—A statute declaring that no person shall hereafter erect, occupy, or use any building in any city for a stable for more than four horses, unless he is licensed to do so by the board of health of such city, is a valid exercise of the police power of the State, and therefore constitutional.

Suit in equity to enjoin the defendant from using premises within the city of Newton as a stable for the keeping of more than four horses. Decree for the plaintiff, and the defendant appealed.

S. L. Powers, for the defendant.

W. S. Slocum, for the plaintiff.

⁸⁴ LATHROP, J. Section 1 of the Statute of 1891, chapter 220, is as follows: "No person shall hereafter erect, occupy, or use any building in any city for a stable for more than four horses unless first licensed so to do by the board of health of said city, and in such case only to the extent so licensed."

It is not contended that the case comes within section 3 of the act, which provides that "the foregoing provisions shall not be construed to prevent any such occupation and use authorized by law at the time of the passage of this act, to the extent authorized at that time," as it does not appear that the defendant was licensed under any former statute: Pub. Stats. c. 102, sec. 39; Stats. 1890, cc. 230, 395. By section 4 of the statute, a penalty is provided for the violation thereof, and any court having equity

jurisdiction is authorized to restrain any erection, etc., contrary to the statute.

The defendant contends that the statute of 1891 is unconstitutional, because it deprives him of the use of his property without any provision for compensation, and because it gives no right of appeal from the decision of the board of health on the question of whether or not a license should be granted; but we have no doubt that the statute in question is constitutional. It is an exercise of the police power of the commonwealth, and not of the right of eminent domain, and such an exercise of the police power is constitutional, although no provision is made for compensation to the owner, and no right of appeal is given from the local authorities, to whom the legislature has seen fit to intrust the determination of the question: *Commonwealth v. Alger*, 7 Cush. 53, 85, 96; *Commonwealth v. Colton*, 8 Gray, 488; *Commonwealth v. Tewksbury*, 11 Met. 55, 57; *Watertown v. Mayo*, 109 Mass. 315, 318; 12 Am. Rep. 694; *Bancroft v. Cambridge*, 126 Mass. 438, 441; *Commonwealth v. Bearse*, 132 Mass. 542; 42 Am. Rep. 450; *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 530; 59 Am. Rep. 113; *Commonwealth v. Roberts*, 155 Mass. 281; *White v. Kenney*, 157 Mass. 12; *Foster v. Kansas*, 112 U. S. 201; *Mugler v. Kansas*, 123 U. S. 623.

In *Langmaid v. Reed*, 159 Mass. 409, 411, it was said by ⁸⁵ Chief Justice Field, speaking of the authority granted this court by Public Statutes, chapter 102, section 39, to issue an injunction to prevent the erection, occupancy, or use of a building as a stable for more than four horses: "This authority is independent of its power as a court of equity to restrain actual nuisances. A stable used for more than four horses may or may not be a nuisance, but, whether it is or not, it is competent for the legislature to say that it shall not be kept except in such places as the mayor and aldermen of a city or the selectmen of towns may permit, and to confer upon a court authority to enforce this prohibition by injunction, because stables in their nature are often offensive to the community, and the use of them may be regulated by the legislature."

Decree affirmed.

CONSTITUTIONAL LAW.—UNDER THE POLICE POWER, it is not competent for the state to prohibit a citizen from carrying on any trade or occupation not injurious to the community: *State v. Scougal*, 3 S. Dak. 55; 44 Am. St. Rep. 756, and note. See, also, the note to *Ex parte Sing Lee*, 31 Am. St. Rep. 222. An ordinance prohibiting the location of a livery stable in any city block in which a school

building is located, or in any block opposite to a block in which a school building is situated, without regard to the manner in which such stable is constructed, kept, or used, and without specifying the distance from a school building within which a livery stable may be conducted, is unreasonable and void: *Phillips v. Denver*, 19 Colo. 179; 41 Am. St. Rep. 230, and note.

PALMER SAVINGS BANK v. INSURANCE COMPANY OF NORTH AMERICA.

[166 MASSACHUSETTS, 189.]

INSURANCE IN FAVOR OF MORTGAGEE.—Under what is known as the Massachusetts standard form, a policy of insurance for the benefit of the mortgagee does not become void as to his interest because of any conveyance or other act of the mortgagor made or done after the policy issued.

INSURANCE FOR THE BENEFIT OF MORTGAGEE ENTITLES HIM TO SUE IN HIS OWN NAME.—If a policy of insurance against loss by fire is issued to an owner of real property, payable in case of loss to a designated mortgagee as his interest may appear, he is entitled to maintain in his own name an action upon the policy without joining his mortgagor, whether the amount of the loss is greater or less than the sum due upon the mortgage, but the mortgagor can sue for the whole loss, if the mortgagee consents.

INSURANCE PAYABLE TO MORTGAGEE, WHEN DOES NOT INCLUDE SUBSEQUENT MORTGAGES.—If the owner of real property obtains insurance thereon, payable in case of a loss to a designated mortgagee as his interest may appear, and such owner afterward conveys the property to another person who conveys to the former owner's wife, who then procures another loan and executes another mortgage to the same mortgagee, the husband joining to release any rights he may have as husband, such second mortgage is not included with the terms of the original insurance, and the mortgagee's recovery may be limited to his interest existing when the policy issued.

Action on a policy of insurance against loss by fire. Judgment for the plaintiff for the full amount sued for, and the defendant appealed.

G. D. Robinson and W. S. Robinson, for the defendant.

S. S. Taft, for the plaintiff.

¹⁹⁰ FIELD, C. J. This is an action on a policy of fire insurance, issued on March 12, 1890, by the defendant to James W. Calkins, for four hundred dollars, and made payable in case of loss to the plaintiff "mortgagee, as its interest may appear." At the time when the policy was issued, James W. Calkins owned

the real estate, and the barn on it, which was the property insured, and the plaintiff, the Palmer Savings Bank, held a mortgage on the property, given by James W. Calkins to the plaintiff to secure his note, payable on demand, for two hundred dollars. Subsequently, James W. Calkins, without the knowledge or assent of the plaintiff, made and delivered a deed of the premises to Inez B. Burleigh, who made and delivered a deed thereof to Lucia E. Calkins, the wife of James W. Calkins. The peculiarity of these deeds will be noticed hereafter. They were each subject to the mortgage which has been mentioned. Afterward, Lucia E. Calkins, for four hundred dollars received of the plaintiff, gave a note to the plaintiff, payable on demand, signed by herself, her husband, and two other persons, and secured the payment of it by a power of sale mortgage on the property described in the said deed to her, and on other property. In this mortgage her name alone appears in the granting clause, but in the proviso her husband's name appears in the following manner: "And for the consideration aforesaid, I, James W. Calkins, husband of the said Lucia E. Calkins, do hereby release unto the said grantee and its successors and assigns all right of or to both curtesy and other rights in the aforegranted premises, and in the proceeds thereof, in case of sale hereunder, and agree to join in any deed of confirmation or any sale or foreclosure made or effected as aforesaid." The in testimonium clause is as follows: "In witness whereof, we, the said Lucia E. Calkins and James W. Calkins, have hereunto set our hands and seals this twenty-third day of May, in the year of our Lord eighteen hundred and ninety-two." They both signed and sealed the deed.

At the time of the fire there was due on the first mortgage two hundred dollars and some interest, and on the second mortgage four hundred dollars and some interest, but after the fire the amount due on the second mortgage was somewhat reduced by partial payments. The ¹⁹¹ amount due on both mortgages at the time of the trial was about five hundred and forty-eight dollars, which is more than the amount of the insurance. The policy was a Massachusetts standard policy, issued under the statute of 1887, chapter 214, section 60, and it was not under seal. The loss was total, and was more than the amount of the insurance.

At the conclusion of the trial the defendant asked the court to rule as follows: "1. The plaintiff has no right of recovery in its own name, and in the form of the plaintiff's action; 2. U

the defendant is liable at all to the plaintiff, no greater amount can be found against it than the principal of the first note signed by James W. Calkins, and the interest thereon; 3. The plaintiff cannot recover of this defendant in this action any sum in excess of the amount due on the said first note of James W. Calkins."

These rulings the court refused to give, and found for the plaintiff in the sum of four hundred and thirty-two dollars, being the whole amount of the insurance with interest, and the presiding justice reported the case to this court. The report concludes as follows: "If the plaintiff is not entitled to recover at all in this action, judgment shall be entered for the defendant. If the plaintiff is entitled to recover of the defendant only the amount of the note of James W. Calkins, and interest thereon, there shall be judgment for the sum of two hundred dollars, and the interest accrued thereon. If the plaintiff shall be entitled to recover the whole amount of said policy in this action, then the judgment of the superior court, as stated above, shall be affirmed."

The policy, being in the Massachusetts standard form, contained, among others, the following provision: "If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate," etc: Stats. 1887, c. 214, sec. 60. If the policy became void as to James W. Calkins by his conveyance of the premises, it still remained in force for the benefit of the mortgagee, so far as its interest appears: *City Five Cents Sav. Bank v. Pennsylvania etc. Ins. Co.*, 122 Mass. 165; *Harrington v. Fitchburg etc. Ins. Co.*, 124 Mass. 126; *Eliot Five Cents Sav. Bank v. Commercial Union Assur. Co.*, 142 Mass. 142. The practice in this commonwealth has ¹⁹² been, in a case of this kind, for the mortgagee to sue in his own name: Cases cited *ubi supra*; *Barrett v. Union etc. Ins. Co.*, 7 Cush. 175; *Macomber v. Cambridge etc. Ins. Co.*, 8 Cush. 133; *Fogg v. Middlesex etc. Ins. Co.*, 10 Cush. 337; *Hale v. Mechanics' etc. Ins. Co.*, 6 Gray, 169; 66 Am. Dec. 410; *Loring v. Manufacturers' Ins. Co.*, 8 Gray, 28; *Franklin Sav. Inst. v. Central etc. Ins. Co.*, 119 Mass. 240; *Foote v. Hartford etc. Ins. Co.*, 119 Mass. 259; *Smith v. Union Ins. Co.*, 120 Mass. 90; *Fitchburg Sav. Bank v. Amazon Ins. Co.*, 125 Mass. 431; *Wheeler v. Watertown etc. Ins. Co.*, 131 Mass. 1; *Eliot Five Cents Sav. Bank v.*

Commercial Union Assur. Co., 142 Mass. 142. But it is said that in none of the foregoing cases was the right of the plaintiff to sue decided, although in some of them an opinion was expressed by the court that the mortgagee could sue in his own name.

It has also been held that the mortgagor can sue in his own name, with the assent of the mortgagee: *Jackson v. Farmers' etc. Ins. Co.*, 5 Gray, 52; *Turner v. Quincy etc. Ins. Co.*, 109 Mass. 568; *Kyte v. Commercial Union Assur. Co.*, 144 Mass. 43. In *Jackson v. Farmers' Ins. Co.*, 5 Gray, 52, it was held that if the assent of the mortgagee was given before suit brought, the plaintiff, who was the mortgagor, would be entitled to recover costs, otherwise not.

It is argued that the decisions permitting a mortgagee to sue in his own name are inconsistent with the decisions in *Mellen v. Whipple*, 1 Gray, 317, *Exchange Bank v. Rice*, 107 Mass. 37, 9 Am. Rep. 1, and other similar cases, with our decisions on life insurance policies, of which *Wright v. Vermont etc. Ins. Co.*, 164 Mass. 302, is an example, and with our decisions on benefit certificates, such as *Rindge v. New England Mut. Aid Soc.*, 146 Mass. 286.

It is the practice of the courts of the states of this country generally, although not universally, in such a case as the present, to permit the mortgagee to sue in his own name. In some states, it is true, a person for whose benefit a simple contract is made, although not a party to it, is permitted to sue upon it. In some a joint action by the mortgagor and mortgagee is permitted, where the mortgage debt does not exhaust the insurance; in some a distinction is taken between a policy where the loss is payable to a mortgagee without any limitation, and one where the loss is payable to a mortgagee according to his interest; ¹⁹³ and in some the mortgagor and mortgagee each can sue according to his interest: See *Motley v. Manufacturers' Ins. Co.*, 29 Me. 337; 50 Am. Dec. 591; *Chamberlain v. New Hampshire etc. Ins. Co.*, 55 N. H. 249; *Meriden Sav. Bank v. Home Ins. Co.*, 50 Conn. 396; *Cone v. Niagara etc. Ins. Co.*, 60 N. Y. 619; *Winne v. Niagara etc. Ins. Co.*, 91 N. Y. 185; *Martin v. Franklin etc. Ins. Co.*, 38 N. J. L. 140; 20 Am. Rep. 372; *State Ins. Co. v. Maackens*, 38 N. J. L. 564; *Coates v. Pennsylvania Ins. Co.*, 58 Md. 172; 42 Am. Rep. 327; *Tilley v. Connecticut etc. Ins. Co.*, 86 Va. 811; *Bartlett v. Iowa State Ins. Co.*, 77 Iowa, 86; *Hammel v. Queen Ins. Co.*, 50 Wis. 240; *Williamson v. Mich-*

igan etc. Ins. Co., 86 Wis. 393; 39 Am. St. Rep. 906; Westchester Ins. Co. v. Coverdale, 48 Kan. 446; Graves v. American Live Stock Ins. Co., 46 Minn. 130; Maxcy v. New Hampshire etc. Ins. Co., 54 Minn. 272; 40 Am. St. Rep. 325; Ermentrout v. American etc. Ins. Co., 60 Minn. 418; Travelers' Ins. Co. v. California Ins. Co., 1 N. Dak. 151; Fire Ins. Co. v. Felrath, 77 Ala. 194; 54 Am. Rep. 58; Hartford etc. Ins. Co. v. Davenport, 37 Mich. 609; Minnock v. Eureka etc. Ins. Co., 90 Mich. 236; Mitchell v. London Assur. Co., 15 Ont. App. 262.

In mortgages in this commonwealth, it is customary for the mortgagor to covenant that he will keep the mortgaged property insured for a certain amount for the benefit of the mortgagee in such form and in such insurance companies as the mortgagee shall approve. Although this does not expressly appear in the report, and we have not been furnished with full copies of the mortgages, we assume that they contained the usual provisions on the subject.

A mortgagor and a mortgagee have each an insurable interest in the property; each can insure for his own benefit, the mortgagor for the full value of the property, and the mortgagee for the full value of his interest in the property, and neither can avail himself in any way of the money recovered from insurance by the other unless there is some contract making it so available. But a form of insurance like that in the case at bar has become common, whereby a part or the whole of the insurance on the mortgagor's property is made payable to the mortgagee, and the money paid by the insurance company to the mortgagee operates in whole or in part as payment of the mortgage debt, and the mortgagor, after the mortgage debt is paid, is entitled to the remainder of the money due from the insurance company, if ¹⁹⁴ there is any. At first, the policy usually was issued to the mortgagor in the common form, and was then assigned by him to the mortgagee to the extent of his interest, and the insurance company assented to the assignment. Afterward, the provisions for the benefit of the mortgagee were inserted in the body of the policy. But such policies, unless there were stipulations to the contrary, were avoided as to the mortgagee by any act of the mortgagor which avoided the policy as to him. To make such policies a better security to the mortgagee, it has been provided in the Massachusetts standard policy that no act or default of any person other than the mortgagee or his agent, or those claiming under him, shall defeat such mortgagee's right to

recover in case of loss; and the policy contains various other provisions with reference to the mortgagee which make the contract with him or for his benefit somewhat different from that with the mortgagor.

When a mortgagor, under an obligation expressed in the mortgage to insure the property to a certain amount for the benefit of the mortgagee, in satisfaction of this obligation, procures insurance on the property, and makes the loss payable to the mortgagee to the extent of his interest, the mortgagor in fact acts both for himself and for the mortgagee. The mortgagee is not an entire stranger to the consideration, because the mortgagor in effecting the insurance has only performed a duty which he was under toward the mortgagee, and for the performance of which he was paid by the loan which was secured by the mortgage. In practice, such policies are delivered to and retained by the mortgagee. The effect of such a policy is the same as if the mortgagor had taken out the insurance in his own name, and then assigned it to the mortgagee to the extent of his interest, and the insurance company had assented to the assignment and had promised the mortgagee that no act or default of the mortgagor should defeat the right of the mortgagee to recover to the extent of his interest. Under such an assignment, assented to by the company, the mortgagee, in the event of a loss, could maintain an action in his own name to recover to the extent of his interest. In *Fogg v. Middlesex etc. Ins. Co.*, 10 Cush. 337, 346, the court say: "But there is another species of assignment, or transfer it may be called, in the nature of an assignment, of a ¹⁹⁵ chose in action; it is this: 'In case of loss, pay the amount to A. B.' It is a contingent order or assignment of the money, should the event happen upon which money will become due on the contract. If the insurer assents to it, and the event happens, such assignee may maintain an action in his own name, because, upon notice of the assignment, the insurer has agreed to pay the assignee instead of the assignor: *Mowry v. Todd*, 12 Mass. 281."

If the interest assigned equals or exceeds the amount of the insurance, it would be the common case of an assignment, and the promise of the debtor to pay the debt when it becomes payable to the assignee. A difficulty has been found by some courts when the assignment is of but a part of the debt, and in such a case, where there is a code regulating practice, the mortgagor and mortgagee sometimes have been permitted or required to join as plaintiffs in the action; but as their interests are several,

it is, to say the least, doubtful whether at common law they could be permitted to sue jointly.

While there are objections against splitting a debt without the consent of the debtor, these objections never have prevailed where the debtor has consented to it. An assignment of a part of a debt is valid against the debtor if he assents to it, and the assignee can sue for the part assigned in his own name if the debtor has promised him to pay it. We think that the policy in the present case is, in effect, a policy for the benefit of the mortgagee as well as of the mortgagor, in which the insurance company has entered into a direct contract with the mortgagee which is somewhat different from the contract with the mortgagor, and has promised the mortgagee to pay the loss to it to the extent of its interest, and that it differs materially from a policy issued to A for the benefit of B where there is no promise to pay B, as well as from a policy so issued where B has no interest unless A chooses to give him an interest after he has procured the policy. The plaintiff had an interest from the beginning in the property insured and in the policy, and the policy was issued to protect that interest from loss by fire. Calkins could not have canceled the policy without the consent of the plaintiff, and could not have adjusted the loss so as to bind the plaintiff without its consent: *Harrington v. Fitchburg etc. Ins. Co.*, 124 Mass. 126.

While in this commonwealth the rule is held strictly that no ¹⁹⁰ one can sue or be sued on a simple contract who is not a party to it, either disclosed or undisclosed, yet it is not in all cases necessary that the consideration should move from the promisee to the promisor, in the ordinary sense of those words. In a novation, no consideration moves from the promisee directly to the promisor. An assignee of a non-negotiable debt must sue in the name of the assignor, unless the debtor has promised to pay it to the assignee; but, if there is such a promise, the assignee can sue in his own name, although no consideration for this promise moves directly from the promisee to the promisor. We think the rule in this commonwealth, in cases like the present, is, that where the mortgage has been paid before the loss, the mortgagor in his own name recovers the whole amount of the loss to the extent of the insurance; that where the mortgage debt exceeds the loss, the mortgagee can recover the whole in his own name; that where the loss exceeds the mortgage debt, the mortgagor and mortgagee each can sue for his share, unless, by the terms of

the policy, the whole loss is payable to the mortgagee, although it may exceed his interest, in which case, perhaps, the mortgagee may be taken as assignee of the whole; and that in any case the mortgagor may sue for the whole loss, if the mortgagee consents, although the separate rights of each must be preserved at the trial, as it often happens that there are defenses against the mortgagor which are not available against the mortgagee. The plaintiff, therefore, is entitled to recover in its own name.

The remaining question is, How much shall the plaintiff recover? It is manifest that the property has been alienated by James W. Calkins, if his deed to Inez B. Burleigh conveyed anything. That deed purports to grant the land to Inez B. Burleigh, but in the granting clause there is no mention of heirs or assigns. The habendum of the deed is in the usual form, except that it is "to the said J. W. Calkins [the grantor], and his heirs and assigns, to their own use and behoof forever." The deed is executed by Calkins and by his wife, who signs in token of her release of dower and homestead in the premises. The deed of Inez B. Burleigh to Lucia E. Calkins is similar, and there is a similar mistake in the habendum. These deeds were without consideration, and the principal purpose was to convey the premises from James W. Calkins to his wife.

¹⁰⁷ If the habendum be rejected in the deed of Calkins to Burleigh as inconsistent with the grant, then the deed conveyed the property to the grantee for her life, and this is true of the deed from Burleigh to Mrs. Calkins. It is possible that the deeds might be reformed in equity so as to effect a conveyance of the fee, which was undoubtedly the intent of the parties, but that we cannot now consider. If there was an alienation of the property by Calkins in fee, or for the life of any person, without the assent of the company, we understand that this avoids the policy as to him. But whether these deeds are void, or conveyed an interest for life, we think that the second mortgage is not within the terms of the policy, and was not within the contemplation of the parties to the policy. It is a mortgage given by Mrs. Calkins on what was considered her property, with full covenants by her, and the husband is not named in the granting clause. It is plainly intended as a mortgage of the land and building of the wife, in which the husband joins to release any rights he may have as husband. Whatever the effect of the mortgage upon his rights may be, the policy was not intended to be payable to such a mortgagee. Whether, if

the title had remained in James W. Calkins, and he had made a second mortgage to the plaintiff after the policy was issued the policy could be held to cover that, it is unnecessary to decide. This mortgage was intended to be a mortgage upon the land and building of the wife, and at the time the mortgage was given James W. Calkins could not insure in his own name the land and building of his wife, so as to make the loss payable to the mortgagee under such a mortgage.

The result is, that the plaintiff is entitled to have judgment entered for the sum of two hundred dollars and interest.

So ordered.

INSURANCE—CONDITIONS AFFECTING MORTGAGEES.—A mortgagee to whom a loss is made payable cannot recover if there has been a breach by the assured of a condition rendering the policy void; *Agricultural Ins. Co. v. Hamilton*, 82 Md. 88; 51 Am. St. Rep. 457; but see *Hardy v. Lancaster Ins. Co.*, 166 Mass. 210; post, p. 395.

INSURANCE—LOSS PAYABLE TO MORTGAGEE—PARTIES.—A policy of insurance by the terms of which a loss thereunder is made payable to a mortgagee is a contract for the benefit of the mortgagee, and he can enforce it in his own name to the amount of the mortgage debt without joining the assured as a party; *Maxcy v. New Hampshire etc. Ins. Co.*, 54 Minn. 272; 40 Am. St. Rep. 325, and note. If an insurance is effected on property, loss, if any, payable to the mortgagee, he is a necessary party to an action on the policy, though the interest of the mortgagee is less than the amount of the insurance; *Burlington Ins. Co. v. Lowery*, 61 Ark. 108; 54 Am. St. Rep. 196.

HARDY v. LANCASHIRE INSURANCE COMPANY.

[166 MASSACHUSETTS, 210.]

INSURANCE, CONDITIONS TO AFFECT MORTGAGEES. If it is intended to modify the provisions contained in the standard form of policies of insurance either by conditions or riders attached to the policy, such intention must be manifested by unambiguous words.

INSURANCE, RIDERS ON POLICIES.—A mortgagee in whose favor a loss is made payable as his interest may appear is not affected by additional insurance procured upon the property without his knowledge or consent, though there is a rider attached to the policy to the effect that if other insurance shall exist on the property, the company shall be liable only for such proportion of the loss sustained as the amount insured shall bear to the whole insurance on the property insured, whether the other insurance applies in the same manner or not. The provisions respecting the other insurance affect the interest of the assured only, and not that of the mortgagee, unless additional insurance is obtained for his benefit and with his knowledge.

INSURANCE.—Interest is recoverable upon a policy of insurance against loss by fire, unless the policy otherwise provides,

from the time when the amount payable has been made certain and has become due. Hence, where a policy stipulates for payment within sixty days after proofs of loss, and that the amount, if not agreed upon, shall be ascertained by an award, and the amount of the loss is ascertained within the sixty days, interest is recoverable from that time, though the insurer claims to be liable for a portion of the loss only.

J. D. Bryant, for the defendant.

G. M. Reed, for the plaintiffs.

²¹⁰ FIELD, C. J. This is an action on a policy of insurance brought by the mortgagees, to whom the loss was made payable "as their interest may appear." The policy is the Massachusetts standard policy, as prescribed by the statute of 1894, chapter 522, section 60, and it ²¹¹ has a slip or rider attached. It was issued to Herbert H. Brown on his property. The amount of the insurance is three thousand dollars; the amount of the loss has been found by referees to be two thousand seven hundred and seventy-five dollars; and the amount due on the mortgage is three thousand dollars and some interest. Brown, after this policy was issued, procured additional insurance on the property in another company to the amount of fifteen hundred dollars, payable to himself, and the plaintiffs never had any knowledge of this additional insurance until after the loss occurred. The defendant admits that, under the rider attached to the policy, other insurance was permitted, and contends that, in accordance with the terms of the rider, it is liable for only thirty forty-fifths of the loss. The plaintiffs contend that their right as mortgagees to recover to the extent of their interest is not affected by this additional insurance, as it was not obtained by them, or for their benefit, or with their knowledge.

The statute of 1894, chapter 522, section 60, clause 7, authorizes slips or riders to be attached to policies modifying the provisions in the body of the policy. The defendant, in effect, concedes that the provisions of the policy with reference to the mortgagees constitute a contract by the terms of which both parties are bound. One provision ²¹² in the body of the policy is as follows: "If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate." The defendant, as we understand, does not seriously contend that, according to the body of the policy, the plaintiffs would not be entitled to recover the full

amount of the loss: See *City Five Cents Sav. Bank v. Pennsylvania etc. Ins. Co.*, 122 Mass. 165; *Eliot Five Cents Sav. Bank v. Commercial Union Assur. Co.*, 142 Mass. 142. The defendant relies mainly, if not solely, upon the language of the rider. The policy provides that it shall be void "if the insured now has or shall hereafter make any other insurance on the said property without the assent, in writing or in print, of the company," and also provides that "if there shall be any other insurance on the property insured, whether prior or subsequent, the insured shall recover on this policy no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon." The rider provides that, in the event of other insurance, the company shall be liable only pro rata, and adds, "whether such other insurance applies in same manner or not. Other insurance permitted." The rider also contains, among others, the following clause: "It is understood and agreed that this policy shall cover loss or damage by lightning to the property hereby insured, whether fire ensues or not, provided, that if there is other insurance upon the property damaged, this company shall be liable for only such proportion of the loss or damage as the amount hereby insured bears to the whole amount insured thereon, whether such other insurance contains a similar clause or not." The principle differences between the provisions of the body of the policy and of the rider concerning other insurance are that by the rider other insurance is permitted; that by the body of the policy, the insured, if there is other insurance, can recover only pro rata; and that the plaintiffs, as mortgagees, are not to be affected by any act of Brown to which they have not consented. By the rider the provision is, that in the event of other insurance "this company shall be liable for only such proportion of the loss," etc., which, it is contended, means shall be liable only for such proportion to either the mortgagor or the mortgagees. The defendant ²¹³ also relies upon this clause in the rider, viz., "whether such other insurance applies in same manner or not," contending that it means that the pro rata provision of the rider shall be enforced as to both the mortgagor and the mortgagees, whether the additional insurance is made payable to the mortgagees or not.

The history of the provisions in the standard policy in favor of a mortgagee is well known. These provisions in their present form are intended to afford to the mortgagee full indemnity to the extent of the insurance and of his interest in the prop-

erty, unless the policy is avoided by some act of his, or of his agents or of those claiming under him, and the mortgagee in certain events comes under obligation to the insurance company to pay for any increase of risk, and to assign to it his mortgage. The rider in the copy of the policy before us is printed, except that part of it which describes the property and the persons to whom the loss is payable, and, if intended to affect the interests of mortgagees, it should have been more explicit. Mortgages ordinarily provide that the mortgagor shall keep the premises insured in a certain amount, for the benefit of the mortgagee, in such form and in such companies as the mortgagee shall approve. The policy of the commonwealth, that such insurance shall not be avoided so as to affect the mortgagee's interest by the acts of the mortgagor, is shown by the adoption of a standard form containing such a provision, and this is the form which mortgagees usually demand. The provisions contained in the standard form can be added to or modified by writing or printing across the face of the policy, or on riders attached thereto, any stipulations specially agreed upon; but an intention fundamentally to change the protection afforded to mortgagees by the standard policy ought not to be inferred from ambiguous and doubtful words.

The insurance, as expressed in the rider, is upon a frame building while occupied as a dwelling. The rider also expressly includes as within the policy the following items of property belonging to the dwelling: "Foundations, all landlord's apparatus and fixtures for heating, lighting, and cooking, storm doors, outside windows, blinds, wire screens, screen doors, and awnings, whether in position or stored in said dwelling, frescoing, and plate glass." We think that the phrase, "whether such other insurance applies in same manner or not," means whether such other insurance covers all the enumerated articles of property or ²¹⁴ not in the same manner as the insurance under this policy. The express provision for lightning in the rider is, that the policy shall cover loss or damage whether fire ensues or not, and that the company shall bear only its fair pro rata proportion of the loss in case of other insurance, whether such other insurance contains a similar provision concerning lightning or not, which tends to confirm our interpretation of the preceding clause. The phrase "Other insurance permitted" means, we think, other insurance by Herbert H. Brown on his interest in the property; and the clause "this company shall be liable for

only such proportion," etc., means liable to the insured, who is Brown, and is not intended to change the meaning of the similar clause in the body of the policy. The policy throughout deals only with insurance by Brown upon his property, although the insurance has been, in effect, assigned to the mortgagees to the extent of their interest, and they are to be protected against the acts of Brown.

If the additional insurance had been procured on the request of the mortgagees, the procuring of it might perhaps be held to be their act, within the meaning of the policy; certainly this would be so if it had been procured for their benefit.

The result we have reached is in accordance with the following decisions upon somewhat similar policies: *Hastings v. Westchester Ins. Co.*, 73 N. Y. 141; *Eddy v. London Assur. Co.*, 143 N. Y. 311; *Hartford etc. Ins. Co. v. Olcott*, 97 Ill. 439. The decision in *Hartford etc. Ins. Co. v. Williams*, 63 Fed. Rep. 925, is the other way, but it is put upon the particular language of the policy, which is as follows: "It is further agreed that, in case of any other insurance upon the property hereby insured, then this company shall not be liable under this policy for a greater portion of any loss sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein."

The policy in the case at bar provides that "in case of any loss or damage, the company, within sixty days after the insured shall have submitted a statement as provided in the preceding clause, shall either pay the amount for which it shall be liable, which amount, if not agreed upon, shall be ascertained by award of referees as hereinafter provided, or replace the property," etc. Proof of loss was received by the company on September 12, 1894, and, within sixty days thereafter, the amount of the loss ²¹⁵ was determined by referees to be two thousand seven hundred and seventy-five dollars. Sixty days from September 12, 1894, expired November 11, 1894. The writ is dated December 15, 1894. The superior court allowed interest from the date of the writ. The plaintiffs contend that interest should be allowed from November 11, 1894. There is no contract to pay interest: *Oriental Bank v. Tremont Ins. Co.*, 4 Met. 1. If interest is recoverable at all, it is as damages for not paying over the money when it became payable. It does not appear distinctly that a demand was made before bringing

the action. In New York and some other states it is held that interest in such a case is recoverable from the expiration of sixty days from the proof of loss: *Hastings v. Westchester Ins. Co.*, 73 N. Y. 141; *Home Ins. Co. v. Adler*, 71 Ala. 516; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Randall v. American Ins. Co.*, 10 Mont. 340; 24 Am. St. Rep. 50; *Hanover etc. Ins. Co. v. Lewis*, 28 Fla. 209. It is said that in England, in actions on policies of insurance, the law is otherwise, and that interest on sums payable at a time certain, where there is no contract to pay interest and no usage and no demand, is given only in actions on bills of exchange, promissory notes, and other commercial securities: *Higgins v. Sargent*, 2 Barn. & C. 348. In this commonwealth, where a definite sum of money is payable absolutely at the expiration of a certain time without demand, interest generally is allowed from the time when the money should have been paid: *Dodge v. Perkins*, 9 Pick. 368; *Foote v. Blanchard*, 6 Allen, 221; 83 Am. Dec. 624. In insurance policies, it often happens that there is some dispute about the amount due, or the person to whom it is payable, or the event on which it becomes payable, which takes it out of the general rule: *Hutchinson v. Liverpool etc. Ins. Co.*, 153 Mass. 143; *Pierce v. Charter Oak etc. Ins. Co.*, 138 Mass. 151; *Thwing v. Great Western Ins. Co.*, 111 Mass. 93. In the present case, the amount was made certain before the expiration of sixty days from the proof of loss; the persons to whom the sum due the mortgagees was payable were certain; and the only dispute was, whether the defendant should pay the mortgagees thirty forty-fifths of the amount of the loss, or the whole of it. Under these circumstances, we think the superior court should have reckoned interest from the expiration of the sixty days.

The plaintiffs are entitled to judgment for two thousand seven hundred and seventy-five dollars, with interest from November 11, 1894.

So ordered.

INSURANCE—CONDITIONS TO AFFECT MORTGAGEES.—Under what is known as the Massachusetts standard form, a policy of insurance for the benefit of the mortgagee does not become void as to his interest because of any conveyance or other act of the mortgagor made or done after the policy issued: *Palmer Sav. Bank v. Insurance Co.*, 166 Mass. 189; ante, p. 387; but in *Agricultural Ins. Co. v. Hamilton*, 82 Md. 88, 51 Am. St. Rep. 457, it was held that a mortgagee to whom a loss is made payable cannot recover if there has been a breach by the assured of a condition rendering the policy void.

INSURANCE—RECOVERY OF INTEREST.—When an insurer absolutely denies liability for a loss, he thereby waives the benefit of a provision in the policy giving sixty days for adjustment and payment of loss, and is liable for interest from its date: *Western etc. Pipe Lines v. Home Ins. Co.*, 145 Pa. St. 346; 27 Am. St. Rep. 703.

COREY v. EASTMAN.

[166 MASSACHUSETTS, 279.]

ARCHITECT, LIABILITY OF, FOR FALSE CERTIFICATE.—A complaint charging that an architect, falsely, negligently, and acting in collusion with the builder, gave a certificate under a contract, and represented the value of labor and materials which had gone into the construction of a building would amount to the sum specified, in reliance upon which the owner paid such sum, whereas the value of such materials and labor amounted to a less sum, naming it, states a cause of action against such architect.

ARCHITECTS, DUTIES AND LIABILITIES OF.—If an architect under contract with the owner of property to supervise the construction of a building and to make statements, or a certificate, showing the value or progress of the work, negligently erroneous statements made, and imprudent advice given by him become torts on the same principle that under a warranty an erroneous statement was a deceit by the old common law even without negligence.

Tort against an architect for misstatements of the amount of work done under a building contract. The first count of the declaration alleged the defendant to be an architect, holding himself out as competent and skillful and as possessing the requisite skill and knowledge for drawing building contracts and examining and superintending work; that the plaintiff, relying on defendant's skill and knowledge, employed him to draw a certain contract in writing and to make plans and specifications for the erection of a dwelling-house; that the defendant accordingly drew, and the plaintiff executed, the contract, and that by its terms he became bound for the payment of a certain sum of money; that the defendant so negligently drew such contract that the plaintiff was obliged to pay a sum so specified "when all the stone and brick work of basement was completed, cesspool built and drain entered therein, and the first floor framed and boarded over," and that upon receiving the certificate of the defendant that the work was completed and the money due, the plaintiff paid it to the contractor; that value of the work performed and materials furnished at the time such payment was made was much less than the sum paid. The second count was substantially like the first, except that it contained the additional allega-

tion that the defendant acted in collusion with the contractor in giving the latter a certificate that the defendant had examined the work and that the amount specified in the certificate was due, whereas the defendant had not examined the work, and such work had not been completed as specified in such certificate, nor was the amount named therein due. Demurrers interposed to the complaint were overruled by the trial court, after which an answer was filed by the defendant. At the trial, the defendant requested the court to rule that unless there was evidence of fraud on the part of the defendant or of collusion between him and the contractor or of his conspiring with the contractor to wrong the plaintiff, the verdict should be for the defendant; that the defendant was not liable for any misjudgment as to the value of the work done. This ruling was refused and a verdict returned for the plaintiff upon the second count of his complaint.

F. S. Hesselstine, for the defendant.

W. F. Prime, for the plaintiff.

²⁸⁶ HOLMES, J. This is an action against an architect for alleged misstatements of the amount of work done under a building contract, by the terms of which, as usual, partial payments were to be made from time to time upon the architect's certificate. The jury found a verdict for the defendant on the first count, so that only the second count needs to be considered. On that they found for the plaintiff. The case is here on a report of the defendant's appeal and exceptions.

The appeal is from the overruling of the defendant's demurrer. The decision was right. The second count charges that the defendant falsely, negligently, and acting in collusion with the builder, gave a certificate under the contract, and represented that the value of the labor and materials which had gone into the construction of the building would amount to the sum certified, etc. This, we think, in spite of the word "negligently," is raised by the allegation of collusion to a somewhat timid charge of fraud: *Batterbury v. Vyse*, 2 Hurl. & C. 42, 46; ²⁸⁷ and whatever may be the view of an architect's position in giving a certificate, no one, we suppose, would doubt that a fraudulent combination with the builder to give a false certificate, if followed by payment on the faith of the representation, would be a good cause of action: *Batterbury v. Vyse*, 2 Hurl. & C. 42;

Ludbrook v. Barrett, 46 L. J. Com. P., N. S., 798; Stevenson v. Watson, 4 C. P. Div. 148, 158, 159.

The claim for damages was put to the jury as standing on an alleged negligent or willfully false statement by the defendant in conversation with the plaintiff, distinct from the defendant's act of certifying the sum paid to be due. No question of variance is before us, but the question raised is, whether the defendant was liable, as a matter of substantive law, if he made such a negligent statement to the plaintiff as to the value of the work done, and if the plaintiff paid on the strength of it. Probably, under the English law, the defendant would not be liable for negligence in making his certificate upon a matter which the plaintiff and the builder had agreed by their contract to leave to him: Stevenson v. Watson, 4 C. P. Div. 148; Tharsis Sulphur etc. Co. v. Loftus, L. R. 8 Com. P. 1; Pappa v. Rose, L. R. 7 Com. P. 525; L. R. 7 Com. P. 32. Compare Irving v. Morrison, 27 U. C. C. P. 242; Thomas v. Fleury, 26 N. Y. 26, 33, 34. But a different principle may come in with regard to oral advice or statements to his employer. In making them the architect is or may be found to be rendering a purely partisan service under his contract, and, if he is, then he is bound to show reasonable care and reasonable professional judgment. As a consequence of his contract of employment, the law throws the risk of his statements upon him at an earlier point than it would do otherwise. But for the contract he would not be liable for statements, unless fraudulent, or for advice, unless dishonest. Under the contract, negligently erroneous statements and imprudent advice become torts, on the same principle that under a warranty an erroneous statement was a deceit by the old common law, without even negligence: See May v. Western Union Tel. Co., 112 Mass. 90; Tasker v. Stanley, 153 Mass. 148, 150; Nash v. Minnesota etc. Co., 163 Mass. 574, 587; 47 Am. St. Rep. 489; Petersen v. Rawson, 34 N. Y. 370; Shipman v. State, 43 Wis. 381.

Judgment on the verdict. _____

MISREPRESENTATIONS—LIABILITY FOR.—If one makes a statement for a consideration as a part of a contract, it is his duty to be accurate, and mistake or ignorance on his part will not relieve him from liability: Nash v. Minnesota Title Ins. etc. Co., 163 Mass. 574; 47 Am. St. Rep. 489, and note. This subject is fully discussed in the extended notes to Cottrill v. Krum, 18 Am. St. Rep. 555; Wells v. Cook, 88 Am. Dec. 442, and Zabriskie v. Smith, 64 Am. Dec. 559.

HARRISON v. PEPPER.

[166 MASSACHUSETTS, 288.]

LIFE TENANT AND REMAINDERMAN — INSURANCE.

A life tenant is not bound to keep the premises insured for the benefit of the remainderman. Each may insure his own interest, but, in the absence of any agreement, neither has any claim upon the proceeds of the other's policy. Therefore, a remainderman cannot compel a life tenant to place a sum received for insurance upon a building destroyed by fire, in trust so as to be turned over to the remainderman on the death of the life tenant, when the insurance was not effected for the benefit of the remainderman, though the moneys received therefrom may be equal to the whole value of the property destroyed.

Suit in equity to compel moneys, received by the defendant for insurance of premises of which he was the life tenant only, to be placed in trust for the plaintiff as remainderman, so that the income should be paid to the tenant for life and the moneys themselves paid to the plaintiff after the death of the tenant. A demurrer to the bill for want of equity was sustained, and the complainant appealed.

H. Dunham and T. J. Donoghue, for the plaintiff.

L. S. Dabney and R. D. Weston-Smith, for the defendant.

²⁸⁸ MORTON, J. The defendant, as life tenant, had an insurable interest in the property, and although it is alleged in the bill that she renewed the insurance on the building in her own name "as an entirety of estate without qualification for the sum of twelve hundred dollars," and that that sum was paid to her as the full value of the dwelling-house, without any deduction by reason of the plaintiff's ownership in fee, it is not alleged that the sum so paid exceeded the value of the defendant's interest, or what the value of the defendant's interest was. If the amount received by the defendant did not exceed the value of her interest, then it is clear that the plaintiff has no right in equity to any portion of it: *Reitenbach v. Johnson*, 129 Mass. 316; *Martineau v. Kitching*, L. R. 7 Q. B. 436; *Stillwell v. Staples*, 19 N. Y. 401.

But if we assume that the sum paid is equal to the total value of the dwelling-house, and exceeds the value of the defendant's ²⁸⁹ interest, and that the bill fairly alleges this, still we do not think that the plaintiff is entitled to recover. A tenant for life is liable for any unauthorized act which tends to the injury of the inheritance—in other words, for voluntary waste. How far

and under what circumstances he is liable for what is termed permissive waste is not altogether clear, and we need not consider: *In re Cartwright*, L. R. 41 Ch. Div. 532; 3 *Leake on Property*, 92; *Pollock on Torts*, 285, 286; *Taylor on Landlord and Tenant*, 7th ed., sec. 688; *Kerr on Injunctions*, 1st ed., 252.

We have been referred to no case in which it has been decided that the neglect of the life tenant to insure is to be regarded as in the nature of voluntary or permissive waste, though it has been held that the failure to pay taxes is: *Stetson v. Day*, 51 Me. 434; but that manifestly stands upon different ground.

It is plain that the plaintiff is not entitled to recover, unless she has some claim upon the funds in the hands of the defendant. In the absence of anything that requires it in the instrument creating the estate, or of any agreement to that effect on the part of the life tenant, we think that the life tenant is not bound to keep the premises insured for the benefit of the remainderman. Each can insure his own interest, but, in the absence of any stipulation or agreement, neither has any claim upon the proceeds of the other's policy, any more than in the case of mortgagor and mortgagee, or lessor and lessee, or vendor and vendee: *Suffolk etc. Ins. Co. v. Boyden*, 9 Allen, 123; *International Trust Co. v. Boardman*, 149 Mass. 158; *Burlingame v. Goodspeed*, 153 Mass. 24; *Warwicker v. Bretnall*, L. R. 23 Ch. Div. 188; *Leeds v. Cheetham*, 1 Sim. 146; *Rayner v. Preston*, L. R. 18 Ch. Div. 1; *Kearney v. Kearney*, 17 N. J. Eq. 59, 71. The contract of insurance is a personal contract, and inures to the benefit of the party with whom it is made, and by whom the premiums are paid. It is a contract of indemnity against loss. The sum paid "is in no proper or just sense the proceeds of the property": *King v. State etc. Ins. Co.*, 7 Cush. 1; 54 Am. Dec. 683; *Wilson v. Hill*, 3 Met. 66; *Suffolk etc. Ins. Co. v. Boyden*, 9 Allen, 123; *Lerow v. Wilmarth*, 9 Allen, 382, 385; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507, 512.

It is not averred, and does not appear, that the defendant intended to make a present of the proceeds of the policy to the plaintiff, or was insuring for her benefit. Whether the amount²⁹⁰ of indemnity received by the defendant for her loss was more or less than the value of her interest cannot affect the plaintiff. Nor can the defendant be converted into a trustee for the plaintiff by the mere fact that the amount which she received was equal to the full value of the house. It was paid to and received by her as indemnity for the loss which she had sustained,

and, as already observed, does not stand in the place of the property insured.

In *Welsh v. London Assur. Co.*, 151 Pa. St. 607, 617, 31 Am. St. Rep. 786, relied on by the plaintiff, there was evidence that the life tenant intended to insure for the benefit of herself and the remainderman.

The plaintiff argues that sound public policy requires that money received by a life tenant on a total loss by fire should be used in rebuilding, or should go to the remainderman, reserving the interest to the life tenant for life. This argument proceeds on the assumption that the proceeds of the insurance take the place of the property insured—a view which, as we have seen, is contrary to our own and other decisions.

We think that the decree dismissing the bill with costs should be affirmed, and it is so ordered.

ESTATES—LIFE TENANTS AND REMAINDERMEN—SECURITY.—Security is unnecessary from a legatee for life, unless there is danger of waste or loss: Note to *Rowe v. White*, 84 Am. Dec. 173.

SWEET v. KIMBALL.

[166 MASSACHUSETTS, 332.]

FRAUD.—TO INDUCE A MAN TO COME INTO THE STATE BY FRAUDULENT REPRESENTATIONS, with intent to arrest him when he gets here, is actionable.

FRAUDULENT REPRESENTATIONS AS TO FUTURE ACTS.—A promise to perform acts in the future, if a mere device resorted to without any intention of performance and for the purpose of inducing a debtor to come within the state, to be there arrested, followed by his coming within the state in reliance upon such promises and by his subsequent arrest, gives rise to a cause of action in his favor.

DURESS, ACTION TO RECOVER MONEYS PAID UNDER. If a debtor is caused to come within the state by the fraudulent representations of his creditor and for the purpose of having him there arrested, and he is so arrested after coming within such state, and pays an amount of money to obtain his release, he may recover such money as paid under duress, if when he paid it he was a stranger, away from his friends, probably unable to give security, and without counsel, though he might have obtained relief by properly bringing the facts of his case to the attention of the court.

DURESS, RECOVERY OF MONEYS PAID TO ANOTHER PERSON THAN THE DEFENDANT.—If a creditor, by false representation, procures his debtor to come within the state for the purpose of arresting and detaining him, and while under such arrest and detention, he pays money under duress to procure his release, he may recover of such creditor all moneys so paid, though part of them

were paid upon a demand not held by that creditor, if the evidence warrants the belief that persons other than the defendant who profited by the plaintiff's arrest, did so through the connivance of the defendant.

Tort. The complaint contained two counts, the substance of both being that the plaintiff was a resident of the state of Rhode Island, indebted to divers persons, among whom was a firm doing business in Boston, of which the defendant and Charles Howe were partners; that the plaintiff surrendered all his property for the benefit of his creditors, as provided for by the laws of Rhode Island; that at a meeting of such creditors, the defendant offered to take any compromise which the Rhode Island creditors would accept; that thereafter the defendant, for the purpose of extorting a pecuniary advantage of the plaintiff, and to that end to bring him within the state of Massachusetts and to have him there arrested and imprisoned, fraudulently represented to plaintiff that, if he would come to Boston, the defendant would accept for his firm such offer as the committee of the creditors should recommend, and would furthermore assist plaintiff in securing such acceptance by other of the Boston creditors; that the plaintiff, relying on the promise of the defendant, went to the store of the latter in Boston, expecting to secure the necessary acceptance of the composition agreed upon by the Rhode Island creditors; that the defendant fraudulently induced the plaintiff to remain at the store under the false statement that he, the defendant, was going to see other creditors of the plaintiff, but, instead of doing so, caused the plaintiff to be arrested under a writ issued out of the superior court of Boston, and to be detained and imprisoned, and forced plaintiff, by such detention and threats of imprisonment, to pay the sum of seven hundred dollars to obtain his release. A demurrer to the complaint was overruled, and, at the trial, the jury returned a verdict in favor of the plaintiff. After the trial, the plaintiff was allowed to amend his declaration by adding a third count for malicious abuse of process. The defendant appealed.

F. Hutchinson and W. H. Preble, for the plaintiff.

S. L. Whipple, for the defendant.

334 **HOLMES, J.** There is no doubt that it is actionable to induce a man to come into this state by fraudulent representations, with intent to arrest him after he gets here: *Cook v. Brown*, 125 Mass. 503; 28 Am. Rep. 259; *Wanzer v. Bright*, 52 Ill. 35. But the defendant, in support of his demurrer, says

that when it is alleged that the defendant fraudulently represented that if the plaintiff would come to Boston the defendant would do certain things, the so-called representation relating wholly to the future was a contract or nothing, and therefore could not be fraudulent. ³³⁵ But the allegation is elliptical. The fraud intended is not the failure of the representations to come true, or, in other words, the failure of the defendant to keep his promise. What is meant is, that the defendant's promises purported to be made for ordinary business reasons, or from goodwill to the plaintiff, whereas in fact they were made as a device to lure the plaintiff into the state. Probably it is meant, further, that there was a fraudulent misrepresentation of the defendant's intention to keep his promises. Whether there is more difficulty in the way of treating any misrepresentation of intent to perform a contract as a fraud and a tort than there is with regard to representations of intent in general, or intent to pay the price of goods in particular, it is unnecessary to consider, since we are of opinion that the use of the promises as a device, as above explained, is a sufficient fraud: *Commonwealth v. Rubin*, 165 Mass. 453. The demurrer properly was overruled: See, further, *Williams v. Reed*, 29 N. J. L. 385, 387.

The second question argued is, that the court ought to have directed a verdict for the defendant on the second count. This alleges a wrongful arrest, and compelling the plaintiff to pay seven hundred dollars to obtain his release. Assuming that the former allegation alone would not justify a recovery where the process was lawfully issued by a court having jurisdiction, yet we think that the count may be regarded as a count to recover money paid under duress, and the former allegation as merely a specification of the nature of the duress. It is true that the present plaintiff could have got rid of the action in which he was arrested sooner or later by bringing the facts to the attention of the court, but that consideration is not enough to prevent the wrongful arrest of a stranger away from his friends, probably unable to give security and without counsel, from being a very grievous form of duress, and it requires no innovation to decide that money paid to be free from it may be recovered: *Clark v. Woods*, 2 Ex. 395, 406; *Grainger v. Hill*, 4 Bing. N. C. 212.

In the view which we have taken of the two counts on which the case was tried, the addition of the third count after the trial was unnecessary, and it also is unnecessary to consider whether,

if the verdict could not be sustained on the pleadings on which ³³⁶ it was rendered, it could be saved by this amendment after the defendant's demurrer and requests for rulings.

The defendant was allowed to testify that he never had an intention of arresting the plaintiff until he received a letter from a Rhode Island creditor on the day of the arrest. He testified that on the morning of that day he went to another creditor, and had a conversation with him about the plaintiff's affairs. A question as to what the defendant did after that, as a result of his conversation, was excluded. It is said that the evidence should have been admitted as bearing on the defendant's intent. The defendant's intent at that time was immaterial. That he had no intent to lure the plaintiff into the state at an earlier time, when he made his promises, he had sworn already.

It is argued that there was an error committed in allowing the defendant to be charged for the sums paid by the plaintiff to settle two other suits. We do not perceive how this question is open on the report. But if any part of the plaintiff's case was believed by the jury, it was not very difficult to infer that those who profited by the plaintiff's arrest did so through the contrivance of the defendant.

Judgment on the verdict.

ARREST FRAUDULENTLY PROCURED—ACTION FOR.—An action is maintainable by one against others who, by fraudulent concert, with intent to cause his arrest and thus compel him to settle a disputed claim, induce him to leave his home in another state and come into Massachusetts: *Cook v. Brown*, 125 Mass. 503; 28 Am. Rep. 259, and note. See, especially, the note to *Dunlap v. Cody*, 7 Am. Rep. 136.

DURESS—RECOVERY OF MONEY EXTORTED BY.—If a man seventy years of age is threatened with criminal prosecution, and, on account of his age and ignorance of the law, he is so put in fear that his will is overcome, and he pays money to another, not of his own free will, but because of the fear, the money is paid under duress and may be recovered: *Cribbs v. Sowle*, 87 Mich. 340; 24 Am. St. Rep. 166, and note.

MURTHA v. LOVEWELL.

[166 MASSACHUSETTS, 391.]

NUISANCE—LICENSE TO MAINTAIN.—If a board is by statute authorized to license the doing of a business, such license is a defense to a bill in equity to enjoin the doing of such business on the ground that as maintained it is a nuisance.

NUISANCE, LEGISLATIVE POWER TO DETERMINE WHAT IS.—When the legislature directs or allows that to be done which would otherwise be a nuisance, it will be valid upon the ground that the legislature is ordinarily the proper judge of what the public good requires, unless carried to such an extent that it can be fairly said to be an unwholesome and unreasonable law.

NUISANCE, LICENSE TO MAINTAIN, WHAT ACTS INCLUDED WITHIN.—A license to carry on that which would, but for the license, be a nuisance includes authority to do whatever is naturally incidental to the ordinary and reasonable performance of the act licensed. Therefore, a license to erect a furnace for the melting of iron, to be provided with a stack and chimney at a specified height above the roof of the building, with a suitable spark arrester upon the top thereof, will protect the licensee in a suit to enjoin his establishment as a nuisance because sparks or small pieces of red hot iron fall on the plaintiff's lot, if the defendant has complied with all the conditions of the order granting the license.

P. J. Doherty and A. E. Burr, for the plaintiff.

L. S. Dabney and A. A. Folsom, for the defendants.

391 LATHROP, J. The defendants do not now contend that their furnace for melting iron was not properly found by the justice of this court who heard the case to be a nuisance at common law, but they seek to justify their acts on the ground of certain so-called licenses issued by the mayor and aldermen of Chelsea, under the Public Statutes, chapter 102, sections 40-48. The first of these appears to be merely a street permit to use a portion of the street in front of the premises for the deposit of building materials.

On March 5, 1895, a license to erect a furnace for melting iron was granted to the defendants, with the provision that they build a stack twenty-five feet in height above the roof of the building, with a suitable spark arrester placed upon the top thereof. Due notice was given of the application for such a license, in accordance with Public Statutes, chapter 102, section 41. A copy of this order was served upon the defendants, but, through some mistake, the height of the stack above the roof was stated to be twenty feet instead of twenty-five feet. Thereupon the defendants proceeded to erect their stack only twenty feet high above the roof. Subsequently, this mistake was dis-

covered, and the defendants filed a petition that the board of aldermen should ³⁹² revise the order by striking out the word "five" after the word "twenty," and on May 14, 1895, the former action of the board was rescinded, and a new license was issued to maintain a steam engine and boiler, also to melt iron, etc., on condition that the chimney on said building be twenty feet high, and capped with a suitable spark arrester. No notice, however, was given to any one on this petition. ~

We are of opinion that the defendants show no ground of defense. They did not comply with the license of March 5, 1895, although, perhaps, through no fault of theirs, and the license of May 14, 1895, cannot avail them, because no notice was given, as provided in section 41 referred to. If the case stopped here, the plaintiff would be entitled to an injunction to restrain the defendants from continuing the nuisance, and to the damages which have been assessed for the injury already done to the plaintiff's premises.

But it was stated by counsel on both sides, at the argument, that since the case was reported to this court the defendants had obtained a license in proper form, after due notice, to continue their business, and we have been requested to consider the question whether, under the sections above referred to, a license is any defense to this bill in equity for a private nuisance. If it is a defense, it is obvious that an injunction should not be granted, and the plaintiff will be entitled only to the damages which he has sustained, and which, by agreement of parties made at the argument, is to be the sum found by the justice who heard the case.

We are of opinion that it is well settled in this commonwealth, that, under statutes similar to the one before us, where a license is granted by a local board and the licensees are complying with the license, what they do cannot be considered as a nuisance, or be restrained by this court. In *Commonwealth v. Parks*, 155 Mass. 531, it is said by Mr. Justice Holmes: "It is settled that, within constitutional limits not exactly determined, the legislature may change the common law as to nuisances, and may move the line either way, so as to make things nuisances which were not so, or to make things lawful which were nuisances, although, by so doing, it affects the use or value of property."

³⁹³ Under the statute of 1845, chapter 197, section 1, which is similar in its language to the Public Statutes, chapter 102, sec-

tion 40, it was said in *Call v. Allen*, 1 Allen, 137, 142, 143, that the power being vested in the officers named in the statute to grant licenses, "it is an inevitable implication from its exercise in making and recording an order prescribing rules, restrictions, and alterations as to the building in which the furnace or engine is constructed, and other provisions for the safety of the neighborhood, that the owner may thereafter, by conforming to, and observing all the terms and requirements of, the order, lawfully continue to maintain, use, and work them"; and, again: "The further prosecution of his business by the defendant, by the use of his engine, was lawful; and his mills and works could afterward be justly complained of only when he should fail in any respect to comply with the requirements of the order, or should act contrary to, or in violation of, its provisions."

This question was considered at length in *Sawyer v. Davis*, 136 Mass. 239, 241, 242, 245; 49 Am. Rep. 27. In that case, after this court had determined, on a bill in equity, that the ringing of a bell on a mill was a private nuisance to the plaintiff, and after a final injunction was issued restraining such ringing, the legislature passed a statute authorizing manufacturers, for the purpose of giving notice to employes, to ring bells and use whistles and gongs of such size and weight, and in such manner and at such hours, as the board of aldermen of cities and the selectmen of towns might designate. The selectmen of the town where the mill was situated granted a license to the owner to ring the bell on the mill at the hour at which he was prevented from ringing it by the injunction. It was held on a bill of review, brought by the millowner, seeking to have the injunction dissolved, that the statute was constitutional, and that the bill could be maintained. It was said in the opinion: "And when the legislature directs or allows that to be done which would otherwise be a nuisance, it will be valid, upon the ground that the legislature is ordinarily the proper judge of what the public good requires, unless carried to such an extent that it can fairly be said to be an unwholesome and unreasonable law": See, also, *Commonwealth v. Rumford Chemical Works*, 16 Gray, 231; *Alter v. Dodge*, 140 Mass. 594; *White v. Kenney*, 157 Mass. 12, 13.

³⁹⁴ The case of *Quinn v. Lowell Electric Light Corp.*, 140 Mass. 106, upon which the plaintiff relies, was decided upon the ground that a license under the Public Statutes, chapter 102, sections 40, 47, to run a steam-engine, if it included authority to run any kind of machinery, was broader than the statute; and

that the machinery, therefore, might by its noise be a nuisance for which an action for damages would lie.

In the case at bar, the nuisance appears to have been caused by the spark arrester not preventing sparks and small pieces of red-hot iron from falling upon the vacant lot of the plaintiff, but "the authority to do an act must be held to carry with it whatever is naturally incidental to the ordinary and reasonable performance of that act": *Sawyer v. Davis*, 136 Mass. 245; 49 Am. Rep. 27. The presiding justice has stated that he was satisfied that, on the evidence, this spark arrester was the best one known for the purpose, and so found it to be suitable, and that the furnace and chimney were managed with all the precautions practicable for the business.

Under the statutes above referred to, which apply to this case, we are of opinion that there is enough to show that the legislature intended the license to cover the whole question, and to authorize the doing of the business with reasonable care. We are also of the opinion that the finding of the single justice shows that the business was conducted with such care. Assuming that there was a proper license, we are, therefore, of opinion that the plaintiff is not entitled to an injunction, but is only entitled to recover the damages which have been assessed.

Decree accordingly.

NUISANCES—POWER OF LEGISLATURE TO DETERMINE WHAT ARE.—The legislature has power to enlarge the category of public nuisances by declaring places or property used to the detriment of public interests, or to the injury of the health, morals, or welfare of the community, to be nuisances, although not such at common law: *Lawton v. Steele*, 119 N. Y. 226; 16 Am. St. Rep. 813. As to those classes of business in the conducting of which police and sanitary regulations are made in a greater or less degree in every city, the determination of the municipal legislature that they are nuisances and should be regulated is conclusive: *Ex parte Lacy*, 108 Cal. 326; 49 Am. St. Rep. 93, and note. See also, the notes to *Janesville v. Carpenter*, 20 Am. St. Rep. 136, and *Hutton v. Camden*, 23 Am. Rep. 212.

NUISANCES—POWER OF LEGISLATURE TO LICENSE.—The ringing of mill bells at a certain hour having been enjoined as a nuisance, the legislature may authorize the ringing at that hour: *Sawyer v. Davis*, 136 Mass. 239; 49 Am. Rep. 27.

HANCOCK NATIONAL BANK v. ELLIS.

[166 MASSACHUSETTS, 414.]

CONFLICT OF LAWS.—The liability of stockholders of a corporation to the creditors thereof must be determined according to the law of the state wherein the corporation exists and by whose laws it was organized.

CORPORATIONS, STOCKHOLDERS, LIABILITY OF IN OTHER STATES.—If by the laws of a state a stockholder is liable to judgment creditors of the corporation as upon a contract for an amount equal to the par value of the stock owned by him, which is suable anywhere, such liability may be enforced by an action brought in another state.

CONFLICT OF LAWS—CONSTRUCTION OF LAWS IN THE STATES WHEREIN THEY WERE ENACTED.—If the courts of a state have construed one of its statutes imposing liability upon stockholders of corporations, such construction must be followed by the courts of another state in actions therein to enforce such liability.

JUDICIAL NOTICE CANNOT BE TAKEN OF THE STATUTES OF ANOTHER STATE nor of their interpretation by its courts. Therefore, averments of such statutes or of their construction in a complaint must be accepted as true upon a demurrer thereto.

CORPORATIONS—STOCKHOLDERS' LIABILITY.—The fact that a receiver of a corporation has been appointed, and has taken possession of its assets, constitutes no defense to an action brought by a creditor against the stockholders, if the liability of the defendant is to the creditors, and is not one which the receiver could enforce.

Action by the plaintiff claiming to be a creditor of the Commonwealth Loan and Trust Company, a corporation organized under the laws of Kansas, against the defendants, as stockholders thereof. The complaint alleged the recovery in Kansas of a judgment against the corporation for a sum specified; that execution had issued upon such judgment, and had been returned unsatisfied; that paragraph 1192 of the General Statutes of the state of Kansas provided that, "if any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him owned, together with any amount unpaid thereon, but that no execution shall issue against any stockholder," unless by order of court, "or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment"; that the plaintiff was not a railway, religious, or charitable cor-

poration, but had brought actions against the stockholders who were residents of the state of Kansas and within the jurisdiction of its courts, and had recovered judgments in such actions, and had applied the proceeds of such judgments to the payment of the plaintiff's claim, leaving unpaid thereon a sum specified; that the defendant in this action owned ten shares of the capital stock of the corporation of the par value of one hundred dollars each; that he appeared as such stockholder upon the books of the corporation, and was conclusively presumed to be such stockholder within the meaning of said paragraph 1192; that the assets of the corporation had been exhausted; that the defendant owes the plaintiff the sum of one thousand dollars under and by virtue of his liability as stockholder as set forth in said paragraph 1192; that said liability is contractual, and that an action to enforce the liability is transitory, and may be brought in any court of general jurisdiction in the state where personal service can be made upon the stockholder, according to the interpretation of the liability of the said paragraph 1192 by the decision of the supreme court of Kansas. A demurrer interposed to the complaint was sustained and the plaintiff thereupon appealed. The grounds of the demurrer were that it did not appear by the complaint that, under the laws of the commonwealth of Massachusetts, the defendant is under any liability to plaintiff; that the only liability of the defendant is a liability under the laws of Kansas, and only enforceable by such laws; that it further appears from the complaint that receivers for the corporation had been appointed in a suit against it, and it does not appear that they are not still in charge of its property, and have the sole right to sue and collect all indebtedness due the corporation from its stockholders, and that it does not appear that, at the date of the incurring of the liability, the defendant was the holder and owner of stock in the company.

W. R. Bigelow, for the plaintiff.

A. E. Burr, for the defendant.

⁴¹⁷ ALLEN, J. This case comes up on demurrer to the plaintiff's declaration. It is averred, in substance, that under the statute of Kansas, as interpreted by the decisions of the supreme court of that state, the liability of the defendant as a stockholder is a contractual liability, and arises upon the contract of subscription to the capital stock made by the defendant in becoming a stockholder, and that, in subscribing to said stock and

becoming a stockholder, he thereby guaranteed payment to the creditors of an amount equal to the par value of the stock held and owned by him, which should be payable to the judgment creditors of said corporation who first pursued their remedy under the statute; and that an action to enforce said liability is transitory, and may be brought in any court of general jurisdiction in the state where personal service can be made upon the stockholder.

The liability of the stockholders must be determined according to the law of Kansas: *New Haven etc. Co. v. Linden Spring Co.*, 142 Mass. 349, 353; *Halsey v. McLean*, 12 Allen, 439, 441; 90 Am. Dec. 157; *Flash v. Conn*, 109 U. S. 371. We now have a case where the declaration, as we interpret it, sets forth that, according to the law of Kansas, the defendant is liable to a judgment creditor of the corporation as upon a contract, which is suable anywhere. The facts alleged in this respect are different from those in any case heretofore presented to this court (see *Bank of North America v. Rindge*, 154 Mass. 203, 26 Am. St. Rep. 240), and the alleged liability of stockholders is of a different character from that which exists in this commonwealth. We are, however, to adopt the construction which is given in Kansas to the liability and undertaking of stockholders in Kansas corporations, and to give force and effect to the same as there established. Accordingly, jurisdiction ⁴¹⁸ exists here to enforce the liability like other debts, if the law of Kansas is accurately stated in the declaration. On the demurrer we can only look at the averments of the declaration. We cannot take judicial notice of the statutes of Kansas, or of their interpretation by the courts of that state. At this stage, we simply look at the case as the plaintiff presents it.

The fact that the corporation is in the hands of receivers is immaterial, because, under the averments of the declaration, the liability of the defendant is directly to creditors, and the receivers could not enforce it: *First Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563, 567; *Cook on Stock and Stockholders*, sec. 218, and cases there cited.

The averments are sufficient to set forth that the defendant is such a stockholder as by the law of Kansas would be liable to the plaintiff.

Judgment reversed. Demurrer overruled.

CORPORATIONS—LIABILITY OF STOCKHOLDERS—CONFLICT OF LAWS.—A stockholder in a corporation organized under

the laws of another state contracts with reference to all the laws of that state which affect its organization. The extent of his individual liability to the creditors of the company is to be determined and enforced by the laws of that state whenever necessary jurisdiction of the parties can be obtained: *First Nat. Bank v. Gustin* etc. Min. Co., 42 Minn. 327; 18 Am. St. Rep. 510. To the same effect see *Marshall v. Sherman*, 148 N. Y. 9; 51 Am. St. Rep. 654, and note.

STATUTES OF ANOTHER STATE—CONSTRUCTION.—If a statute of a state has been construed by its highest judicial tribunal, such construction will ordinarily be received as conclusive in the courts of other states: *Van Matre v. Sankey*, 148 Ill. 536; 39 Am. St. Rep. 196; *Case v. Cushman*, 3 Watts & S. 544; 39 Am. Dec. 47, and note; *American Print Works v. Lawrence*, 23 N. J. L. 590; 57 Am. Dec. 420, and note.

EVIDENCE—JUDICIAL NOTICE—LAWS OF ANOTHER STATE.—The courts of one state do not take judicial notice of the laws of another: *Scroggin v. McClelland*, 37 Neb. 644; 40 Am. St. Rep. 520, and note. But the courts of West Virginia will, under its code, take judicial notice of the laws of other states, and, in exercising this power, may consult the statutes thereof or any other book; *Wilson v. Phoenix Powder Mfg. Co.*, 40 W. Va. 413; 52 Am. St. Rep. 890.

DOYLE v. FITCHBURG RAILROAD COMPANY.

[166 MASSACHUSETTS, 492.]

RAILWAY CORPORATIONS, EMPLOYEES, WHEN DEEMED PASSENGERS.—One who is employed as a clerk of a railway corporation, subject to be discharged at any time, and who resides out of the city in which his work is to be done, and who, under a uniform custom on the part of the corporation with respect to its employes residing out of the city, was furnished with a pass to his home over its line, and who rides upon such pass, is not to be deemed a gratuitous passenger. The pass is a part of the compensation for his services, and gives him the same rights as if he paid therefor in money.

RAILWAY CORPORATIONS, STIPULATIONS AGAINST LIABILITY FOR NEGLIGENCE.—A railway corporation cannot, by stipulation, exempt itself from liability for injuries received by a passenger from the negligence of the corporation or its employes: and this rule extends to and in favor of an employé riding on a train as passenger, though without the payment of fare, if the circumstances are such that his right to so ride may be regarded as a part of the compensation for his services rendered to the corporation.

Action of tort by the administrator of Cornelius J. Doyle, deceased, to recover for personal injuries to the decedent resulting in his death, alleged to be due to the negligence of the defendant. The decedent at and for some time prior to his death was employed as a clerk in the freight department of the defendant at Boston. His employment was not for any stated period, and his wages were fixed at a daily rate. He lived with his father in Waltham, and usually rode each day to and from that

place to Boston on the defendant's train. While riding on such train he was not engaged in defendant's service. According to a well-known and uniform custom of the defendant, known to the decedent, it furnished to its employés who worked at Boston and lived at some other place on the line of its road a pass, or ticket, entitling the employé to ride to and from his place of residence to Boston. The rate of wages paid employés was the same whether they were furnished such passes or not, and whether they resided at Boston or not. Each pass had sixty-two numbers to be punched, and was good for sixty-two rides during the month for which it was issued, and the person in whose favor a pass was issued was entitled to ride thereon whether he was traveling in the service of the company or not. On the back of the pass the following conditions were printed: "The person accepting this free ticket thereby and in consideration thereof assumes all risk of accidents, and expressly agrees that the company is not a common carrier in respect to him, and shall not be liable under any circumstances, whether of negligence of its agents or otherwise, for injury to the person, or for loss or injury to the property, of the passenger using this ticket." On the evening of September 10, 1892, while the decedent was riding from Boston to his home in Waltham, on a business or pleasure trip of his own, and in no way connected with the defendant, he was killed through a collision caused by the gross negligence of an engineer employed by the defendant. The defendant requested the trial judge to rule that the acceptance of the pass with the conditions on the back thereof exonerated the defendant from liability, and, therefore, that on the whole case the plaintiff could not recover. The trial judge refused to rule as requested, and, on the contrary, determined that the evidence was sufficient to support a finding in favor of the plaintiff, and found accordingly. The defendant alleged exceptions.

G. A. Torrey, for the defendant.

G. L. Mayberry and T. F. Carey, for the plaintiff.

⁴⁹⁴ MORTON, J. The defendant concedes that, in view of the decision in *Doyle v. Fitchburg R. R.*, 162 Mass. 66, 44 Am. St. Rep. 335, the plaintiff's intestate must be regarded as a passenger; but he contends that, notwithstanding what is there said, the ticket was a gratuity; and he bases this contention principally on the difference between the bill of exceptions in this case and in that. There is a slight difference, it is true, between the

two. In the former case, the bill of exceptions stated that the tickets were issued only to employés who worked in Boston and lived at some other place on the line of the road, and "without other compensation than that the person receiving the ticket should perform services for the defendant in accordance with the terms of his employment." In this case the words quoted were omitted. In other respects the two bills of exceptions are alike. We think that the difference is not important, and that it fairly may be said in this case, as in that, that the ticket formed part of the consideration by which the plaintiff's intestate was induced to enter and continue in the employment of the defendant, and was not a mere gratuity. The ticket was only given to employés, and not to all of those, but, so far as appears, only to such as worked in Boston and ⁴⁹⁵ lived on the line of the railroad in some other place. It had reference, therefore, to special circumstances attending the performance of services for the company, and the arrangement well may have been regarded as mutually advantageous. By it the defendant was enabled to obtain the services of those who did not live in Boston, and thus to draw its employés from a larger body, subject only to the expense of their transportation, and the plaintiff's intestate was enabled to enter the defendant's employment on equal terms as to wages with those living in Boston. Without speculating as to what the rights of the plaintiff's intestate to the ticket would have been if at any time he had left the defendant's employment before the end of the month, we think it plain, as already stated, that as this case stands the ticket properly cannot be regarded as a gratuity.

The defendant contends, however, that, even if the plaintiff's intestate was not a free passenger, the plaintiff cannot recover because of the stipulation on the back of the ticket, to which the plaintiff's intestate must be presumed, by accepting the ticket, to have assented. In this respect, this case raises a question which it was not found necessary to decide in the former case, and which does not appear to have been directly decided in this commonwealth. We assume that, if the ticket had been a gratuity, the contract on the back of it would have precluded a recovery, and that it would have made no difference that the negligence was gross: *Quimby v. Boston etc. R. R. Co.*, 150 Mass. 365; *Rogers v. Kennebec Steamboat Co.*, 86 Me. 261; *Griswold v. New York etc. R. R. Co.*, 53 Conn. 371; 55 Am. Rep. 115. How far common carriers may go in contracting to be relieved from the

consequences of their own negligence and that of their servants is a matter on which different courts have taken different views, and on which, in some instances, courts within the same jurisdiction have expressed themselves differently at different times. It is clear that they have not an unlimited power of contract in this respect. A private individual may refuse to transport a person from one place to another unless the latter will agree to assume all risk of injury. But railroad corporations would have no right to insist as a condition of carrying a passenger that he should make such a contract. This arises out of the nature of the service which they undertake. They may prescribe ⁴⁹⁶ rates of fare and reasonable regulations for the safety of passengers and the conduct of the business in which they are engaged, but, if the passenger is willing to conform to these, they cannot insist that he shall accept the risk of accident as a condition of being carried. But the question now is, What is the effect of such a contract voluntarily entered into by a passenger who in other respects occupies the position of a passenger for hire? There is a dictum in this state to the effect that such a contract would not relieve a railroad company from liability for injuries caused by its own negligence or that of its servants: *Quimby v. Boston etc. R. R. Co.*, 150 Mass. 365, 371; and we think that it must be regarded as settled in this commonwealth that such a contract in regard to the carriage of goods would not exempt a railroad from liability for its own negligence or that of its servants: *Squire v. New York Cent. R. R. Co.*, 98 Mass. 239, 246; 93 Am. Dec. 162; *Grace v. Adams*, 100 Mass. 505; 97 Am. Dec. 117; 1 Am. Rep. 131; *School Dist. v. Boston etc. R. R. Co.*, 102 Mass. 552, 556; 3 Am. Rep. 502; *Hoadley v. Northern Transp. Co.*, 115 Mass. 304; 15 Am. Rep. 106; *Fonseca v. Cunard S. S. Co.*, 153 Mass. 553, 557; 25 Am. St. Rep. 660. Although the liability of a carrier of merchandise is that of an insurer, and the liability of a carrier of passengers is measured by the highest degree of care which human foresight reasonably will admit of, we see no valid reason for holding that in the former case the carrier cannot be exempted from his own negligence, and that in the latter he may. The object in both cases, as is said in *New York Cent. R. R. Co. v. Lockwood*, 17 Wall. 357, 377, 378, is to secure the utmost fidelity and care in the performance of their respective duties; and this object in the case of the passenger carrier, as in that of the merchandise carrier, can be accomplished more satisfactorily by denying them the right to contract

for exemption from liability for their own negligence and that of their servants than in any other mode. The powerful and dangerous agencies usually employed, the absolute control of them which they have, the trust necessarily reposed in them, the compulsion which they might otherwise exercise, and the public nature of their service render the rule, we think, just and reasonable.

The law in England and in some of the states here is otherwise, but the great weight of authority in this country is against ⁴⁹⁷ the right of a common carrier to contract for exemption from the consequences of its own negligence or that of its servants: *Grand Trunk Ry. Co. v. Stevens*, 95 U. S. 655; *New York Cent. R. R. Co. v. Lockwood*, 17 Wall. 357; *Ohio etc. Ry. Co. v. Selby*, 47 Ind. 471; 17 Am. Rep. 719; *Rose v. Des Moines Valley R. R. Co.*, 39 Iowa, 246; *Cleveland etc. R. R. Co. v. Curran*, 19 Ohio St. 1; 2 Am. Rep. 362; *Annas v. Milwaukee etc. R. R. Co.*, 67 Wis. 46; 58 Am. Rep. 848; *Pennsylvania R. R. Co. v. Henderson*, 51 Pa. St. 315; *Jacobus v. St. Paul etc. Ry. Co.*, 20 Minn. 125; 18 Am. Rep. 360; *Missouri Pac. Ry. Co. v. Ivy*, 71 Tex. 409; 10 Am. St. Rep. 758; *Carroll v. Missouri Pac. Ry. Co.*, 88 Mo. 239; 57 Am. Rep. 382; *Willis v. Grand Trunk Ry. Co.*, 62 Me. 488; *Flinn v. Philadelphia etc. R. R. Co.*, 1 Houst. 469, 501, 502; *Kansas City etc. R. R. Co. v. Simpson*, 30 Kan. 645; 46 Am. Rep. 104; *Mobile etc. R. R. Co. v. Hopkins*, 41 Ala. 486; 94 Am. Dec. 607; *Louisville etc. R. R. Co. v. Wynn*, 88 Tenn. 320; *Maslin v. Baltimore etc. R. R. Co.*, 14 W. Va. 180; 35 Am. Rep. 748; *Virginia etc. R. R. Co. v. Sayers*, 26 Gratt. 328; *Orndorff v. Adams Exp. Co.*, 3 Bush, 194; 96 Am. Dec. 207; *Taylor v. Little Rock etc. R. R. Co.*, 39 Ark. 148; *Berry v. Cooper*, 28 Ga. 543; *Southern Exp. Co. v. Moon*, 39 Miss. 822; *Wood's Railway Law*, sec. 425. See contra, *Peek v. North Staffordshire Ry. Co.*, 10 H. L. Cas. 473; *Mynard v. Syracuse etc. R. R. Co.*, 71 N. Y. 180; 27 Am. Rep. 28; *Nicholas v. New York Cent. etc. R. R. Co.*, 89 N. Y. 370; *Kenney v. New York Cent. etc. R. R. Co.*, 125 N. Y. 422.

If the question were a new one in New York, it is possible that a different rule might be established from that which now prevails: See *Mynard v. Syracuse etc. R. R. Co.*, 71 N. Y. 180; 27 Am. Rep. 28; *Nicholas v. New York Cent. etc. R. R. Co.*, 89 N. Y. 370. In the case of free passengers, it has been held that, since the carrier is not bound to transport them, it may impose such terms short of willful negligence or injury as it chooses

as a condition of carrying them: *Quimby v. Boston etc. R. R. Co.*, 150 Mass. 365; *Rogers v. Kennebec Steamboat Co.*, 86 Me. 261; *Griswold v. New York etc. R. R. Co.*, 53 Conn. 371; 55 Am. Rep. 115. But in the absence of any special contract or stipulation, the carrier is bound to exercise the same ⁴⁹⁸ degree of care toward a free passenger as toward a passenger for hire: *Quimby v. Boston etc. R. R. Co.*, 150 Mass. 365; *Rogers v. Kennebec Steamboat Co.*, 86 Me. 261. So if a passenger insists upon riding, or is required by the nature of his occupation to ride, in a place not provided for passengers, it has been held that the carrier properly may say to him that he must take the risk, however arising: *Bates v. Old Colony R. R. Co.*, 147 Mass. 255; *Hosmer v. Old Colony R. R. Co.*, 156 Mass. 506; *Robertson v. Old Colony R. R. Co.*, 156 Mass. 525; 32 Am. St. Rep. 482. And in the case of merchandise it has been held that the carrier may properly limit its liability in various ways, so long as it does not claim exemption from its own negligence or that of its servants: *Squire v. New York Cent. R. R. Co.*, 98 Mass. 239; 93 Am. Dec. 162; *Grace v. Adams*, 100 Mass. 505; 97 Am. Dec. 117; 1 Am. Rep. 131; *School Dist. v. Boston etc. R. R. Co.*, 102 Mass. 552; 3 Am. Rep. 502; *Hoadley v. Northern Transp. Co.*, 115 Mass. 304; 15 Am. Rep. 106. None of these cases support the defendant's contention that, in the case of a passenger for hire who is being transported as such passengers usually are, a railroad company may contract to be relieved from liability for injuries caused by its negligence or that of its servants. The plaintiff's intestate was, as we have already seen, such a passenger, although in the defendant's employ, and the contract on the back of the ticket was, therefore, invalid so far as it purported to exonerate the defendant from liability for its negligence, or that of its servants.

Exceptions overruled.

RAILROADS—EMPLOYEES—WHEN DEEMED PASSENGERS.

One to whom, while in the employ of a railway corporation, a ticket or pass is issued entitling him to ride to and from his home to his place of employment, must be regarded as a passenger, for whose death from negligence the corporation is answerable, if he was entitled to ride on such pass more times than is necessary in traveling to and from his work, and, at the time of his injury, he was not engaged in any business of the corporation, if such pass was not a mere gratuity but furnished as part of the consideration which induced him to enter the employment of the corporation: *Doyle v. Fitchburg R. R. Co.*, 162 Mass. 66; 44 Am. St. Rep. 335, and note. A United States railway postal clerk on a railway train, entitled to ride free while on duty or going to or returning therefrom, is a pas-

senger and may recover for any injury inflicted by the negligence of the railway company: *Cleveland etc. Ry. Co. v. Ketcham*, 133 Ind. 346; 36 Am. St. Rep. 550, and note.

RAILROADS—RELEASE FROM LIABILITY.—If a statute makes the killing of a passenger of a railroad through gross negligence punishable by a penalty payable to the widow and children or next of kin, such passenger cannot release the corporation from liability, and therefore his agreement to do so cannot bar an action brought for his death by an administrator for the benefit of the persons entitled to the penalty: *Doyle v. Fitchburg R. R. Co.*, 162 Mass. 66; 44 Am. St. Rep. 335. See, also, the note to *Ulrich v. New York etc. R. R. Co.*, 2 Am. St. Rep. 373.

CHASE v. HENRY.

[166 MASSACHUSETTS, 577.]

A DISCHARGE IN INSOLVENCY GRANTED by a court of a state is of no effect against a creditor residing in another state, who has not submitted himself to the jurisdiction of the court of insolvency.

INSOLVENCY, NONRESIDENT PARTNER, EFFECT OF DISCHARGE AS AGAINST.—If an insolvent owes a debt to a partnership, some of the members of which are, and others are not, residents of the state wherein the discharge in insolvency is granted, it can have no effect against the nonresident members, and therefore constitutes no defense to an action in the name of the firm for the recovery of its debt, the partnership not having participated in the insolvency proceedings in any way.

Action to recover for goods consigned by the plaintiffs to the defendant for sale on commission. The only defense to the action consisted of a discharge in insolvency granted by the court of insolvency for Norfolk county in the state of Massachusetts. The plaintiffs did not participate in the proceedings in the court of insolvency in any way. They were partners, engaged in the business of manufacturing in the state of New Hampshire, but had a place of business and store and office in Boston. Two of the plaintiffs were residents of Massachusetts and the third a resident of New Hampshire.

B. B. Jones, for the plaintiffs.

F. R. Hall, for the defendant.

⁵⁷⁸ KNOWLTON, J. There has been some difference of opinion among learned judges in former years in regard to the extent to which state insolvency laws can be made applicable to debts contracted ⁵⁷⁹ and payable in the state where the insolvency proceedings are, when the creditor is, at the time of making the contract, or at the time of the insolvency proceedings,

an inhabitant of another state. So far as insolvency proceedings assumeto affect a resident of another state, they involve questions arising under the constitution of the United States, the decision of which by the supreme court of the United States is authoritative and binding upon all the courts of the several states. The general doctrine stated by that court is, that a discharge in insolvency granted by a state court is of no effect against a creditor residing in another state, who does not submit himself to the jurisdiction of the court of insolvency, on the ground that as a nonresident he is not amenable in any way to the jurisdiction of the state in which the discharge is granted, and that the courts of such a state can do nothing that will affect his rights under contracts outstanding in his favor. If, at the time of making the contract, the statute is in force, and the parties are within the state where the proceedings in insolvency are subsequently had, and the contract is to be performed there, so that the statute does not impair the obligation of an existing contract, these facts are not enough to make a discharge effectual if the creditor is a resident of another state: *Baldwin v. Hale*, 1 Wall. 223; *Denny v. Bennett*, 128 U. S. 489; *Kelley v. Drury*, 9 Allen, 27; *Guernsey v. Wood*, 130 Mass. 503; *Phoenix Nat. Bank v. Batcheller*, 151 Mass. 589; *Regina Flour Mill Co. v. Holmes*, 156 Mass. 11, 12; *Pullen v. Hillman*, 84 Me. 129; 30 Am. St. Rep. 340; *Norris v. Atkinson*, 64 N. H. 87; *Roberts v. Atherton*, 60 Vt. 563; 6 Am. St. Rep. 133. So far as any of our earlier decisions are inconsistent with this doctrine, they are overruled or modified by the controlling authority of the supreme court of the United States: See, also, *Pennoyer v. Neff*, 95 U. S. 714; *Freeman v. Alderson*, 119 U. S. 185; *Eliot v. McCormick*, 144 Mass. 10.

The intimations in some of the earlier cases in that court, that a discharge might be given effect in the courts of the state in which it was granted when it would be held invalid in the courts of other states and of the United States, have never been incorporated into the law, and our own decisions are to the contrary: *Kelley v. Drury*, 9 Allen, 27; *Murphy v. Manning*, 134 Mass. 488; *Phoenix Nat. Bank v. Batcheller*, 151 Mass. 589.

In the present case, the plaintiffs are copartners engaged in ⁵⁸⁰ the business of manufacturing slippers in New Hampshire, and having a store and office in Massachusetts. Two of them are citizens and residents of Massachusetts; the other never resided in this commonwealth. The defendant obtained a dis-

charge in insolvency, but the plaintiffs never proved or offered to prove their claim. Under the rules of law to which we have referred, it is clear that if the plaintiffs had all been residents of Massachusetts the discharge would be a bar, and if they had all been residents of New Hampshire it would not. They were copartners, having a common interest in their claim. The cases go upon the ground that doing business and making contracts in this state give no jurisdiction to discharge a debt. As against the plaintiff Griffin, who resided in New Hampshire, the courts of Massachusetts could do nothing to impair his right to hold the debtor responsible for his debt. Looking to Griffin alone, his rights and property in the claim are precisely the same as if no insolvency proceedings had intervened. As we have already shown, our courts will recognize these substantive rights to the same extent as would the courts of New Hampshire or of the United States. As a member of the firm, he is entitled to have this debt collected if it can be, so that he may have it included in the assets which he will share. The fact that his copartners reside here gives no jurisdiction to our court to deprive him of his property: *Phelps v. Brewer*, 9 Cush. 390; 57 Am. Dec. 56; *Stone v. Wainwright*, 147 Mass. 201. The fact that in suing upon his claim he must join his copartners is not a good reason for denying him the right to prosecute it. The determining point in reference to the question whether the discharge is a bar to the claim is the fact that doing a part of his business in this commonwealth and associating himself with partners who reside here does not operate to give the courts of our state jurisdiction to discharge a debt which is either partly or wholly his, unless he chooses to submit himself to the jurisdiction of the court by participation in its proceedings. In a case like this, the debt is an entirety. It is either discharged altogether or it remains unchanged. It cannot justly be held that the entire debt should be barred because two of the partners are residents of Massachusetts, and that these two should make up from their own property to the nonresident partner the share to which he is entitled. The ⁵⁸¹ result is, that inasmuch as his rights cannot be affected, the debt as a whole cannot be affected by the discharge.

We are of opinion that the entry must be judgment for the plaintiffs.

JUDGE HOLMES wrote a dissenting opinion in which he said: "I am unable to agree with the decision of the majority, and, as two other of the judges are of the same way of thinking, I deem it best

to state the fact, and to give my reasons. The commonwealth of Massachusetts, at the time of the insolvency proceedings, had jurisdiction, and, subject to the constitution of the United States, had sovereign power, over the defendant and over the plaintiffs Chase and Chamberlain. As between those persons, it had the power and the constitutional right to declare all obligations which were entered into after the insolvent law was passed at an end when a discharge should be granted. Its power was derived from its power over the persons of the parties named, and could not be affected by the nature of the obligation, or by the fact that others also were interested in the obligation who were not within its power. Jurisdiction and sovereignty deal with persons and with all legal relations of persons, not with particular kinds of contracts. It is true that Massachusetts could not discharge the claim of a person outside its territory—in this case the plaintiff Griffin. But that did not affect its power to discharge Chase and Chamberlain, who were within it. It may be that, if it did discharge them, the plaintiff Griffin cannot recover; but that is not because Massachusetts has dealt with his claim or has attempted to deal with it *ultra vires*, but because he cannot recover without joining others whose claim this state could deal with and has discharged. It seems to me an inversion to say that a jurisdiction otherwise perfect is defeated because of the secondary and indirect effects it may have on persons outside the jurisdiction. The true order of subordination appears to me the other way. In fact, in other cases—for instance, divorce—courts having jurisdiction of one party do not scruple to deal with obligations between that party and another out of the state, although logically the effect upon the rights of the other party in that case is direct: *Loker v. Gerald*, 157 Mass. 42, 45; 34 Am. St. Rep. 252; 1 Bishop on Marriage and Divorce, secs. 698-702, 837. See, also, *Blackinton v. Blackinton*, 141 Mass. 432, 435; 55 Am. Rep. 484. It appears to me that the suggestion that the debt is an entirety is merely a *petitio principii* clothed in scholastic language. As a fact, in other cases the debt is not dealt with as an entirety: *Stone v. Wainwright*, 147 Mass. 201, 203. One who accepts a promise jointly with others acquires a property which has the inherent vice that anything which disables his fellow contractees from suing will prevent his maintaining a suit. For instance, if one partner has set off his own debt wrongfully against a debt due the firm, the innocent partners cannot recover: *Homer v. Wood*, 11 Cush. 62; *Grover v. Smith*, 165 Mass. 132; 52 Am. St. Rep. 506. So, 'when once the statute [of limitations] runs against one of two parties entitled to a joint action, it operates as a bar to such joint action': *Marsteller v. McClean*, 7 Cranch, 156, 159; *Perry v. Jackson*, 4 Term Rep. 516; *Freeman on Cotenancy and Partition*, secs. 375-378. I presume it would make no difference that one of the parties lived out of the state. If the statute of limitation bars an action in such a case, I see no reason why the insolvent law should have a less effect."

INSOLVENCY—DISCHARGE AS BAR TO ACTION BY CITIZEN OF ANOTHER STATE.—A discharge in insolvency granted by a court of one state to one of its citizens is not a bar to an action in that state by a citizen of another state who has not voluntarily submitted himself to the jurisdiction of the court in the insolvency proceedings: *Stirn v. McQuade*, 66 N. H. 403; 49 Am. St. Rep. 623, and note. An assignment in insolvency made under the law of one state is not a bar to a subsequent attachment of the insolvent's property situated in another state by a citizen thereof or of a third state: *Sturtevant v. Armsby Co.*, 66 N. H. 557; 49 Am. St. Rep. 627, and note.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

CARLEY v. GITCHELL.

[105 MICHIGAN, 23.]

HOMESTEADS — CONTRACT TO CONVEY — VALIDITY. A contract executed before entry of public land as a homestead to make a conveyance thereof on acquiring title is void as against public policy.

LICENSE BASED ON ILLEGAL CONTRACT.—One who goes into occupancy of land under a contract to purchase it which is void as against public policy, and continues such occupancy for a period of time less than is required to create a right by prescription, cannot claim a license to use the land as long as improvements placed thereon by him are maintained.

LICENSE BASED ON ILLEGAL CONTRACT.—One who goes into the occupancy of land under a contract to purchase which is contrary to public policy and void, and does not continue such occupancy long enough to acquire a right by prescription, cannot, on the ground that he has acquired a license, maintain and continue to use a dam erected by him upon such land.

Sawyer & Waite, for the appellants.

W. H. Phillips and B. J. Brown, for the appellees.

39 MONTGOMERY, J. The conceded facts in this case are as follows: Complainant Parmenter, on April 3, 1883, purchased land for a sawmill site on Cedar river, in the southwest corner of the southwest quarter of section 35, township 35 north, range 27 west, in Menominee county. At this point the Cedar river runs nearly on the line between sections 34 and 35. On May 26, 1883, one Samuel McIntosh and Parmenter made a written contract, by which McIntosh agreed to sell to Parmenter a strip of land in the southeast corner of the southeast quarter

of section 34, nine hundred and sixty-eight feet long and one hundred and thirty-two feet wide, and also such other portions of the southeast quarter of the southeast quarter as might be flooded or overflowed by reason of the building and maintaining of a dam by said Parmenter across said river when said river was at its usual height, for the sum of three dollars per acre for all of said ⁴⁰ land so described. Said McIntosh agreed to convey the title by proper deed to Parmenter, after he had acquired a good, sure, and indefeasible title from the United States to said forty acres of land, at which time the consideration was to be paid. Parmenter was to have possession of the strip. This agreement was duly recorded May 31, 1883. Soon thereafter Parmenter conveyed a half interest in this mill site to complainant Carley. The complainants immediately erected a mill upon their land upon the east bank of the stream, and constructed a dam, one end of which rested upon the land described in the above agreement. They also took possession of said strip, and have used it for storing lumber, and have erected some buildings thereon. The erection of the dam caused about eight acres to be flooded all the time, which, without the dam, would be flooded only in the spring and at the time of heavy rainfalls. The cost of their entire mill plant is twenty-two thousand dollars. They occupied said mill property from 1883 to October, 1892, when this bill was filed. McIntosh made a formal entry of this land, eighty acres (south half of southeast quarter), under the homestead act of Congress, on the twenty-fifth day of June, 1883. He lived upon and occupied it, clearing and improving certain portions thereof, until March 13, 1888, when he died. His title would have become complete in June following. His widow made application under the homestead act, thereby succeeding to the rights of her husband, and obtained a patent September 1, 1891. December 24th following she conveyed the land by deed to the defendants. Prior to the entry of McIntosh, one Kenny had made entry of this eighty acres, and had made certain improvements thereon. For reasons unnecessary to mention, his entry and application were void. McIntosh was poor, and, at the time he made the agreement, Parmenter paid Kenny for his improvements, for McIntosh, who desired to make a homestead entry upon the land, and also the expenses of McIntosh in making the entry. The land was at that time of little value, not exceeding three dollars ⁴¹ per acre. Owing to the erection of the mill, its value was increased to twelve dollars per

acre. After the purchase by the defendants, they brought an action of ejectment against complainants, who thereupon filed this bill in chancery, setting up the above facts, alleging the irreparable injury to them by the substantial destruction of their property, and praying for the specific performance of the contract, that they be decreed to be in the rightful possession of the property for the purposes of flowage, and that, if the contract cannot be enforced, they may be decreed to have possession for a term of years sufficient to fulfill the object of the mill plant and improvements. The case was heard upon pleadings and proofs, and the bill dismissed.

The circuit judge found this agreement between McIntosh and Parmenter to be against public policy, and void under the homestead act. It will be noticed that the contract in question was made prior to the actual entry of the land as a homestead by McIntosh at the United States land office, so that he was required to make both the preliminary affidavit under section 2290 of the Revised Statutes, and final proof of occupancy under section 2291. Section 2290 requires that the applicant shall make an affidavit, in which he shall state that such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not, either directly or indirectly, for the use or benefit of any other person. Section 2291 requires that, in addition to proof of residence and cultivation, the applicant shall make affidavit that no part of such land has been alienated, except as provided by section 2288, which section authorizes a conveyance for church, cemetery, or school purposes, or for the right of way of railroads.

We think it is impossible to distinguish the present case from *Anderson v. Carkins*, 135 U. S. 483. In that case *Anderson* agreed with *Carkins*, by an agreement bearing date December 16, 1876, to convey to him by ⁴² good and sufficient warranty deed, on or before May 1, 1881, the land described. The land was entered as a homestead on the 7th of March, 1877. On the 31st of March, 1884, *Anderson* made final proof under the homestead law. The land contracted to be conveyed by *Anderson* had been in the possession of *Carkins*, who held it, together with eighty acres additional, as a timber claim, from 1873 to the time of the contract. He had broken and cultivated forty acres, and planted on it twenty acres of trees. The improvements that he had made were of the value of one thousand dollars, and it was in consideration of his relinquishing his claim to the sixty acres that the

agreement to convey the land in question, one-half of the amount, was made. A similar consideration was furnished in the present case by Parmenter, he paying Kenny for the improvements which he had made upon the land prior to the entry of McIntosh. The court, in *Anderson v. Carkins*, 135 U. S. 483, had no difficulty in holding that there was ample consideration for the contract, but it was held void on grounds of public policy. The court said: "There can be no question that this contract contemplated perjury on the part of Anderson, and was designed to thwart the policy of the government in the homestead laws, to secure for the benefit of the homesteader the exclusive benefit of his homestead right. Such a contract is against public policy, and will not be enforced in a court of equity": See, also, *Mellison v. Allen*, 30 Kan. 382. But it is strenuously insisted that, "as McIntosh permitted the complainants to have possession of this land, and the use of the stream, with the right to attach their dam to his side of the stream, with knowledge that they were to build a mill, and as a matter of fact was knowing to the steps entered into by them to build and equip the mill at the large expense which they were to," his acts should be construed as "at least a license, which in time might ripen into an easement, even if it had not after this lapse of time; ⁴³ and being a license acted upon, and upon which money was expended, it would be irrevocable so long as the mill of complainants was carried on and operated at that point."

The occupancy has not been for a sufficient length of time to create a right by prescription, and it is but an evasion to say that that which could not be made the subject of agreement, because of public policy intervening to prevent it, can be sustained as a license, where the only attempt at license is in the execution of an agreement void in law. To sustain this contention would be, in effect, to make a new contract for the parties, and we think it not permissible.

An attempt is made to bring this case within the case of *Edwards v. Allouez Min. Co.*, 38 Mich. 46; 31 Am. Rep. 301. In that case, a bill was filed for an injunction. Defendant, at a cost of some sixty thousand dollars, had erected a stampmill on the banks of Hill creek, and had been operating the same for some years. As a result of its operation, large quantities of sand were carried down by the waters of the stream, and deposited on the bottom lands below, and the evidence showed that it would be impossible to carry on the mining operations of defendant

with profit unless this were permitted. After the erection of the mill, the complainant purchased a piece of land, through which the water ran, a short distance below this mill, and upon which the mill, as operated, was depositing sand. This land was purchased for speculative purposes, and apparently under an expectation of being able to force defendant to buy it at a large advance on the purchase price. The real value of the land, except as a convenience to the business of defendant, was small. The court held, in effect, that an injunction is not a process to be lightly ordered in any case, and is not a matter of right, and it was said: "Wherever one keeps within the limits of lawful action, he is certainly entitled to the protection of the law, whether his motives are commendable or not; but, ⁴⁴ if he demands more than the strict rules of law can give him, his motives may become important. In general, it must be assumed that the rules of the common law will give adequate redress for any injury; and when the litigant avers that under the circumstances of his particular case they do not, and that, therefore, the gracious ear of equity should incline to hear his complaint, it may not be amiss to inquire how he came to be placed in such circumstances."

It was further said in the case that "it is beyond question that complainant sustains a legal injury, for which he is entitled to suitable redress. The only question on this record is, whether he is entitled to the special redress he seeks, namely, an injunction."

And in conclusion it was said: "If complainant wants more than is reasonable, he has a right to obtain it under the rules of law, but he cannot demand the aid of equity in a speculation. If, in speculative language, he has a corner in real estate, there is no greater reason why he should have the assistance of an injunction to aid his schemes than there would be if on the produce exchange he had effected a corner in grain. Without the writ, in either case he may be the sufferer, but he suffers nothing for which damages cannot compensate him."

We have quoted from the opinion of Mr. Justice Cooley. In this case Chief Justice Campbell dissented, and Mr. Justice Marston did not sit; Mr. Justice Graves concurring in the result reached by Mr. Justice Cooley. But this case is an authority rather for the defendants than for the complainants. The effect of the decision was to remand the complainant to his suit at law, and this was put upon the ground that a court of equity

is not bound to interfere by an injunction when an adequate remedy at law exists. Indeed, it was stated in distinct language: "He is entitled to his rights under the rules of law, but he is entitled to nothing of grace."

In the present case, this is precisely what the defendants⁴⁵ are asking by their action of ejectment. If they were before the court, asking an injunction, and the opinion of Mr. Justice Cooley in *Edwards v. Allouez Min. Co.*, 38 Mich. 46, 31 Am. Rep. 301, should be followed, an injunction would be denied them on the ground that they are entitled to their rights under the rules of law, but that they are not entitled to anything of grace, and they would be remanded to their remedy by an action at law. What a mockery this would be, if, after they were thus remanded to a court of law, and were prosecuting their suit, it would be open to the defendants in that litigation to turn about and file a bill to prevent them from pursuing the very remedy to which the court had remanded them.

This may be a hard case for the complainants, but, they not having obtained a title to the land such as is enforceable either in equity or in law, and having acquired no right by prescription, and having placed themselves in the position in which they are, acting under a contract void on the ground of public policy, we find it impossible to relieve them, unless we shall ignore rights of property, and assume to make contracts for parties, or punish one party to an illegal contract and thereby advance the interests of the other. This we cannot do any more on the equity side of the court than in a suit at law.

The decree of the court below will be affirmed, with costs.

McGrath, C. J., Long and Hooker, JJ., concurred with Montgomery, J.

MR. JUSTICE GRANT concurred in that portion of the opinion maintaining that the contract in suit to convey the land upon acquiring title was void, but he contended that "the complainants are entitled to relief to prevent the destruction of the dam, one end of which rests upon the defendants' land. The dam and mill plant were erected with the express assent of McIntosh, and with the knowledge and acquiescence of his wife. Both were greatly benefited thereby. The defendants purchased with full knowledge of these facts and of the situation. They possess no rights, legal or equitable, other than those possessed by Mr. and Mrs. McIntosh. A trifling amount would, in any event, compensate them for all the damages sustained, while the destruction of the dam would work irreparable injury to the complainants, causing a loss of many thousands of dollars. The land

overflowed is comparatively worthless, and is overflowed in its natural state some portions of the year. We think this branch of the case is clearly within the rule enunciated by this court in *Edwards v. Mining Co.*, 38 Mich. 46; 31 Am. Rep. 301. In that case, the land, useful for only the same purposes as this, was covered with stamp sand from the defendants' stampmill, which practically destroyed its value. In the present case, it is covered with water. The forcible language of Mr. Justice Cooley in that case is equally applicable here, and we refer to it without quoting it. While the purpose of the defendants in making the purchase is not as clearly shown upon the record as was that of Mr. Edwards, still we cannot shut our eyes to the situation, nor to the conclusion that their purpose was the same. The defendants can be amply compensated in a suit at law for the small damage, if any, sustained, and to this remedy the court of equity will leave them. . . . Complainants seek to have the decree of the court below modified so as to restrain the defendants from interfering with the dam as it existed at the time of their purchase, until they shall have time to cut and manufacture the timber for which their plant was constructed. I think the decree should be so modified, and the case remanded to the court below, with the instruction to permit the parties to produce further testimony if desired, and to determine the time which the complainants shall have for that purpose. I think no costs should be allowed."

PUBLIC LANDS—AGREEMENT TO CONVEY—VALIDITY.—An agreement to convey, or a conveyance by a homesteader executed before his entry is completed, is against public policy and void: *Nichols v. Council*, 51 Ark. 26; 14 Am. St. Rep. 20, and note; *Moffatt v. Bulson*, 96 Cal. 106; 31 Am. St. Rep. 192, and note. An agreement to convey land when title thereto shall be acquired under the homestead laws of the United States is valid and enforceable, if, at the time it was made, the parties thereto were in possession of different parts of a tract, and each entitled to acquire it under such laws, and the object of the agreement was to avoid difficulty and enable each to acquire title to the portion of which he was already in possession and the right to the possession of which the others conceded: *Sweesey v. Sparling*, 81 Iowa, 433; 25 Am. St. Rep. 506.

IN RE SNEDEN.

[105 MICHIGAN, 61.]

HABEAS CORPUS—CUSTODY OF CHILDREN—RES JUDICATA.—A decision on habeas corpus respecting the custody of a child is conclusive in a subsequent application for the writ, unless some new fact has occurred which has altered the status of the case, but it does not necessarily follow that such determination is not reviewable on error or certiorari.

HABEAS CORPUS—REVIEW.—A petition for a writ of habeas corpus which does not allege that a former determination of the same matter on habeas corpus was contrary to law, or that the evidence did not support the facts, nor that the evidence was not reported nor any new fact altering the status of the case, is insufficient and must be dismissed.

W. W. Irwin for the petitioner.

McBride & Danhof, for the respondent.

⁶¹ McGRATH, C. J. This is habeas corpus in behalf of the father against the grandfather to obtain the custody of a daughter of petitioner. The child was born November ⁶² 29, 1888. The mother died in January, 1889, since which time the child has been with the grandparents. In September, 1893, the father married again, and now seeks to obtain possession of the child. In August, 1894, a like application was made to the circuit court for the county of Ottawa, where, after the taking of testimony and a full hearing, the court filed a very full and exhaustive finding, remanding the child to the custody of the grandparents. Respondent answers that the facts and circumstances surrounding the parties are the same as when the judgment of the circuit court was rendered, and contends that petitioner is concluded by the determination of that court.

Whatever may be the rule respecting a person imprisoned, the general rule is, that as to the custody of children, the determination of a court on habeas corpus is conclusive in a subsequent application for the writ, unless some new fact has occurred which has altered the status of the case: 9 Am. & Eng. Ency. of Law, 238; Church on Habeas Corpus, 2d ed., sec. 387, p. 575; Freeman on Judgments, 4th ed., sec. 324; Mercein v. People, 25 Wend. 64; 35 Am. Dec. 653; McConologue's case, 107 Mass. 170; State v. Malone, 3 Sneed, 413; State v. Bechdel, 37 Minn. 360; 5 Am. St. Rep. 854; Bonnett v. Bonnett, 61 Iowa, 199; 47 Am. Rep. 810.

In In re Snell, 31 Minn. 110, it was held that the refusal to discharge a prisoner was not a bar to another writ based upon

the same state of facts, nor to a hearing and discharge thereon; but in *State v. Bechdel*, 37 Minn. 360, 5 Am. St. Rep. 854, *In re Snell*, 31 Minn. 110, is distinguished from those in which the writ is sued out merely for the purpose of determining which of two parties is entitled to the custody of an infant. In the latter case, the court held that the question was not whether the infant was restrained of her liberty, but who was entitled to her custody; that the gist of the charge was, not that the child was restrained or deprived of her liberty, but that such restraint was in prejudice of the right of the petitioner to her custody; that the case was really one of private parties contesting private rights under the form of proceedings in habeas corpus; and that a former adjudication in such case might be pleaded as *res judicata*, and was conclusive upon the parties upon the same state of facts.

It does not necessarily follow that such determination is not reviewable on error or certiorari. The case of *Corrie v. Corrie*, 42 Mich. 509, was brought to this court upon certiorari. It is true that the court there say that, "if a consideration of evidence is required, we suppose the proper way to be to take a habeas corpus from this court." The question actually determined there, however, was whether the court would re-examine the evidence on certiorari.

In *In re Stockman*, 71 Mich. 180, the court before whom the original application was made, instead of exercising its own duty in determining the question, submitted it to a jury, and this court seems to have disregarded that determination for that reason.

It is urged in the present case, however, that the testimony taken on the hearing in the circuit court was not reported, so that it might be made use of on review; but the fact is not averred in the petition, nor is it alleged that the determination was contrary to law, or that the evidence did not support the facts found by the court.

The proceeding must, therefore, be dismissed, and the child remanded to the custody of the respondent.

The other justices concurred.

HABEAS CORPUS—CUSTODY OF CHILDREN—RES JUDICATA.—A former adjudication on the question of the right to the custody of an infant child brought up on habeas corpus may be pleaded as *res judicata*, and is conclusive upon the same parties upon the same state of facts: *State v. Bechdel*, 37 Minn. 360; 5 Am. St. Rep. 854; *Merceln v. People*, 25 Wend. 64; 35 Am. Dec. 653, and note;

People v. Merceln, 3 Hill, 399; 38 Am. Dec. 644. See, also, the extended note to **State v. Smith**, 20 Am. Dec. 336.

HABEAS CORPUS—REVIEW.—A discharge on habeas corpus is conclusive and not appealable, and the prisoner cannot be arrested again for the same offense: **Ex parte Jilz**, 64 Mo. 205; 27 Am. Rep. 218. A writ of error will not lie in behalf of the state to review a judgment of a court of competent jurisdiction in habeas corpus proceedings, discharging from custody a person convicted and imprisoned for crime: **State v. Grottkau**, 73 Wis. 589; 9 Am. St. Rep. 816.

KITTERMASTER v. BROSSARD.

[105 MICHIGAN, 219.]

ATTORNEY AND CLIENT—FEES.—An agreement for attorney fees in an instrument is void unless expressly sanctioned by statute, and a court of equity has no inherent power to enforce such an agreement.

Walker & Walker, for the appellant.

220 HOOKER, J. Complainant appeals from a pro confesso decree of foreclosure, and the only question raised by the record is his right to have the decree increased by including a fee of forty dollars, provided for by the following clause in the mortgage: "And it is further expressly agreed that as often as any proceeding is taken to foreclose this mortgage, either by virtue of the power of sale herein contained or in chancery, or in any other manner provided by law, said first parties shall pay said second party forty dollars, as a reasonable solicitor or attorney fee therefor, in addition to all other legal costs, and will keep said mortgaged premises insured for the benefit of said second party."

It seems to be the settled law of Michigan that provisions for attorney's fees in instruments are void, except where expressly sanctioned by statute. This rule is asserted in cases of stipulated attorney's fees in promissory notes in the case of **Bullock v. Taylor**, 39 Mich. 137, 33 Am. Rep. 356, where such provisions were held void, as a stipulation for a penalty, and opposed to the policy of our laws as to attorney's fees: See, also, **Wright v. Traver**, 73 Mich. 495. Numerous cases support the rule as applied to stipulations for attorney's and solicitor's fees in mortgages: **Van Marter v. McMillan**, 39 Mich. 304; **Myer v. Hart**, 40 Mich. 517; 29 Am. Rep. 553; **Canfield v. Conkling**, 41 Mich. 371; **Parks v. Allen**, **221** 42 Mich. 482; **Vosburgh v. Lay**, 45 Mich. 455; **Millard v. Truax**, 47 Mich. 251; 50 Mich. 343; **Kennedy v.**

Brown, 50 Mich. 336; Sage v. Riggs, 12 Mich. 313; Hardwick v. Bassett, 29 Mich. 17; Damon v. Deeves, 62 Mich. 465; Louder v. Burch, 47 Mich. 111; Botsford v. Botsford, 49 Mich. 31.

It is contended that a court of equity may impose a reasonable solicitor's fee, as has been done by this court in cases cited. Howell's Statutes, section 6623, authorizes the supreme court to establish rules of practice for the circuit courts in chancery with a view to "the diminishing of costs," among other things. Such rules have been made, and chancery rule No. 90 regulates the imposition of costs, and restricts the power of the circuit courts. Several of the cases cited deny the validity of agreements, by parties, for larger costs than those provided by law. We think that the cases cited clearly settle the law of this state upon the subject before us, and that the complainant was not entitled to the fee claimed. The United States supreme court has taken the same view of the Michigan cases: See Bendey v. Townsend, 109 U. S. 665.

The decree of the circuit court must be affirmed.

The other justices concurred.

Attorney's Fees—Validity of Stipulation for.*

Although there is direct conflict in the authorities, the great majority of them sustain the proposition that a stipulation in a note to pay a certain amount or a certain per centum in addition to principal and interest as an attorney's fee, if the obligation is not paid at maturity, and is collected by an attorney, or suit is brought by him in aid of such collection, is valid, so long as the sum stipulated for is reasonable, and not unjust or oppressive. The same rule obtains in regard to mortgages and other contracts of like nature: Brahan v. First Nat. Bank, 72 Miss. 266; Meacham v. Pinson, 60 Miss. 217; Eyrich v. Capital State Bank, 67 Miss. 60; Campbell v. Freeman, 99 Cal. 546; McCormack v. Falls City Bank, 52 Fed. Rep. 107; Bank of Commerce v. Fuqua, 11 Mont. 285; 28 Am. St. Rep. 461; Krause v. Pope, 78 Tex. 478; Montgomery v. Crossthwait, 90 Ala. 553; 24 Am. St. Rep. 832; Williams v. Flowers, 90 Ala. 136; 24 Am. St. Rep. 772; Smith v. Silvers, 32 Ind. 321; Hubbard v. Harrison, 38 Ind. 323; Garver v. Pontinous, 66 Ind. 191; Tuley v. McClung, 67 Ind. 11; Smock v. Ripley, 62 Ind. 81; Ogborn v. Ehasen, 77 Ind. 393; Bond v. Orndorf, 77 Ind. 583; Harvey v. Baldwin, 124 Ind. 59; Gaar v. Louisville Banking Co., 11 Bush. 180; 21 Am. Rep. 209; Davidson v. Vorse, 52 Iowa, 384; Farmers' Nat. Bank v. Rasmussen, 1 Dak. 60; Clawson v. Munson, 55 Ill. 394; Dorsey v. Wolff, 142 Ill. 589; 34 Am. St. Rep. 99; Peyser v. Cole, 11 Or. 39; 50 Am. Rep. 451; McAllister's Appeal, 59 Pa. St. 204; Miner

* REFERENCE TO MONOGRAPHIC NOTE.

Attorney's fees as element of damages: 8 Am. St. Rep. 158-161.

v. Paris Exchange Bank, 53 Tex. 550; Bank of British North America v. Ellis, 6 Saw. 96.

In *Wilson Sewing Machine Co. v. Moreno*, 6 Saw. 35, the court, in deciding such a stipulation to be valid, said: "The ruling that such stipulation makes the note usurious is founded upon the unauthorized assumption of fact, that the sum agreed to be paid as an attorney's fee in case the note is not paid at maturity is not what it purports to be, but illegal interest in the disguise thereof. Of course, where it appears that such is the real nature of the transaction, it should be treated accordingly. But the fact cannot be assumed any more than that a like sum of the alleged principal is illegal interest in disguise. Accordingly, the tendency of the decisions hostile to this stipulation is to leave these untenable grounds, and hold it void, upon the ground that it is a convenient device for usury, and tends to the oppression of the debtor, and it may be admitted that this suggestion is not without force, particularly in cases where the amount provided is largely in excess of what such collection could ordinarily be made for. But a court assumes to make the law, rather than declare it, when it pronounces such a contract void, not because it is prohibited or intrinsically wrong, but because it may be used as a cover for usury, and a means of oppressing the debtor. An agreement by a debtor to pay a reasonable attorney's fee in case his creditor is compelled to incur the expense of an action to collect the debt is only an agreement to so far reimburse the creditor the loss which he may sustain by reason of the debtor's failure to perform his contract to pay his debt. In justice and fairness, it stands on as high ground as the right to recover damages for the nonperformance of any contract. But where the fee is so large as to suggest that it is a mere device to secure illegal interest, or some unconscionable advantage, the court should be slow to enforce the payment of it, and ought, probably, upon slight additional evidence to that effect, to refuse to allow it, or to reduce it to a reasonable sum. Borrowers and lenders seldom deal on equal terms, and the necessities of the former often constrain them to accede to terms and conditions which are oppressive, in the vain hope that they will be able to meet their engagements promptly, and thereby avoid the payment of the charges and penalties stipulated for in case of failure. It would, then, be better if these stipulations were not made for a fixed sum or percentage, but rather for such sum as the courts, under all circumstances, might judge reasonable and right. In this way regard might be had to the nature and value of the services actually rendered by the attorney. Where the judgment is obtained without opposition on the part of the debtor, as is often the case, the fee should be less than where it is obtained against such opposition. But, after all, the rights of the parties, in the absence of any statute to the contrary, to contract for the payment of a reasonable attorney's fee by the debtor, in case his creditor is put to the expense of collecting his debt by law, rests upon the same ground as the right to make any other contract not prohibited by law, or *contra bonos mores*."

In *Peyser v. Cole*, 11 Or. 39, 50 Am. Rep. 451, the court sustained the validity of such a stipulation in a note and reviewed the authorities to some extent as follows:

"In *Huling v. Drexel*, 7 Watts, 126, the court say: 'The contract here has nothing in it oppressive to the borrower; it is advantageous to the borrower and lender when merely intended to enforce a punctual performance of the contract; nor is there the slightest pretense to say that it is intended as a cover to usury. A failure on the part of the borrower puts nothing in the pocket of the lender; on the contrary, the probability is, he will not be reimbursed the expenses which he may incur. With such stipulations, which are frequently made, persons may borrow money at a less rate of interest, as punctuality is always taken into consideration in fixing the terms of the loan.' And in *Parham v. Pullam*, 5 Coldw. 497, similar views are expressed. In this case the court say: "The contract of the debtor to pay the attorney's commissions, in case of suit upon default of payment of the debt for the prescribed time, adds nothing to the amount of interest to be paid the creditor. If the debtor pays the ten per cent interest stipulated, and also pays the attorney's commissions, the creditor has received no more than the ten per cent interest. If he does not pay the attorney's commissions, the creditor receives to that extent less than the ten per cent interest. 'The supreme court of Indiana thus expressed its unqualified approval of such engagements on the part of the borrower: 'A stipulation whereby the debtor agrees to be liable for reasonable attorney's fees in the event that his failure to pay the debt shall compel the creditor to resort to legal proceedings to collect his demand is not only not usurious, but is so eminently just that there should be no hesitation in enforcing it': *Smith v. Silvers*, 32 Ind. 321. As to the considerations for such stipulations, the supreme court of Texas, in *Miner v. Paris Exchange Bank*, 53 Tex. 559, says: 'If the contract were lawful in other respects, the conditional stipulation to pay the usual attorney fees, in the event suit had to be instituted to enforce it, would be legal and founded upon a valuable consideration. Such fees, though not an element of damages, in an ordinary suit for the collection of money, can be made such by express contract': *Roberts v. Palmore*, 41 Tex. 617. Upon the point of sufficiency of consideration for such a stipulation, we think there can be no doubt. Making the loan itself, although at the highest rate of interest allowed by law, would constitute a valuable and sufficient consideration. And the only question involving any serious difficulty, it seems to us, is whether such engagements are opposed to the policy of the statute against usury. If the effect of enforcing them would be to give the lender a larger compensation for the loan and use of his money than such statute allows, then they should be held usurious and void. But while the lender has no lawful right to contract with the borrower for a rate of interest exceeding the limit imposed by the statute, he is not debarred from requiring as a condition of making the loan that he shall be secured in such

a way as will enable him to receive the principal of the loan and the amount of lawful interest stipulated for, without further loss or expense occasioned by the default of the borrower. As is said by the court in *Imler v. Imler*, 94 Pa. St. 372: 'The contract is one of indemnity, and if the defendant, by his neglect or refusal to pay, has subjected his creditor to the necessity of employing counsel, why should he not pay?' It is no new or additional compensation for the use of the money that is provided for by such a stipulation. Such an engagement is not in the nature of a contract for additional interest, but a provision simply against possible future loss or damage of a certain and definite character, which can only result as a consequence of the neglect or default of the borrower, and against which there seems no good reason why he should not be held competent to indemnify. The lender only charges the rate of interest allowed by law upon his contract with the borrower for interest, but on account of the breach of a further stipulation, not forming any part of said contract, but founded on a valuable consideration, he claims such damages as he may sustain by being compelled to retain counsel to institute judicial proceedings to collect his debt. In legal contemplation, it is possible for the borrower to avoid making default in payment and competent for him to indemnify the lender against any special damages it may occasion. Such is the view expressed in *Miner v. Paris Exchange Bank*, 53 Tex. 559, and, in our judgment, it commands the assent of good reason. There is nothing peculiar in the particular provisions of general policy of our laws which render this latter class of decisions inapplicable to the determination of the case at bar. On the other hand, such stipulations in contracts for the loan of money in this state are not only frequent, but practically universal. In the several courts of first instance, their validity has generally been recognized, and relief founded upon them awarded in proper cases. In the federal court for the district of Oregon, their validity has been expressly adjudged: *Wilson etc. Co. v. Moreno*, 6 Saw. 35; *Bank of British North America v. Ellis*, 6 Saw. 96. In the presence of this state of things, the law-making power has remained silent, and its tacit approval may not unreasonably be inferred. We should hesitate, while a reasonable doubt remained, to overturn an existing order of things so important in its relations to the business interests of the country and so well established in the thoughts and habits of the business public. But while it would hardly be deemed accurate to say that the question has yet been settled either way by a controlling weight of authority, it can hardly be controverted that the current of adjudication is in favor of the validity of such engagements, subject to the general supervisory power of the courts as to their bona fides and reasonableness. Whether a specified amount or per cent, or only "reasonable fees," is provided for by the stipulation, we have no doubt of either the power or duty of the court where the question of good faith or reasonableness is presented, upon issues properly framed, to pass upon and determine it, as it should any other issue in the case. If found to be a mere pretext for the con-

realment of usury, or to be unreasonable in amount, the remedy is with the court. In this case, the complaint alleged that the sum of forty dollars, for which the judgment appealed from was rendered, was a reasonable attorney's fee for instituting the action, etc. No answer was filed, and consequently this allegation must have been taken as admitted. The only question raised by the demurrer and motion to strike out was, whether such stipulation should be deemed void per se. We hold that it was not, and therefore the judgment should be affirmed with costs to respondent."

In *Bowie v. Hall*, 69 Md. 433, 9 Am. St. Rep. 433, 434, the court, in passing upon this question, expressed the following views: "But even if the question were a new one, we can discover no ground whatever upon which to declare such a contract void. In the case before us, the interest on the sum lent, up to the maturity of the note, is less than half the most reasonable commissions the lender will have to pay an attorney for collecting it by suit or otherwise. So that, by default of the borrower, he would lose all the interest and part of the principal. What possible objection can there be in allowing parties to contract against a result like that? In our judgment, such contracts violate no principle of law or public policy. It seems to us simply a stipulation intended to secure punctuality in the performance of the contract, and, as such, contains no element of oppression to the borrower. Its tendency, in fact, is to help him to borrow at a less rate of interest, as punctuality in payment is usually taken into consideration in fixing the terms of a loan. Nor can it be regarded as a cover to usury, for its effect is clearly not to put any money above the legal rate of interest in the pocket of the lender, but merely to enable him to get back his money, with legal interest, and nothing more. We are not aware of any case in which such a contract has come before an English court; and this may result from what we believe to be the fact, that the practice of remunerating attorneys and solicitors for their professional services by a certain percentage on money collected by them for their clients by suits in court has never prevailed in England. In this country, however, such a practice has been commonly adopted. Contracts, therefore, like the present are not unusual here, and have become numerous in recent times. In some cases, their validity has been denied by the courts; but it seems they are sustained by a decided preponderance of authority. Counsel for appellant has, with commendable diligence, collected a number of authorities sustaining them (which we give), and doubtless others to the same effect may be found: *Huling v. Drexell*, 7 Watts, 129; *McAllister's Appeal*, 59 Pa. St. 204; *Smith v. Silvers*, 32 Ind. 321; *Clawson v. Munson*, 55 Ill. 394; *Camp v. Randle*, 81 Ala. 240; *Miner v. Paris Exchange Bank*, 53 Tex. 559; *McGill v. Griffin*, 32 Iowa, 445; *Chase v. Whitmore*, 68 Cal. 545; *Peyser v. Cole*, 11 Or. 39; 50 Am. Rep. 451."

In a late case in Illinois (*Dorsey v. Wolff*, 142 Ill. 589-594, 34 Am. St. Rep. 99), the court said: "The promise to pay the attorney's fee is a promise to do something after the note matures. It does not

affect the character of the note before, or up to the time of, its maturity, either as to certainty in the amount to be paid, or fixedness in the date of payment, or definiteness in the description of the person to whom the payment is to be made." It was also held in this case that an agreement to pay ten per cent on the amount of the note as an attorney's fee for collection was not usurious nor unreasonable, and that "Inasmuch as the note is negotiable and passes by indorsement to the assignee, the agreement as to the attorney's fee also passes to such assignee as part of the note. The stipulation or promise to pay the attorney's fee is not made with the payee alone. The note is payable to the payee or order. The promise is as much to the holder as to the original payee. The fee is to be paid if the note is not paid when due whether it is then owned by the payee or by any other holder. Moreover, the attorney's fee is an incident to the main debt, and passes with it": *Dorsey v. Wolff*, 142 Ill. 598; 34 Am. St. Rep. 99.

The promise in a note to pay attorney's fees if suit is instituted thereon can be enforced against the indorser: *Hubbard v. Harrison*, 38 Ind. 324. And it is not necessary to resort to an independent action to collect such fees: *Bank of Commerce v. Fuqua*, 11 Mont. 285; 28 Am. St. Rep. 461. Upon a note stipulating for the payment of an attorney's fee, such fee may be recovered against the estate of the maker in case of his death before maturity: *Bond v. Orndorf*, 77 Ind. 583; *Davidson v. Vorse*, 52 Iowa, 384. The stipulation for an attorney's fee becomes operative and can be enforced only when expenses have been actually and necessarily incurred in the employment of an attorney for the enforcement of collection consequent upon the failure of the payor to keep his engagement, and then only to the extent actually paid or to be paid or reasonably chargeable: *Goss v. Bowen*, 104 Ind. 207.

A contract for the payment of attorney's fees is a contract of indemnity, and the holder thereof cannot recover any more than indemnity. If he has agreed with his attorney for a smaller sum than that stipulated for in the agreement, such agreement will inure to the benefit of the maker of the contract, and will limit the amount of the holder's recovery on account of attorney's fees: *Kennedy v. Richardson*, 70 Ind. 524. A stipulation in a mortgage or deed of trust that the mortgagor, in addition to legal interest, shall pay to the mortgagee, attorney's fees incurred in collecting the debt, is almost universally considered valid and enforceable so long as the amount of the fee agreed upon is reasonable and not oppressive. Such a stipulation does not render the mortgage usurious, nor is it opposed to public policy: *Munter v. Linn*, 61 Ala. 492; *Brannan v. Kay*, 33 S. C. 283; *Maus v. McKellip*, 38 Md. 231; *Fechhelmer v. Baum*, 43 Fed. Rep. 719; *Fowler v. Equitable Trust Co.*, 141 U. S. 411; *Burns v. Scoggin*, 9 Saw. 73; *Butler v. Sanger*, 4 Tex. Civ. App. 411; *Rainwater etc. Co. v. Weaver*, 4 Tex. Civ. App. 594; *Hermes v. Vaughn*, 3 Tex. Civ. App. 607; *Boyd v. Summer*, 10 Wis. 41; *Hitchcock v. Merrick*, 15 Wis. 522; *Huling v. Drexell*, 7 Watts, 126; *Plaza Bluffs etc. Co. v. Evera*,

65 Ill. App. 205; Clawson v. Munson, 55 Ill. 394. And the same rule is generally maintained as to similar stipulations in mortgage notes: Ogborn v. Eliason, 77 Ind. 393; McGill v. Griffin, 32 Iowa, 445.

Quite a respectable number of authorities maintain that a stipulation in a note to pay a reasonable attorney's fee for instituting and prosecuting a suit on the note, in addition to legal interest, is unauthorized by law and void. These cases take the ground that such a stipulation is for a penalty or forfeiture and tends to the oppression of the debtor, is a cover for usury, without consideration, and contrary to public policy and void: Boozer v. Anderson, 42 Ark. 167; Merchants' Nat. Bank v. Sevier, 14 Fed. Rep. 662; Dow v. Updike, 11 Neb. 95; Security v. Eyer, 36 Neb. 507; 38 Am. St. Rep. 735; Toole v. Stephen, 4 Leigh 581; Rixey v. Pearre, 89 Va. 113; Tinsley v. Hoskins, 111 N. C. 340; 32 Am. St. Rep. 801; State v. Taylor, 10 Ohio, 378; Shelton v. Gill, 11 Ohio, 417; Martin v. Trustee of Belmont Bank, 13 Ohio, 250; Witherspoon v. Musselman, 14 Bush, 214; 29 Am. Rep. 404. This rule has long been maintained in Michigan: Bullock v. Taylor, 39 Mich. 137; 33 Am. Rep. 356; Myer v. Hart, 40 Mich. 517; 29 Am. Rep. 553, and cases cited in the principal case. Such rulings by the state courts have been affirmed by the federal courts on several occasions: Gray v. Havemeyer, 53 Fed. Rep. 174; Bendey v. Townsend, 109 U. S. 665; Dodge v. Tulleys, 144 U. S. 451. In Witherspoon v. Musselman, 14 Bush, 214, 29 Am. Rep. 404, the court said: "We are clearly of opinion that all such contracts are absolutely void. They are contrary to the policy of our laws, which prescribe the amount of attorney's fees that may be taxed against the unsuccessful litigant. They are agreements to pay penalties, tend to the oppression of the debtor, and to encourage litigation." In Boozer v. Anderson, 42 Ark. 167, the court said: "About the validity of such stipulations, there has been and is, a great diversity of judicial opinion. They are of recent origin, and courts of equal authority and respectability have condemned and sustained them. To us it appears clear, even to demonstration, that they are agreements for a penalty. The obligor agrees to pay a certain sum of money if he shall fail to perform the contract contained in another clause of the same instrument. Whenever the injury is susceptible of definite admeasurement, as it is in all cases where the breach consists in the nonpayment of money, the parties will not be allowed to stipulate for a greater amount, whether in the form of a penalty or as liquidated damages." "A stipulation in a mortgage to the effect that, in case an action should be brought to foreclose it, a reasonable attorney's fee, to be fixed by the court for the services of plaintiff's attorney in the foreclosure action, should be included in the decree and paid out of the proceeds arising from the sale of the mortgaged premises, is against public policy and void": Leavans v. Bank, 50 Ohio St. 591. To the same effect is Thomasson v. Townsend, 10 Bush, 114. In Oregon, the doctrine now prevails that a provision in a note for a stipulated attorney's fee of a certain per centum of the amount found due in a suit to collect the note is void, and in such cases no attor-

ney's fee can be allowed: *Levens v. Briggs*, 21 Or. 333; *Kimball v. Moir*, 15 Or. 427. The same rule applies to mortgages: *Balfour v. Davis*, 14 Or. 47. In *Levens v. Briggs*, 21 Or. 333, a mortgage note provided that ten per cent of the principal and interest thereof should "be added for attorney's fees if collected by process of law or by an attorney." In delivering the opinion, the court said: "The remaining question is, whether any attorney fee is collectible under this note. In *Balfour v. Davis*, 14 Or. 47, the parties contracted for a specified percentage in case of suit, and we refused to enforce it or to allow any attorney fee. Had the note provided for a reasonable attorney fee, to be ascertained by the court, as was done in *Peyser v. Cole*, 11 Or. 39, 50 Am. Rep. 451, there could have been no legal objection, but where the parties stipulated for an oppressive and unconscionable amount, no court ought to enforce it, and because that method has grown into an oppressive abuse and the courts were being used to make it effectual, we thought best to announce the rule that no attorney fee would be allowed by the courts if the amount thereof be specified in the contract. The reasons are obvious. No one can know beforehand the value of legal services in enforcing collection until their extent is certainly known. If a stubborn defense were interposed, and the case should be carried to the highest court, certainly a somewhat more liberal amount ought to be paid than if the defendant made default. Besides, if it be conceded that the parties may specify the amount if it be reasonable, it is somewhat difficult on principle to say they shall not determine for themselves what is reasonable." In Pennsylvania, it is now held that such a stipulation in a mortgage is in the nature of a penalty, and that its enforcement is a matter within the control of the court in the exercise of its equity powers: *Daly v. Maitland*, 88 Pa. St. 384; 32 Am. Rep. 457; *Lindley v. Ross*, 137 Pa. St. 629; *Wilson v. Ott*, 173 Pa. St. 253; 51 Am. St. Rep. 767. A contract between a wife and her attorneys in advance of a decree for divorce and the allowance of alimony, giving such attorneys one-half of such alimony, is void as against public policy: *Jordan v. Westerman*, 62 Mich. 170; 4 Am. St. Rep. 836.

ATTORNEY AND CLIENT—FEES.—A stipulation in a note, that in case it is collected by "legal process, the usual collection fee shall be due and payable therewith," is contrary to public policy and void: *Tinsley v. Hoskins*, 111 N. C. 340; 32 Am. St. Rep. 801, and note. A stipulation in a promissory note to pay a reasonable attorney's fee if the note is "collected by suit" is void: *Witherspoon v. Musselman*, 14 Bush, 214; 29 Am. Rep. 404, and extended note. If a note provides for a reasonable attorney fee, in case of suit, and there is an issue as to what is such a fee, the statutory attorney fee only will be allowed, unless some evidence is taken as to what constitutes a reasonable attorney fee: *Bradfeldt v. Cooke*, 27 Or. 194; 50 Am. St. Rep. 701.

SARMIENTO v. DAVIS BOAT AND OAR COMPANY.

[105 MICHIGAN, 300.]

CORPORATIONS—SEAL AS EVIDENCE.—A statute providing that, if the common seal of a corporation is affixed to any instrument purporting to be executed by it, it shall be prima facie proof of the due adoption of such seal, that it was affixed by due authority, and that such instrument was lawfully executed, does not require that the corporate seal shall be affixed to each instrument, but only makes it prima facie proof of due authority whenever it is attached thereto.

CORPORATIONS—AUTHORITY OF PRESIDENT.—The president, or other chief executive officer, of a corporation has general authority to appear, to employ counsel, to answer, or to execute a bond on appeal in any suits brought against the corporation.

E. A. Gott and A. Russell, for the appellant.

E. E. Kane and Russel & Campbell, for the respondent.

³⁰¹ GRANT, J. This suit was brought under the watercraft law of this state. The vessel, which had been attached, was released upon the filing of a bond, signed "The Davis Boat & Oar Company, by Edgar A. Davis, President." Judgment went against the boat company and George S. Davis, the surety on the bond. Both complainants and defendants appealed to this court. The appeal bond was signed by the Davis Boat & Oar Company in the same manner as was the bond upon which the judgment is based. No objection was taken to the form of that bond, and the authority of Mr. Davis, its president, to execute it was not questioned. Complainants now move to dismiss the appeal in this case for the reason that the company has filed no such bond on appeal as is required by law, "there being no evidence in writing that the Davis Boat & Oar Company, a corporation, has authorized Edgar A. Davis to execute the bond filed, or affix a seal." The sole objection is, that no corporate seal was attached to the bond. In reply to this motion, Mr. Davis has filed an affidavit, showing that his authority ³⁰² was so extensive as to authorize the signing of the bond. The usual scroll as a seal was affixed to the bond. Mr. Davis is shown to be the general manager and to have entire control of all the business of the corporation. He is, therefore, presumed to have authority to execute the bond.

The only statute cited by counsel for the complainants upon which they rely to show the requirement of the use of the corporate seal is act No. 162. Laws of 1893, which reads as follows: "Any corporation, joint stock company, or partnership associa-

tion, limited, may have a common seal, which it may alter at pleasure, and such seal affixed to any instrument purporting to be executed by any such corporation, joint stock company, or partnership association, limited, foreign or domestic, shall be prima facie proof of the due adoption of said seal, and that it was affixed to said instrument by due authority, and that said instrument was, in fact, lawfully executed by such corporation, joint stock company, or partnership association, limited.

This act does not require the corporate seal, but only makes it prima facie proof of due authority whenever it is attached. It would be impracticable to require every railroad or vessel corporation, doing business in many counties of the state, where it has litigation, and also in other states, to use its corporate seal in every such case. The complainants rested content with a bond to release the vessel executed in the same way. The chief executive officer of a corporation has general authority to appear, to employ counsel, and to answer any suits brought against it. Mr. Davis, having general authority to manage all the affairs of the corporation, will be held authorized to execute a bond for appeal from one court to another: *American Ins. Co. v. Oakley*, 9 Paige, 500; 38 Am. Dec. 561; *Savings Bank v. Benton*, 2 Met. (Ky.) 244; *Oakley v. Workingmen Union Ben. Soc.*, 2 Hilt. 488. See, also, *Preston Nat. Bank v. Smith etc. Purifier Co.*, 84 Mich. 381, 384, and authorities there cited.

The motion is denied, with costs.

The other justices concurred.

CORPORATIONS—SEAL AS EVIDENCE.—A deed of a corporation reciting that it is sealed with the corporation seal raises the presumption that what purports to be such seal, placed after the names of the corporate officers executing the deed, is the seal of the corporation: *Benbow v. Cook*, 115 N. C. 324; 44 Am. St. Rep. 454, and especially note. This subject is fully treated in the extended note to *B. S. Green Co. v. Blodgett*, 50 Am. St. Rep. 157.

CORPORATIONS—PRESIDENT—AUTHORITY OF, GENERALLY.—The president of a corporation, being its chief officer, is presumably authorized to carry out its lawful contracts: *Board of Trade v. Nelson*, 162 Ill. 431; 53 Am. St. Rep. 312, and note.

RICE v. HOSKING.

[105 MICHIGAN, 303.]

CONSTITUTIONAL LAW—CONSTRUCTION OF STATUTES.—A statute making it the duty of the probate judge, when the heirs of a deceased person, upon whose estate administration is sought, are residents of a foreign country, to notify the consul of such country of the pendency of, and of the day set for hearing an application for letters of administration, or the probate of a will, and prescribing the form of notice, simply provides for an act on the part of a probate judge, and is not in conflict with another statute providing for public notice by personal service or publication of the order for such hearing to all interested parties, nor is such statute in conflict with constitutional provisions requiring that no law shall be revised, altered, or amended by reference to its title only, and that an altered or revised law must be re-enacted and published at length, and that no law shall embrace more than one object which shall be embraced in its title.

CONSTITUTIONAL LAW—PROBATE STATUTE—NOTICE TO FOREIGN HEIRS.—A statute making it the duty of the probate judge, when the heirs of a deceased person, upon whose estate administration is sought, are residents of a foreign country, to notify the consul of such country of the pendency of and of the day set for hearing the application for letters of administration of the probate of a will, and prescribing the form of such notice, is for the sole benefit of foreign heirs, and they alone can take advantage of a failure to give the required notice, and they may waive such notice, at any time before the estate is closed.

EXECUTORS AND ADMINISTRATORS—PROBATE—JURISDICTION—COLLATERAL ATTACK.—The failure of a probate judge to comply with a statute requiring him to give notice to foreign heirs of the date for hearing the probate of a will, does not deprive him of jurisdiction acquired by petition and otherwise regular proceedings to probate such will, so as to constitute ground for collateral attack on such probate in a suit by the executor to collect assets belonging to the estate. The only parties who can complain of such probate are the foreign heirs.

Chadbourne & Rees, for the appellants.

A. T. Streeter and C. R. Brown & Son, for the respondent.

304 GRANT, J. Plaintiffs, as executors, brought suit upon
305 two promissory notes, dated July 22, 1887, and executed by the defendant, payable to the order of Isaiah C. Watson, and by him indorsed to the order of Martha D. Watson. In the petition filed for the probate of the will, it appeared that some of the heirs of the deceased resided in Canada. Upon the filing of the petition the probate court made the usual order for the hearing under Howell's Statutes, section 5801, and required the same to be published three weeks in a newspaper in Houghton county. The hearing was had within sixty days of the time of filing the petition, and letters testamentary were granted. This law was en-

acted prior to the Revised Statutes of 1846, and under it the courts of probate of this state have proceeded in the probate of wills. It required public notice by personal service, or by a publication of the order for three weeks, successively, previous to the time appointed.

In 1887 the legislature passed an act entitled, "an act requiring judges of probate in certain cases to give notice to foreign consuls of an application for administration in the estate of deceased persons."

This act is as follows: "Whenever it shall appear upon application to any probate court for letters of administration, or to prove the will of any deceased person, that the heirs at law of said deceased, or any of them, are residents of a foreign country, it shall be the duty of the judge of such probate court to notify the consul resident in this state, if there be one of such foreign nation where the said heir or heirs may reside, and, if no such consul reside in this state, he shall notify the consul of such foreign nation in the city of New York, of the pending of and the day appointed for hearing such application. And such notice may be given by letter addressed to such consul, and deposited in the postoffice, with the postage prepaid thereon, at the city or village where such application was made, at least sixty days before such day of hearing, unless such heir or heirs shall file in such probate court ³⁰⁶ a waiver of such notice, in writing and under oath": 3 Howell's Statutes, sec. 6812.

The judge of probate gave no notice as required by this section. The circuit court found, as a conclusion of law, that the probate court acquired no jurisdiction to probate the will by reason of the failure of the probate judge to give this notice. This presents the sole question upon the record.

The plaintiffs' contentions are: 1. If the act of 1887 is to be regarded as an amendment to section 5801, it is an amendment by indirection, and prohibited by section 25, article 4, of the constitution, which reads: "No law shall be revised, altered, or amended by reference to its title only, but the act revised, and the section or sections of the act altered or amended, shall be re-enacted and published at length": 2. It is in violation of section 20 of article 4, which reads: "No law shall embrace more than one object, which shall be expressed in its title": 3. The provisions of the act are not mandatory or jurisdictional, but, if mandatory as to foreign heirs, they are not mandatory as to parties and interests within the country; 4. If the provisions be

held mandatory, the failure to comply with them can be complained of by foreign heirs only.

1. We think the first two points are not well grounded. While the last act might properly have been passed as an amendment to Howell's Statutes, section 5801, yet it is not necessarily an amendment. It provides simply for an act on the part of the probate judge which is not in conflict with the other provision, and does not, of necessity, change it. Two statutes relating to the same subject will be so construed as to allow both to stand where they do not contain inconsistent provisions, and the provisions of both can be carried out: *Connors v. Cape River Iron Co.*, 54 Mich. 168; *Tillotson v. Saginaw*, 94 Mich. 240; *Merriman v. Circuit Judge*, 96 Mich. 606. Section 5801 does not require the hearing on the petition to take place at any specified ³⁰⁷ time. It cannot be less than three weeks, because there must be three successive weeks' publication previous to the time of hearing. The court may fix the time at sixty days or more from the date of the order, and thus be enabled to comply with the latter statute. We see no repugnancy between the two.

2. The failure of the probate judge to comply with the statute did not deprive him of jurisdiction, which he acquired upon the filing of the petition. Parties interested in the estate were residents of Houghton county. The object of the statutory notice, while the proceeding itself is in nature in rem, is to give the heirs and legatees, and others interested in the distribution of the property of the estate, an opportunity to be heard. Debtors of an estate are not parties in interest, within the meaning of the statute. They are not concerned in the proceedings any further than to protect themselves by the payment of their debts to the proper representatives of the estate. Although the notice may be insufficient, and the proceedings declared void upon seasonable objection by a party in interest who has not waived it, yet an appearance will waive the defect, and bind all those who so appear. As to the parties in interest living in Michigan, the notice was sufficient. The finding of facts states that "none of the foreign heirs filed any waiver of such notice." Whether they appeared at all in the case is not shown. The petition stated the residence and postoffice address of each heir living in Canada. They may appear at any time before the estate is closed, and file their waiver. They can only be interested in the probate of the will, which affects the distribution of the property. The court below held the proceedings in the probate court absolute-

ly void. It must be conceded that these foreign heirs might have appeared in the probate court at any time after the judgment in this case was rendered, waived the notice, and thus validated the entire proceeding. We would thus have the anomalous situation of a valid decree in the probate ³⁰⁸ court, probating the will, and authorizing the executors to collect the estate, and a judgment in the circuit court, in a collateral proceeding, holding the decree void, and cutting off the estate from a large portion of its assets. Certainly, the legislature did not contemplate such a situation. Obviously, the statute was enacted for the sole benefit of foreign heirs, and it is but reasonable to hold that they are the sole persons who can take advantage of a failure to comply with its provisions. Other heirs, legatees, creditors, and debtors are neither benefited nor injured by this requirement that the judge of probate shall write and send a letter which may or may not result in notice to the foreign heirs.

The statute of Wisconsin is the same as section 5801, above referred to. In *O'Dell v. Rogers*, 44 Wis. 136, the supreme court of that state, in an able and exhaustive opinion, has discussed the jurisdiction of probate courts, and the effect of a failure to publish the notice within the time required by the statute. In that case, the publication fell short of the statutory three weeks, and it was held that the decree admitting the will to probate was valid as to all who were duly notified, or who appeared and assented to the proceedings. An infant heir was not represented upon the hearing, and it was held that she could not be charged with laches, consent, or ratification during minority. After she became of age, she filed a petition in the probate court alleging want of notice of the time and place of probate, by personal service or due publication, and alleging acts of fraud to impeach subsequent proceedings of the executors, and denying the jurisdiction of the probate court, and prayed that the probate of the will, and all subsequent proceedings, be set aside. Her petition did not question the validity of the will, or its due proof, and asked relief only consistent with a valid probate. It was held that her petition and complaint operated as an assent and submission on her part to such probate and appointment. It was there said that, ³⁰⁹ "the death of the testator gives to courts of probate general jurisdiction, and proof of the domicile and situation of the estate, both the general jurisdiction of the subject matter and jurisdiction of the particular case"; and "that whenever the courts, deciding upon the question of the

effect, upon a decree of the court of probate, of a want of notice to persons in interest, or of their nonappearance, use the word 'void,' it is used, not in the sense of an absolute nullity, but of invalidity, and as to such persons only." Many authorities sustaining this proposition are there cited and commented upon.

In the present case, the executors have given a bond; the probate of the will was valid as to all parties living within the United States; the foreign heirs are the only ones who can have any interest in contesting the will, or in setting aside the probate; the executors and their bondsmen are liable for all the money collected, which must be distributed under the order and direction of the probate court; and payment by debtors to them is valid, and a complete bar to any further liability.

3. The judgment must be reversed, but it is insisted by the defendant that a new trial should be ordered. We cannot agree with this contention. The case was tried before the court without a jury, and the judge made the following findings: "From the testimony in the case, the court finds that the notes offered in evidence were executed by the defendant, Hosking, and delivered to the payee therein; that the said Martha D. Watson, at the time of her decease, was the owner of said notes, and that there was and is now due thereon the face amount thereof, with interest from the twenty-second day of July, 1887, at seven per cent per annum; that Martha D. Watson, the deceased person represented by the plaintiffs, had become and was, at the time of her decease, the owner and holder of the notes described heretofore, and was entitled to recover upon the same against the defendant."

It thus appears that the merits of the controversy upon ³¹⁰ the evidence were determined by the circuit court in favor of the plaintiffs, and the only ground upon which judgment was rendered for the defendant was that above stated. If the defendant had other grounds of defense which he considered fatal, he should have requested the court so to find, so that the entire controversy might have been settled upon this appeal. He chose to rely upon the one point, but for which judgment would have been rendered by the court below for the plaintiffs.

It follows that the judgment must be reversed, and judgment entered in this court for the plaintiffs, with the costs of both courts.

The other justices concurred.

STATUTES.—AMENDMENT of by mere reference to title in amending act is discussed in the note to *Winona v. School Dist. No. 82*, 12 Am. St. Rep. 695. The entire statute need not be set forth in an act amending it by adding new sections or altering old ones. It is only when all the sections of a statute are amended that the entire act, as amended, must be set out in the amendatory statute: *State v. Thurston*, 92 Mo. 325; 1 Am. St. Rep. 720, and note.

PROBATE JURISDICTION—COLLATERAL ATTACK.—It is presumed that the probate court, before making an appointment of an administrator of the estate of a deceased person, has ascertained the existence of the jurisdictional facts without which the power of appointment could be exercised. Such grant of administration, when made, cannot be collaterally assailed otherwise than in a direct proceeding: *Kling v. Connell*, 105 Ala. 590; 53 Am. St. Rep. 144, and note.

REED v. GOULD.

[105 MICHIGAN, 359.]

PARTNERSHIP—FRAUDULENT SALE BY PARTNER—REMEDY.—An action at law cannot be maintained by one partner in his name alone or in the joint name of the partners to recover his interest in property transferred by his copartner to defraud him. His only remedy is in equity.

Cahill & Ostrander, for the appellants.

Smith, Lee & Day, for the respondent.

³⁶⁸ MONTGOMERY, J. This case was before the court at the October term, 1892, and the decision of the court is found reported in *Reed v. Gould*, 93 Mich. 359. As the case was then presented, the action was one in which the plaintiff sued to recover the value of his exemptions in a stock of goods belonging to the firm of Reed & Jacobs, which had been transferred to the defendants, and the judgment was reversed, on the ground that the circuit judge submitted the case to the jury upon a different theory than that claimed in the declaration, and upon which the case was tried. After the case was remanded, the plaintiff amended his declaration, and, upon a second trial, ³⁶⁹ recovered against the defendants, upon the ground that the sale of the copartnership property of Reed & Jacobs, and its transfer to defendants, in satisfaction of their debt and for a money consideration received by Jacobs, was in fraud of plaintiff's rights. The plaintiff recovered a verdict of one thousand dollars, and after moving for a new trial, which was refused, the defendants brought error.

The case is submitted upon three propositions urged by defend-

ants: 1. That there was no sufficient proof to show that there was any fraud in the sale of the goods by Jacobs to defendant; 2. That plaintiff has been guilty of such laches as debars him from now asserting such fraud; 3. That this action, by this sole plaintiff, cannot be maintained in a court of law, but that his remedy is in equity.

In the view we take of the case, it is unnecessary to consider the first two points, as we are satisfied that the plaintiff cannot maintain this action at law, even if it be conceded that there was testimony fairly tending to show fraud, and that the plaintiff's laches have not been such as to bar his remedy, as matter of law. This case well illustrates some of the difficulties in the way of applying the remedy which the plaintiff has sought. The theory is, that the plaintiff's partner was guilty of a fraudulent disposition of the assets of the firm. The court below could find no safer or other rule of damages than to permit a recovery by the plaintiff of the full value of the property disposed of, except the books of account, which were not in controversy. We are unable to conceive upon what principle this should be permitted. The transfer was undoubtedly effectual so far as related to the interest of Jacobs in the property: *Wells v. Mitchell*, 1 Ired. 484; 35 Am. Dec. 757; *Blaker v. Sands*, 29 Kan. 551; *Kingsbury v. Tharp*, 61 Mich. 216, 225.

A distinction is to be taken between a mere possessory action and an action to recover damages for the wrong. ³⁷⁰ The defrauded partner may treat a fraudulent sale as void, and reclaim the property; or he may have his appropriate possessory action; and certainly, in the absence of a plea of nonjoinder, he can maintain this action without joining his copartner: *Hutchinson v. Dubois*, 45 Mich. 143. But does it follow that in an action at law for damages the rights of the parties can be worked out? We think not. The question has usually arisen in cases in which the copartner brought suit, including, as plaintiff, the partner who had been guilty of the wrong. In these cases the remedy has been pointed out, and held to be in equity. A leading case is *Jones v. Yates*, 9 Barn. & C. 532, in which case Lord Tenterden said: "We are not aware of any instance in which a person has been allowed, as plaintiff in a court of law, to rescind his own act, on the ground that such act was a fraud on some other person, whether the party seeking to do this has sued in his own name only, or jointly with such other person. . . . The defrauded partner may perhaps have a remedy in equity, by

a suit in his own name, against his partner, and the person with whom the fraud was committed. Such a suit is free from the inconsistency of a party suing on the ground of his own misconduct." See, also, *Estabrook v. Messersmith*, 18 Wis. 545, *Ellis v. Allen*, 80 Ala. 515, and *Homer v. Wood*, 11 Cush. 62, in which latter case the holding of the court is quite as applicable to a suit by an individual partner as to one instituted by the firm. The court say:

"It may seem hard and inequitable that the innocent party, who is himself the victim of his copartner's fraud, should be thus shut out from his legal remedy. But the legal connection of copartners is so peculiar and intimate that their rights and remedies in a court of law are necessarily limited by the relation which they hold to each other. They cannot sue each other. They cannot maintain an action against one of their copartners who is indebted to them in his individual capacity, nor against another firm of which one of their copartners is ³⁷¹ also a member. These and similar restrictions are the unavoidable results of the technical rules of law in their application to the mutual relations of copartners, and serve to show that, in a court of law, the rights of copartners cannot always have corresponding and adequate remedies. These must be often sought in a court of equity only": See, also, *Story on Partnership*, sec. 238; *Craig v. Hulschizer*, 34 N. J. L. 363; *Piercy v. Fynney*, L. R. 12 Eq. 69; *Miller v. Price*, 20 Wis. 117; 17 Am. & Eng. Ency. of Law, 1247, 1248.

In *Wells v. Mitchell*, 1 Ired. 484, 35 Am. Dec. 757, the question was directly presented whether the defrauded partner may maintain an action in his own name, and, principally upon the authority of *Jones v. Yates*, 9 Barn. & C. 532, it was held that he could not. The court, in deciding the case, use the following language, in which the distinction between tenants in common and partners is very clearly made: "If a tenant in common destroys the chattel, or, as some think, if he sell the whole, his fellow may have trover or trespass against him. But it is clear that between partners those actions do not lie; nor, indeed, any others at law. Everything rests in confidence between partners, and lies in account while the partnership continues; and, if one of them sell or take or destroy the joint effects, all that can be done is to charge to him the value in account. The interest of partners in particular chattels cannot be determined by the number of part-

ners or their shares of the profits; nor can one of them claim a division of specific articles. . . . If this action had, therefore, been brought against the fraudulent partner himself, it must have failed; and it might be on the clearest ground of right and justice. So, for the same reason, it must against the vendee of that partner. As respects the right to the thing sold, the assignee stands in the shoes of his assignor. Besides, it is impossible to say what damages the plaintiff ought to recover. In an action by one tenant in common, he has only to show his interest, which is determinate, as a quarter or a half; and, no plea in abatement being put in, the jury apportions the damages accordingly. But, as already mentioned, the interests of partners are complicated, and ³⁷² depend upon the result of all the accounts of the partnership. To take the accounts a court of law is unfit, and, indeed, incompetent; and, therefore, the jury cannot apportion the damages which, as a partner, the plaintiff ought to recover. As a court of law thus finds itself incapable of ascertaining the rights of the parties and doing justice between them, it ought not to assume the jurisdiction for any purpose, but leave the whole subject to that tribunal which can administer exact justice in the premises."

We think this reasoning peculiarly applicable to the present case. It is contended that the case of *Grimes v. Bowerman*, 92 Mich. 258, is an authority sustaining plaintiff's right. The case is clearly distinguishable. Grimes charged a conspiracy between Fleming and defendant antedating the formation of the copartnership, and counted, not only upon fraudulent acts of the copartner and defendant, but upon a malicious suit by defendant in which not only plaintiff's interest in the firm was seized, but his individual property as well. The court, by Mr. Justice McGrath, said: "We are of opinion that, under the peculiar facts of this case, plaintiff was entitled to maintain his action."

In the present case, the firm property alone was involved, and, if the sale was void, the firm, and not Reed alone, was entitled to the property. As has been seen, he might have taken possession, but it does not follow that he can recover in his own right, in an action at law, the full value of the goods. It may appear on an accounting that he has no interest in the property, and that the full value has been applied to the extinguishment of copartnership debts.

A plea of nonjoinder was not necessary, for, if Jacobs had joined, it would bring the case directly within the cases above

cited, and the action could not be maintained. The appropriate remedy is in equity.

Judgment reversed, and a new trial ordered.

The other justices concurred.

PARTNERSHIP—FRAUDULENT SALE BY ONE PARTNER—REMEDY.—If a partner makes a trust deed of the firm property to secure the payment of his individual debt, and the trustee obtains possession, the other partner has no remedy at law, and must resort to equity for redress: *Hoff v. Rogers*, 67 Miss. 208, 19 Am. St. Rep. 301. See, also, the note to *Williams v. Lewis*, 7 Am. St. Rep. 409.

SEAMANS v. TEMPLE COMPANY.

[105 MICHIGAN, 400.]

CORPORATIONS — FOREIGN — RIGHT TO SUE. — DOCTRINE OF STATE COMITY cannot be invoked in behalf of a foreign corporation seeking to recover upon a claim or contract expressly prohibited by law, or one which is clearly at variance with the settled policy of the State.

INSURANCE, FOREIGN—RIGHT TO SUE.—A foreign insurance corporation, prohibited by statute from issuing policies upon property within the state without express authority, and from doing business or maintaining actions therein without compliance with certain regulations and conditions, cannot, without complying with such requirements, maintain an action in that state on a contract of insurance on property situated therein, no matter whether such contract is made in that state or in the state of the domicile of the corporation.

Turner, Turner & Turner, and G. E. Sutherland, for the appellant.

Bunker & Carpenter, for the respondent.

401 **HOOKE**, J. The plaintiff is receiver of a mutual fire insurance company, organized and doing business at Milwaukee, under a statute of Wisconsin which authorizes such companies to do business in that state and elsewhere. This company has never complied with the statutes of Michigan by filing the prescribed statement and obtaining the requisite authority to do business here: *Howell's Statutes*, sec. 4331, et seq. It appears however, that it has **402** done business in most, if not all, of the states, their laws to the contrary notwithstanding; and, although its officers testify that it has had no agents, it is shown that prospective risks have been examined by persons called "inspectors," who ordinarily carried applications, and, as stated by a witness

for the plaintiff, "filled them out whenever he and the applicant could agree upon the question of taking insurance," and that "he had authority to take applications to submit to the office." The witness was asked if the company had any other agents than the inspectors, to which he answered: "They were not agents. They merely examined risks, suggested improvements, filled out and submitted applications, and recommended the application, if favorable, for us to write."

The application and premium note being signed by the applicant and received at the home office in Wisconsin, a policy would be forwarded by mail, and assessments would be demanded and paid in the same way.

That such inspectors were agents of the company, within the statute cited, is plain, and the whole scheme is a flagrant attempt to evade the provisions of the laws of the several states which are intended to restrict the insurance business. The testimony in this case shows that the defendant company succeeded a partnership named Ames & Frost, and that insurance upon the property now owned by the defendant was obtained in the method described. The record fails to show (or, if it does, we have overlooked it) whether the defendant's policy was given by way of renewal at the expiration of the Ames & Frost policy or upon a transfer of the business to the defendant. Perhaps it is not important. For some reason a new policy was issued, the application and so-called "note" being filled out at the company's office in Milwaukee, and sent to defendant by mail, who signed and returned the same by mail. It does not appear that any inspector took part in this particular transaction. A receiver, being appointed in Wisconsin, ⁴⁰³ took charge of the affairs of the insurance company, and made an assessment upon the members, and this action is brought for such assessment.

Counsel for plaintiff contend that the insurance company has not done business in this state, but that the contract is one made in Wisconsin, to be performed there, and that it is therefore valid, and, that being so, the plaintiff may sue and recover upon it in the courts of this state under the rule of comity between states. This rule applies to corporations as well as to natural persons: Howell's Statutes, sec. 8135. But the right of a foreign corporation to sue in our courts is limited: 1. By statute (Howell's Statutes, sec. 8136); and 2. By the general rule that the doctrine of state comity will not be applied in behalf of a foreign corporation seeking to recover upon a claim or con-

tract expressly prohibited by law, or one which is clearly at variance with the settled policy of the state: *Thompson v. Waters*, 25 Mich. 214; 12 Am. Rep. 243; *Christian Union v. Yount*, 101 U. S. 356. It is the policy of this state to limit the business of insurance to such corporations, domestic and foreign, as shall be authorized by the commissioner of insurance to do business, after compliance with certain regulations and conditions prescribed by law; and all fire insurance companies are expressly forbidden to transact any business of insurance within this state without the requisite authority. Howell's Statutes, section 4277, applies to domestic corporations, and prescribes what shall be "their authority to commence business and issue policies." Howell's Statutes, section 4331, applies to foreign corporations, and provides: "That it shall not be lawful for any person or persons to act within this state, as agent or otherwise, in prosecuting or receiving applications for insurance, or in any manner to aid in transacting the business of fire or marine insurance, for any company not incorporated in this state, without first procuring a certificate of authority," etc.

The section also provides: ⁴⁰⁴ "And no insurance company, or officer or agent or agents of any insurance company, unincorporated or incorporated in any other state, shall transact any business of insurance in this state, unless And upon the filing it shall be the duty of said secretary of state [insurance commissioner] to issue a certificate thereof, with authority to transact business," etc.

Howell's Statutes, section 4354, contains a still more pointed prohibition as to foreign companies, declaring it "unlawful for any person or persons, as agent, solicitor, surveyor, broker, or in any other capacity, to transact or to aid in any manner, directly or indirectly, in transacting or soliciting, within this state, business for any insurance company, or in any capacity to procure, or assist to procure, a fire or inland marine policy on property situated in this state," without procuring the certificate of authority before provided for. Subsequent sections provide a penalty, and a method of enforcing it. Section 4359 imposes a penalty of two hundred and fifty dollars upon any company which shall issue or permit to be issued upon any property in this state a policy of insurance without having the authority to do so, and provides that no such company shall thereafter be authorized to do business in this state until all such penalties shall be paid.

If it be conceded that the contract was made in Wisconsin, and that the premiums and loss, if any, are payable there, it is as much in contravention of the policy of this state as though it had been made and was to be performed here. It cannot be supposed that the statutes cited were intended merely to prevent the act of making the contract in this state. The object is to protect the citizens of this state against irresponsible companies, and to prevent insurance by unauthorized companies upon property in this state: *American Ins. Co. v. Stoy*, 41 Mich. 401; *Hartford Fire Ins. Co. v. Raymond*, 70 Mich. 501. The argument of counsel for plaintiff is substantially this: ⁴⁰⁵ "We know that the laws of Michigan are designed to prevent our insuring Michigan property, but we have done so in a way that does not contravene the letter of the Michigan statute. We have made our contract through the mail, and we have committed no violation of the Michigan statute, because we have done nothing upon Michigan soil. We have evaded your law, and obtained a contract which you have sought to prohibit, and now we ask you to enforce it for us under the doctrine of state comity."

Under such circumstances, the courts of the state are not open to the offending company, and the rule of state comity cannot be invoked in its behalf: See *Thompson v. Waters*, 25 Mich. 214; 12 Am. Rep. 243; *Christian Union v. Yount*, 101 U. S. 356.

Again, the statute (Howell's Statutes, sec. 8136) has application. These statutes prohibit all insurance companies, domestic as well as foreign, from issuing policies upon property in this state without express authority. This was an act "forbidden to be done by any corporation [domestic or foreign] without express authority by law," and no action can be maintained upon any contract arising out of it: *Seamans v. Zimmerman*, 91 Iowa, 363, and cases cited.

The judgment of the circuit court will be affirmed.

The other justices concurred.

IN THE CASE of *People's Mut. Ben. Soc. v. Lester*, 105 Mich. 716, it was decided, upon the authority of the principal case, that under a statute providing that when, by the laws of the state, any act is forbidden to be done by a corporation without express authority, and such act is done by a foreign corporation, it shall not be authorized to maintain an action founded upon such act or upon any liability or obligation, express or implied, arising out of, or made or entered into in consideration of, such act: Howell's Mich. Stat., sec. 8136, a foreign mutual benefit society, which has failed to comply with the law of the state, cannot maintain an action therein to recover from

its agent money collected by him on assessments made by it upon its members residing in that state.

INSURANCE—FOREIGN—RIGHT TO SUE.—A foreign insurance corporation that has not complied with the laws of this state respecting the transaction of its business here cannot maintain an action for premiums due on a policy of insurance upon property in this state, whether in or out of the state: *Cowan v. London Assur. Corp.*, 73 Miss. 321; post, p. 535. If a statute declares that no foreign insurance company shall, directly or indirectly, take any risks or transact any insurance business in this state until it has complied with the requirements of such statute, a contract insuring property in this state, made by such a corporation in the state of its creation, will not support an action in this state to recover an assessment made against the insured: *Rose v. Kimberly*, 89 Wis. 544; 46 Am. St. Rep. 855, and note.

ELLIOTT v. MARTIN.

[105 MICHIGAN, 506.]

INNKEEPERS—LIEN.—If one not a guest delivers an animal to a hotelkeeper under an express agreement for its board, the hotelkeeper has no innkeeper's lien for the keeping and care of the animal.

INNKEEPERS—LIEN.—If one not a guest and not the owner of an animal delivers it to a hotelkeeper under an express agreement for its board without authority from the owner, the hotelkeeper has no lien for the keeping and care of the horse, under a statute providing that whenever any person shall deliver to another any animal to be kept or cared for, the latter shall have a lien thereon for its keeping and care, and may retain possession thereof until such charges are paid.

J. T. McCurdy, for the appellant.

A. L. Chandler, for the respondent.

⁵⁰⁶ **HOOKE**R, J. The plaintiff, being the owner of a stallion, put him into the possession of one Wilkinson, a horse trainer, at the same time taking back a promise to pay five dollars per month until one hundred dollars should be paid to the plaintiff, which plaintiff testified was to pay for a half interest in the horse, which he agreed to sell him. The writing stated that one hundred-dollars was part payment for the horse, the title and right of possession to remain in the plaintiff until the sum should be fully paid. Wilkinson took the horse to the barn of the defendant, who was a hotelkeeper, and arranged for its board at one dollar and seventy-five cents per week, ⁵⁰⁷ Wilkinson to care for the horse. He was kept there two weeks, during which time Wilkinson was boarding at a Mr. Clark's. He was

not a guest of the defendant at any time, or, at all events, if it can be claimed that he was, the fact was disputed, and therefore a question for the jury. At the end of the two weeks he arranged with a Mr. Tucker to board the horse, and then went away. Tucker kept the horse until his feed gave out, and then took him to the defendant, and arranged to have him kept there for Wilkinson; the understanding being that the price should be seventy-five cents a day, and that one or both should write Wilkinson. Wilkinson did not return, and after some fourteen weeks the plaintiff found the horse at the defendant's barn, and, upon refusal to surrender him, replevied him. The defendant pleaded the general issue, and upon the trial claimed a lien for the keeping of the horse. The court directed a verdict for the defendant for the value of the keeping after the time that Mr. Tucker brought the horse there, but said no recovery should be permitted for the two weeks that he was there upon the first occasion. Error is assigned upon the charge, and the only question before us is, whether defendant had a valid lien upon the horse for the keeping.

Tucker was at no time a guest at the hotel. The defendant is not shown to have known the true condition of the title to the horse, or that he did not suppose him to belong to Wilkinson. But the horse was not brought there by a guest, and, indeed, was taken under an express agreement to board. This gave him no right to an innkeeper's lien. This question has been discussed in the recent case of *Taylor v. Downey*, 104 Mich. 532, 53 Am. St. Rep. 472, and need not be further considered here: See *Grinnell v. Cook*, 3 Hill, 485; 38 Am. Dec. 663, and cases cited.

It is claimed that a lien existed under Howell's Statutes, section 8399, which reads as follows: "Whenever any person shall deliver to any mechanic, ⁵⁰⁸ artisan, or tradesman any materials or articles for the purpose of constructing, in whole or in part, or completing any furniture, jewelry, implement, utensil, clothing, or other article of value, or shall deliver to any person any horse, mule, neat cattle, sheep, or swine to be kept or cared for, such mechanic, artisan, tradesman, or other person shall have a lien thereon for the just value of the labor and skill applied thereto by him, and for any materials which he may have furnished in the construction or completion thereof, and for the keeping and care of such animals, and may retain possession of the same until such charges are paid."

Under this statute, a lien would have attached if the horse had been taken to the defendant's barn for keeping by the plaintiff's direction. We think the evidence may have been sufficient to warrant the conclusion that plaintiff, being the owner of the legal title to the horse, authorized Wilkinson, the owner of an equitable half interest, to take the horse, for their mutual benefit, to keep and train, and that he thereby made him his agent, in the conduct of their mutual business, to the extent, at least, of getting the horse kept. But this was a question which should have been submitted to the jury, as the fact was not conclusively shown.

The judgment must be reversed, and a new trial ordered.

The other justices concurred.

INNKEEPERS' LIENS.—An innkeeper has no lien upon funds in his keeping when they were received from one who was never his guest: *Grinnell v. Cook*, 3 Hill, 485; 38 Am. Dec. 663, and note. The fact that goods in the possession of a guest at an inn belong to a third person does not prevent the innkeeper from having a lien thereon, provided he had no notice of such ownership: *Singer Mfg. Co. v. Miller*, 52 Minn. 516; 38 Am. St. Rep. 568, and note. See, also, the note to *Cook v. Kane*, 57 Am. Rep. 31, 32.

GIBBONS v. HECOX.

[105 MICHIGAN, 509.]

BANKS AND BANKINGS—LIENS.—A bank has a lien on all moneys, notes, and funds of a customer in its possession, for any indebtedness of such customer to the bank which is due and unpaid.

BANKS AND BANKING—LIENS—PRIORITY.—A note in the hands of a bank for collection is subject to a lien by the bank for the payment of a note owned by it and made by the payee of the first note, and which matures while the latter note is in its hands for collection. Such lien is superior to the rights of the assignee of the note left for collection, whose assignment is not made until after the maturity of the note owned by the bank.

J. Lewis and Fletcher & Wanty, for the appellant.

N. O. Griswold, for the respondents.

509 LONG, J. The complainant sets out in his bill:

"1. That he is receiver of the said City National Bank 510 of Greenville, which is a corporation organized under an act of Congress known as the 'National Bank Act' and acts amendatory thereof.

"2. That said bank, being insolvent, suspended payment on or

about the twenty-second day of June, 1893; that your orator was appointed as receiver thereof by the comptroller of the currency on or about the twenty-seventh day of June, 1893; that he qualified as such receiver, and took possession of the bank books, records, and assets of said bank, on or about the first day of July, 1893, and ever since has been, and still is, acting as such receiver.

"3. That among the assets of said bank which came into the possession of your orator, as such receiver, was a note of two thousand dollars made by the defendant Charles L. Hecox, under the name of C. Leander Hecox, of which note the following is a copy:

" '\$2,000.

New York, May 5, 1893.

" 'Three months after date, I promise to pay to the order of Stanwood Mfg. Co. two thousand dollars, at Mutual Bank; value received.

C. LEANDER HECOX.'

"That said note belonged to said bank, and has, ever since your orator was appointed receiver of said bank, been in his possession and under his control as such receiver; that said note was indorsed in blank by the payee, the Stanwood Manufacturing Company, before its delivery to the said City National Bank of Greenville; that no payment whatever has ever been made upon the same, and that the defendant Hecox, the maker of said note, was at the time your orator was appointed such receiver, and ever since has been, and still is, financially irresponsible.

"4. That on or about the twenty-third day of November, 1892, the defendant Charles L. Hecox left with the said bank for collection a note which then belonged to him, of which the following is a copy:

" '\$1,000.

Greenville, Michigan, September 27, 1892.

" 'One year after date, I promise to pay to the order of Charles L. Hecox, one thousand dollars, at the City National Bank of Greenville, Michigan; value received. Interest at 7 per cent. Due September 30, 1893. (Signed) R. F. SPRAGUE.'

"And the note so left for collection was in the custody of said bank at the time it suspended payment, and at ⁵¹¹ the time your orator was appointed its receiver as aforesaid; that the same remained in the custody of your orator, as such receiver, until long after the maturity of the note mentioned above in paragraph 3, and is still in his possession.

"5. That on or about the sixteenth day of April, 1894, and while said note so signed by Rufus F. Sprague was still in the

possession of your orator, as such receiver, the defendant Charles L. Hecox made an assignment thereof to the defendant Theodore I. Phelps; that on or about the twenty-fifth day of April, 1894, said Theodore I. Phelps began an action upon said note against the maker, Rufus F. Sprague, in the circuit court for the county of Montcalm, which action came on to be tried in said court on the twenty-seventh day of July, 1894; that your orator was required, by a subpoena duces tecum issued out of said court, to appear at the trial of said cause, and produce said note; that he did appear in answer to said subpoena, and, in obedience to the orders of the court, produced the said note to be used in evidence, whereupon, on the trial, with the permission of the judge presiding in said court, the defendant Charles L. Hecox indorsed the said note in the following form: 'Pay to T. I. Phelps or order. Charles L. Hecox.' That this was the first indorsement which had ever been made upon said note, which, until that time, had remained to the order of Charles L. Hecox.

"6. That on the twenty-seventh day of July, 1894, a judgment was rendered in the said action in favor of the said Theodore I. Phelps against the said Rufus F. Sprague on said note for the sum of \$1,128.30 and costs; that your orator, as the receiver of said bank, had a lien upon the said note signed by Rufus F. Sprague, which was at the time it was left with the City National Bank of Greenville for collection, and at the time the \$2,000 note which was held by said bank against Charles L. Hecox matured, the property of the said Charles L. Hecox, and that, as such receiver, he has a lien upon said judgment, or the money which may be collected upon the same by the said Theodore I. Phelps, or any other person; but the defendants deny that your orator has any lien or claim upon said note, or upon said judgment, or upon the moneys which may be collected on the same.

"7. To the end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereby prayed, and may answer this bill without ⁵¹² oath (their answers on oath being hereby waived), that your orator may be declared, as such receiver, to have a lien upon the said note signed by Rufus F. Sprague, and upon the judgment obtained thereon by the said Theodore I. Phelps, that the defendants may be decreed to account to your orator for said note and judgment, and anything which may have been or which may be collected thereon by either or any of the said defendants, and that your orator

may have such other and further relief as the nature of the case may require," etc.

The bill was demurred to as not stating a case for equitable relief, and dismissed in the court below.

It appears by the bill that the note of \$1,000 was in the possession of the bank, and not assigned by Hecox to defendant Phelps, until after the \$2,000 note became due, and that then Hecox was financially irresponsible. The only question raised is whether, under the circumstances, the bank had a lien on the \$1,000 note belonging at that time to Hecox, by reason of his indebtedness to the bank on the \$2,000 note. The claims run between the same parties, and are capable of being liquidated by calculation.

It is a general rule that the lien of the bank does not attach until some indebtedness is actually in existence, and matured. Thus, a bank holding a note of a depositor has no right of set-off, and no valid lien, before the note matures, so that it has been held that if, in the interval before the maturity, the depositor makes an assignment of his funds without the knowledge of the bank, but otherwise legal, the amount of his balance will pass to the assignee: *Giles v. Perkins*, 9 East, 12; 1 *Morse on Banks and Banking*, sec. 329. In Illinois and Missouri, it is held that a bank has no lien on the funds of a depositor, to apply them on a debt not yet due, and cannot retain them against a check-holder: *Bank v. Ritzinger*, 20 Ill. App. 29; *Commercial Nat. Bank v. Proctor*, 98 Ill. 558; *Zelle v. Institution*, 4 Mo. App. 401. This rule, however, is at strict law, for in equity it seems that where there is danger of insolvency the bank would be allowed to retain enough of the ⁵¹³ deposit to meet the note when due, though, it is said, in law the debt in futuro could not be set off against a debt in praesenti. The general rule derived from the cases is, that the bank has a lien on all moneys, notes, and funds of a customer in its possession, for any indebtedness of the customer to the bank which is due and unpaid. The reason given for allowing the lien is, that any credit which a bank gives by discounting notes or allowing an overdraft to be made is given on the faith that money or securities sufficient to pay the debt will come into the possession of the bank in the due course of future transactions. In *In re Farnsworth*, 5 Biss. 223, Judge Blodgett, of the United States circuit court of Illinois, held that a bank holding a customer's demand note has a lien upon the proceeds of drafts delivered to it for collection after the giving of the note,

though collected after the filing of petition in bankruptcy, and can apply such proceeds upon the note. In *Muench v. Bank*, 11 Mo. App. 144, the court say: "The general lien of bankers is part of the law merchant. That bankers have a lien on all money and funds of a depositor in their possession for the balance of the general account is undisputed. A banker's lien does not arise on securities deposited with him for a special purpose; otherwise we have no doubt that when a discount has been made by the bank, and the note has matured, so as to create an indebtedness from the depositor to the bank, all funds of the depositor which the bank has at the date of the maturity of the discounted note, or which it afterward acquires in the course of business with him, may be applied to the discharge of his indebtedness to the bank; and this is true not only of the general deposit of the customer, but the rule applies to any commercial paper belonging to the depositor in his own right, and placed by him with the bank for collection."

The bill sets out sufficient grounds for equitable relief, and the demurrer should have been overruled.

The decree of the court below will be reversed, and the cause remanded. Defendants will have twenty days after ⁵¹⁴ notice of the remittitur being filed in the circuit court to answer the bill, if they so desire, and, in default, a decree will be entered there in accordance with the prayer of the bill. Complainant will recover costs of this court.

The other justices concurred.

BANKERS' LIENS.—A banker has no lien upon funds in his hands for the indebtedness of a customer in the absence of a contract for that purpose, either express or implied: *Continental Nat. Bank v. Weems*, 69 Tex. 489; 5 Am. St. Rep. 85. A bank has no lien upon a customer's deposit for his indebtedness to the bank not yet due: *Jordan v. National Shoe etc. Bank*, 74 N. Y. 467; 30 Am. Rep. 319. The doctrine of the principal case is supported by the note to *Masonic Sav. Bank v. Bangs*, 4 Am. St. Rep. 202, where the authorities on the subject are collected.

MUNZER v. STERN.

[105 MICHIGAN, 52.]

SALES—RESCISSION FOR FRAUD—COMPROMISE—TENDER.—If the buyer of goods purchases them with intent to defraud the seller, and then, with the same intent, enters into a compromise agreement with the latter, by which he agrees to return part of the goods and pay for the remainder at a future day, the seller may, upon discovery of the fraud in the compromise before such day, immediately rescind the agreement, and, by replevin, retake the goods remaining in the hands of the buyer, without tendering or redelivering to him the goods received under the compromise, although, by its terms, the seller has waived the right to replevin the goods on the ground of fraud in their purchase.

EVIDENCE IS NOT ADMISSIBLE to rebut a statement made by counsel which there is no evidence to sustain.

EVIDENCE OF CONVERSATIONS OCCURRING IN DEFENDANT'S ABSENCE are not admissible against him, although they tend to contradict statements made by his counsel in his opening statement to the jury.

Howard & Roos and Bondeman & Adams, for the appellant.

Osborn, Mills & Master, for the respondents.

⁵²⁴ GRANT, J. A firm by the name of Livingston & Block was engaged in the dry goods and retail cloak business in the city of Kalamazoo. In the summer of 1893 plaintiffs sold to this firm cloaks of the value of \$2,728.50, shipping the same in July or August. About August 29th the plaintiffs learned that Livingston & Block had purchased a much larger amount of goods than formerly, and that they had been shipping goods away. Munzer thereupon went to Kalamazoo, interviewed Livingston & Block, at first tried to obtain payment, although the purchase price was not due until January following, by informing Livingston & Block that they were in need of money, and offering a large discount for cash payment, and, failing in this, charged them with shipping away goods, and demanded a return of at least a part of the goods which plaintiffs had sold to them. Livingston & Block admitted to Munzer that they had shipped away goods, but none purchased of the plaintiffs, and there is no evidence ⁵²⁵ that at that time they had done so. Livingston & Block refused to surrender any of the goods, and Munzer returned to Chicago, leaving the matter in charge of plaintiffs' attorneys, Osborn & Mills. Mr. Mills shortly thereafter interviewed Livingston & Block, and testified that he informed them of plaintiffs' claim that they had purchased more goods than usual, and had shipped goods away, and that Mr. Block denied having

shipped away any goods. At the second interview Mr. Mills informed Livingston & Block that he was instructed to replevin the goods, and should do so at once unless a compromise was effected, whereupon a proposition was made, which was submitted to plaintiffs by their attorneys, assented to by them, and on September 2, 1893, incorporated into the following contract:

"Whereas, R. Munzer & Company, of Chicago, Illinois, has heretofore sold and shipped to Livingston & Block, of Kalamazoo, Michigan, two bills of cloaks, one amounting to \$71 and one to \$2,657.50, said bills being dated December 1, 1893, due in 30 days, with 7 per cent discount if paid in 10 days and 6 per cent discount if paid in 30 days; and

"Whereas, a misunderstanding has arisen between the parties in regard to said bills of cloaks; and

"Whereas, it is desired by all parties to settle said differences amicably:

"Now, therefore, it is hereby agreed between the parties that said Livingston & Block shall return to said R. Munzer & Co. \$1,600 worth of said cloaks, and that the same shall be received by R. Munzer & Co. in payment of said bills to that amount, and that said Livingston & Block shall keep the balance of said cloaks, and shall pay for the same upon the terms of the original sale; that is to say, they shall pay for the same on January 1, 1894, and by so doing said Livingston & Block have a discount of 6 per cent, and, if said Livingston & Block so desire, they may pay for said cloaks on December 10, 1893, less a discount of 7 per cent. The cloaks that are to be reshipped to R. Munzer & Co. are to be shipped this day. And in consideration of the foregoing said R. Munzer & Co. are not to bother or disturb said Livingston & Block in the possession of the cloaks retained by them, or to bring ⁵²⁶ suits for the recovery thereof, until the bill for the same becomes due, as herein agreed."

Livingston & Block reshipped the goods according to this contract. On September 18th Livingston & Block executed a chattel mortgage on the entire stock to the defendant, Stern, as trustee, to secure certain alleged creditors, most of whom were relatives of either Livingston or Block. Between that date and the close of the month fifteen replevin suits were brought against Stern by the creditors of Livingston & Block to recover goods claimed to have been purchased fraudulently. Plaintiffs also brought this suit of replevin, and recovered \$849 worth of their

goods out of \$1,128.50. Verdict and judgment were for the plaintiffs.

1. The defendant requested the court to direct a verdict for the defendant, for the reason that, under the evidence, the plaintiffs were fully advised of the circumstances and conditions surrounding the case, and entered into the compromise agreement with full knowledge of the facts. The court instructed the jury that the plaintiffs by this agreement waived every right to bring suit in replevin because of any claim on their part that the goods were fraudulently purchased, and that they could not repudiate the agreement unless they had shown that the plaintiffs or their agents were misled into making such agreement by reason of some fraud practiced by Livingston & Block, and that they must show that some active fraud was perpetrated to induce them to enter into said agreement. We think the instruction was correct. If the jury believed the evidence on the part of the plaintiffs—which, of course, they did—they were justified in reaching the conclusion that this compromise agreement was not entered into in good faith by Livingston & Block; that they were then hopelessly insolvent; that they had purchased, at a time when business was depressed, nearly five times the usual amount of their purchases, that they did this without intending to pay for them; that they themselves, without the knowledge of their clerks, ⁵²⁷ secretly packed and shipped a large amount of goods to fictitious consignees; and that they sold goods at cost less a discount of from ten to eighteen per cent, and that some were shipped in the original packages. There was other evidence upon this point, which it is unnecessary to state. These things were done within a few days after the receipt of the goods. Plaintiffs had the right to assume that this agreement was made with a view to the continuance of their business, whereas the evidence on plaintiffs' part tends strongly to show that they had no such intention. There was evidence to sustain the finding not only that they purchased these goods and others with intent to defraud, but also that they entered into this agreement with intent to retain the goods mentioned therein for the like purpose. In such case, the plaintiffs were justified in rescinding the contract and retaking their goods.

2. It was not necessary for the plaintiffs to offer to return the goods obtained by the agreement before bringing replevin for the remainder. Such action would be an idle ceremony, not re-

quired by the law. Neither does the law require a party to tender back or surrender that to which he is entitled. Livingston & Block had paid nothing. Their purchase was fraudulent. Both the original purchase and the compromise agreement were tainted with fraud. By retaking the remainder of the goods, the plaintiffs placed themselves in the situation in which they were before the perpetration of the fraud, and this was their clear legal right. The general rule requiring the surrender, or offer to surrender, what has been received, upon the rescission of a contract voidable for fraud, is not one of universal application, and has many exceptions. It does not require unreasonable or impossible things to be done: *Sloane v. Shiffer*, 156 Pa. St. 59, 65; *Insurance Co. v. Hull*, 51 Ohio St. 270; 46 Am. St. Rep. 571; *Pearse v. Pettis*, 47 Barb. 276; *Smith v. Salomon*, 7 Daly, 216; *Montgomery v. Pickering*, 116 Mass. 227. The rule has no application to the present case.

528 3. The only remaining question arises upon the admissibility of evidence. Mr. Mills was permitted to testify to a conversation between himself, Mr. Munzer, and one Einstein, who represented a New York firm who had sold goods to Livingston & Block. Livingston & Block were not present, and, among other things, Mr. Mills testified to a statement made by Einstein of a conversation he had with a gentleman, whose name was not given, upon a street-car in New York, that he had sold Livingston & Block a large bill of goods, and that Mr. Einstein further said that he ascertained that they had purchased several thousand dollars more than they had gotten of him. It is attempted to support its admission upon the opening statement to the jury of counsel for defendant that they would show that Mr. Munzer was the sole cause of all the difficulty in which Livingston & Block were involved, and that he had written to various creditors for the express purpose of breaking up their business. It was furthermore insisted that this conversation was substantially told to Livingston & Block by Mr. Mills. The admission of the testimony cannot be justified under any rule of evidence. The opening statement of counsel did not make it competent. It was hearsay. Testimony is not admissible to rebut a statement made by counsel which there is no evidence to sustain. We do not find that the most damaging statements in this conversation were repeated to Livingston & Block by Mr. Mills. The record states that the defendant introduced evidence tending to contro-

vert that given by the plaintiffs. We do not, therefore, feel at liberty to hold that this was error without prejudice.

For this reason judgment must be reversed, and a new trial ordered.

McGrath, C. J., Long and Montgomery, JJ., concurred.

Hooker, J., did not sit.

SALES—RESCISSION BY VENDOR FOR FRAUD.—A sale of goods tainted with fraud on the part of the vendee is voidable by the vendor as to the vendee, and as to those claiming under him with notice: *Rowley v. Bigelow*, 12 Pick. 307; 23 Am. Dec. 607; *Hoffman v. Noble*, 6 Met. 68; 39 Am. Dec. 711, and note. A vendor may rescind a sale effected by fraud on the part of the vendee, and maintain trover against such vendee for the goods without a demand: *Thurston v. Blanchard*, 22 Pick. 18; 33 Am. Dec. 700, and extended note. A fraudulent sale may be rescinded by the seller, but such rescission must be made before other rights acquired in good faith have intervened: *Union Stock Yard etc. Co. v. Mallory*, 157 Ill. 554; 48 Am. St. Rep. 341. See, also, the extended note to *Reid v. Cowduroy*, 18 Am. St. Rep. 364.

SALES—RESCISSION FOR FRAUD—PUTTING IN STATU QUO. A vendee who seeks to have a contract of sale set aside for fraud must offer to return the purchase money in order to put the purchaser in statu quo: *Cowan v. Fairbrother*, 118 N. C. 406; 54 Am. St. Rep. 733, and note.

GRAND RAPIDS v. BRAUDY.

[105 MICHIGAN, 670.]

TRIAL—ACQUITTAL.—The refusal of a court to proceed to trial of an appeal from a conviction under an ordinance and the quashing of the proceedings on the ground that the ordinance is invalid, does not amount to an acquittal, as there has been no trial on the merits in such court.

MANDAMUS TO COMPEL TRIAL OF APPEAL—CERTIORARI.—Mandamus is the more appropriate remedy by which to compel a court to proceed to the trial of an appeal, but the same result may be reached by certiorari.

CONSTITUTIONAL LAW—ORDINANCES.—Courts cannot interfere with legislative discretion, and are slow to declare ordinances invalid because unreasonable, when the power to legislate upon the subject has been conferred upon the common council of a city.

POLICE POWER—RIGHT TO REGULATE PAWNBROKERS.—The business of pawnbroker, junk dealer, or dealer in second-hand goods and merchandise, is expressly within the control of the police power of the state and is properly subject to reasonable rules and regulations, and a very clear abuse of this power must be shown in order to justify the court in declaring the regulations unreasonable and void.

PAWNBROKERS—RIGHT TO REGULATE.—The business of pawnbrokers, junk dealers, and dealers in secondhand goods is legitimate, but no inalienable right exists to carry it on without complying with provisions and restrictions required by the legislative power of the state.

PAWNBROKERS.—ORDINANCES REGULATING pawnbrokers, junk dealers, and dealers in secondhand goods and merchandise by requiring them to pay a reasonable license fee and give bond conditioned to comply with such ordinances, and prohibiting them from purchasing or taking any goods, articles, or things offered by any person under sixteen years of age, or by any intoxicated person or habitual drunkard, and reserving the power in the city council to revoke such license at will, are reasonable and valid.

H. J. Felker and H. Joslin, for the appellant.

F. A. Rodgers, for the respondent.

⁶⁷¹ GRANT, J. The defendant was convicted of engaging in the business of junk dealer in the city of Grand Rapids without having procured a license therefor from the common council, contrary to the provisions of "An ordinance relative to licensing and regulating pawnbrokers, junk dealers, and dealers in secondhand goods." The trial and conviction were had in the police court of the city. He thereupon appealed the case to the superior court of the city. The superior court, upon motion of the defendant, quashed the complaint and warrant upon the ground that the provisions of the ordinance, particularly those ⁶⁷² of sections 7, 8, and 11, were unreasonable, and in restraint of trade. The entire ordinance is as follows:

"Section 1. No person shall engage in the business of pawnbroker, junk dealer, or dealer in secondhand goods and merchandise, except furniture, in the city of Grand Rapids, without a license therefor from the common council of said city.

"Sec. 2. Every person, and all persons, desiring to engage in the business of pawnbrokerage or junk dealing in said city of Grand Rapids, or in the business of dealing in secondhand goods and merchandise, except furniture, in said city, shall make application in writing to said common council, specifying (as near as may be) the street and building in which he, she, or they intend to carry on said business, signed by at least twelve freeholders, citizens of said city, of good reputation, certifying to the good reputation, fair fame, and moral character of the applicant or applicants.

"Sec. 3. After such application shall be granted, and before a license shall be issued thereon, pawnbrokers shall execute a bond to the city of Grand Rapids in the penal sum of five thou-

sand dollars, and junk dealers and other persons included in this ordinance shall execute a bond to said city in the penal sum of two thousand dollars, with one or more sufficient securities, to be approved by the mayor, conditioned that he, she, or they will in all respects comply with and faithfully observe all the requirements of the charter and ordinances of the city of Grand Rapids relative to pawnbrokers, junk dealers, and dealers in secondhand goods and merchandise, except furniture. And the said pawnbrokers shall also pay into the treasury of said city the sum of fifty dollars per annum, and the junk dealers and secondhand dealers shall pay into the treasury of said city the sum of twenty-five dollars per annum, as a license fee, before such license shall be issued.

"Sec. 4. Whenever said common council shall have determined to grant a license to such applicant or applicants, and upon the presental to the clerk of said city of the bond hereinbefore provided for, and the receipt of the treasurer of said city for the license fee, the said clerk shall issue to the said person or persons a license under the seal of the city, in which it shall be stated that the same is revocable at any time by the common council of said city for such time as the said common council shall have prescribed therefor; but before receiving such ⁶⁷³ license such applicant or applicants shall pay to said clerk, as a fee for issuing and recording the same, the sum of one dollar, and, before the said clerk shall issue any such license, he shall record the same in a book to be provided for such purpose.

"Sec. 5. No person or persons, licensed as a pawnbroker, a junk dealer, or as a dealer in secondhand goods or merchandise, except furniture, shall, by virtue of one license, keep more than one house, shop, or place for such business of pawnbroker, junk dealer, or dealer in secondhand goods, except furniture; provided, however, that such person or persons may remove from one place of business to another in said city by giving immediate written notice of such removal to the chief of police of said city, and of the building (as near as may be), and of the street to which removal is made.

"Sec. 6. Every person or firm licensed under this ordinance shall cause his or her name or their firm name (as the case may be), with the words 'licensed pawnbroker,' 'licensed junk dealer,' or 'licensed dealer in secondhand goods and merchandise' (as the case may be), to be printed or painted, in large legible characters, and placed over the outside or door or entrance of his, her, or their shop, office, or place of business.

"Sec. 7. Every person, or firm of persons, licensed to carry on either of said businesses in said city, shall keep a book, in which shall be legibly written in ink, at the time of the purchase or taking of any goods, article, or thing, an accurate account and description, in the English language, of the goods, article, or other thing purchased or pledged, the amount of money paid therefor, the time of purchasing or taking the same, the name and residence of the person selling or pledging such goods, article, or thing, and a description of the person or persons (as near as may be) from whom the same were purchased or taken. And, when any watch is purchased or taken, the person or firm of persons so licensed shall also write in such book the name of the maker thereof and its number; and when jewelry or gold or silver articles of any kind are purchased or taken, he, she, or they shall note, in said book, all letters or marks described, engraved, or cut thereon.

"Sec. 8. That it shall be the duty of every person or firm of persons aforesaid to make out and deliver to the ⁶⁷⁴ chief of police of said city, every day before the hour of 12 o'clock noon, a legible and correct copy from the book required in section 7 hereof, giving an accurate account and description of each and all of the articles and things purchased or taken during the preceding day, the price paid therefor, the precise time of purchase or taking, the name and residence of the person or persons from whom such purchases were made, and a description of the person or persons (as near as may be) from whom purchased or taken.

"Sec. 9. The book provided for in section 7 of this ordinance shall at all reasonable times be open to the inspection of the mayor of said city, or of the chief of police, or any member of the police force thereunto authorized by the said chief of police.

"Sec. 10. It shall be the duty of every person or firm of persons, licensed as aforesaid, upon his, her, or them (as the case may be) receiving information or learning that any goods, articles, or thing left with him, her, or his or her firm has been lost or stolen, to notify in writing the chief of police of the fact, giving the name of the person from whom he, she, or they received the same, the time when it was received, and of any other facts connected therewith that may tend to the discovery or conviction of the thief or thieves.

"Sec. 11. No person or firm of persons, licensed as aforesaid, shall purchase or take any goods, articles, or thing offered him,

her, or them from any person under the age of sixteen years, or from any person who is at the time intoxicated, or from any person who is an habitual drunkard; nor, knowingly, take or purchase from any servant or apprentice any goods, article, or thing, without first ascertaining that such article or thing is the property of the person or persons offering to sell or pledge the same.

"Sec. 12. Any person or persons who shall violate any of the provisions or requirements of this ordinance, on conviction thereof, shall be punished by a fine of not less than five dollars nor more than fifty dollars, and costs of prosecution, or by imprisonment at hard labor in the common jail of the county of Kent, or in any penitentiary, jail, workhouse, house of correction, or almshouse of said city, in the discretion of the court or magistrate before whom the conviction may be had, for a period of not less than five days nor more than ninety days. And ⁶⁷⁵ in case such court or magistrate shall only impose a fine and costs, the offender may be sentenced to be imprisoned at hard labor in the common jail of the county of Kent, or in any penitentiary, jail, workhouse, house of correction, or almshouse of said city, until the payment of such fine and costs, for a period of not less than five days nor more than ninety days."

1. It is first insisted that this is a criminal case, that the action of the court amounted to an acquittal, and that the city is therefore remediless. This position cannot be maintained. There was no trial upon the merits. The court simply refused to proceed to trial, and quashed the proceedings, because it held the ordinance invalid. This court has repeatedly issued the writ of mandamus to compel circuit and recorder's courts to proceed with the trial of criminal cases under similar circumstances: *People v. Swift*, 59 Mich. 529; *Sadler v. Sheahan*, 92 Mich. 630. See, also, *Ware v. Branch Circuit Judge*, 75 Mich. 488. While the writ of mandamus may be the more appropriate remedy, the same result is reached by the writ of certiorari, which has been held to be the proper remedy to review convictions for violations of city ordinances: *Swift v. Wayne Circuit Judges*, 64 Mich. 487; *People v. White*, 53 Mich. 537.

2. It is next insisted that the ordinance is so unreasonable that it should be declared void. The charter expressly confers upon the common council the power to license and regulate pawnbrokers, junk dealers, and dealers in secondhand goods. Courts cannot interfere with legislative discretion, and are slow to declare ordinances invalid because unreasonable, when the power

to legislate upon the subject has been conferred upon the common council. The council's discretion, and not the court's, must control. In such matters the city authorities are usually better judges than the courts: *Fisher v. Harrisburg*, 2 Grant Cas. 291; *Commonwealth v. Robertson*, 5 Cush. 438; *St. Louis v. Weber*, 44 Mo. 547; 1 *Dillon on Municipal Corporations*, sec. 328. "Regard must be had for all the circumstances of the particular city, the objects sought to be attained, and the necessity which exists for the ordinance": 1 *Dillon on Municipal Corporations*, sec. 327. It is common ⁶⁷⁶ knowledge that thieves resort to these places to dispose of their stolen goods, and that unscrupulous, and oftentimes criminal, persons are engaged in the business. The business, therefore, comes expressly within the control of the police power of the state, and is properly subject to reasonable rules and regulations. A very clear abuse of this power must be shown in order to justify the court in declaring the regulations to be unreasonable and void. While this business is legitimate, in the absence of any statute law controlling it, no inalienable right exists to carry it on without complying with those provisions and restrictions which the legislative power of the state has seen fit to require.

This brings us to the provisions complained of. Neither the license fee of twenty-five dollars or fifty dollars nor the bond is unreasonable. This was decided in *Kitson v. Ann Arbor*, 26 Mich. 325. The license fee in that case was one hundred dollars for keeping a saloon or restaurant, and the bond two thousand dollars. The defense was, that if it assumed to license the sale of intoxicating liquors, the ordinance was void under the constitution, which prohibited their sale; and, if it involved the license of a restaurant, it was void, as unreasonable, and in restraint of trade. The ordinance did not provide for or authorize the sale of intoxicating liquors. It was insisted that a saloon was necessarily a place for the sale of such liquors. The court held otherwise, and in illustrating the argument said: "A pawnbroker might as well attempt to do business without a license by confining his dealings to stolen goods, or an auctioneer by making no legitimate sales, and holding none but Peter Funk auctions."

There is nothing unreasonable in requiring such persons to keep a record of their purchases, and to furnish a statement thereof to the police department. This provision is no more unreasonable, and certainly is as essential for the protection of

society, as the law regulating druggists, which requires them to record in a book the names of all persons applying for intoxicating liquors, the date ⁶⁷⁷ of sale, the amount and kind of liquor sold, and the purpose for which the same was to be applied: Laws 1887, Act No. 313, sec. 3.

The statutes of several states provide that, in order to obtain a license for the sale of intoxicating liquors, the application must be indorsed by a certain number of freeholders, certifying to the good character and reputation of the applicant. This is upon the theory that the state has the right to require that such business shall be carried on by reputable men, and not by the disreputable, vicious, and criminal classes. This provision has been universally sustained by the courts. The same principle applies to junk dealers and pawnbrokers, and we find nothing unreasonable in the requirement that the application to enter upon the business shall be indorsed by twelve freeholders.

We cannot hold unreasonable that provision prohibiting the licensee from purchasing from boys, intoxicated persons, or habitual drunkards. The reason for this provision is apparent, for it is well known that there are many young thieves in the large cities, who steal property, and resort to these places, ready to sell it for a mere nominal sum. It is also well known that habitual drunkards will use the same means to obtain money to satisfy their appetites for intoxicating liquors.

The only other provision we need to notice is that giving the power to revoke the license arbitrarily. It seems to be conceded by counsel for the city that the common council does not possess the right to revoke the license without cause shown. He says: "It must be presumed that this right would be exercised only in cases of violation of the conditions of the ordinance, and after an investigation of such a charge; otherwise an action of the common council in assuming to so revoke arbitrarily could be restrained from doing injustice to the licensee."

No express power to revoke is conferred upon the council. In the investigation we have been able to make we ⁶⁷⁸ find but few authorities bearing upon the subject, and counsel in their briefs have cited none. We find two authorities sustaining this power: *Commonwealth v. Kinsley*, 133 Mass. 579; *Martin v. State*, 23 Neb. 371. But in both these cases the express power to revoke was conferred upon the city by its charter. If no reservation of the right to revoke were reserved in the license, there would be little difficulty in reaching a conclusion. Has the common

council the right to insist, as a condition precedent to the issue of the license, that the applicant shall agree that his license may be revoked at the will of the council? is the question presented. The necessity of a rigid control over this business in our large cities is clear. Convictions are difficult, though the public authorities may be well convinced that stolen goods are bought and sold at these places. The business is not necessary to the welfare of society or the public. The common council, with the knowledge of all the facts before them to a greater extent than courts can possibly have, have determined that it is well, in their judgment, to require these conditions. While the exercise of any arbitrary power may seem harsh, still we are of the opinion that this requirement is not so unreasonable as to require the courts to declare it void. Counsel for defendant cites and relies upon *Chaddock v. Day*, 75 Mich. 527; 13 Am. St. Rep. 468; *Hughes v. Recorder's Court*, 75 Mich. 574; 13 Am. St. Rep. 475; *In re Frazee*, 63 Mich. 396; 6 Am. St. Rep. 310; *People v. Armstrong*, 73 Mich. 288; 16 Am. St. Rep. 578. An examination of these cases will show that in neither their facts nor principles are they like the case at bar. It is unnecessary for us to note the distinctions.

We hold the ordinance valid, and the order of the court below is reversed, and the court directed to proceed with the trial of the cause.

The other justices concurred.

MANDAMUS MAY ISSUE TO COMPEL JUDICIAL ACTION: Note to *State v. Young*, 34 Am. St. Rep. 48. This question is fully discussed in the extended note to *Dane v. Derby*, 89 Am. Dec. 739.

MUNICIPAL CORPORATIONS—ORDINANCES.—COURTS DO NOT INQUIRE INTO THE REASONABLENESS of city ordinances when power to pass them exists. The inquiry must be confined to the existence of such power: *Skaggs v. Martinsville*, 140 Ind. 476; 49 Am. St. Rep. 209, and note; but they may inquire into any alleged abuse of the powers of cities and towns in the enactment of ordinances and restrain them when they transcend such powers; *State v. Taft*, 118 N. C. 1190; 54 Am. St. Rep. 768.

MUNICIPAL CORPORATIONS—ORDINANCES REGULATING SALE OF SECONDHAND CLOTHING.—A town which has the power to abate nuisances and preserve the public health may, by ordinance, restrict the sale of secondhand clothing by compelling fumigation and disinfection or requiring proper assurances that it has not been obtained from infected places: *State v. Taft*, 118 N. C. 1190; 54 Am. St. Rep. 768, and note.

MUNICIPAL CORPORATIONS—PAWNBROKER, RIGHT TO REGULATE.—Under a charter giving a city power to license, regu-

late, tax, or suppress hawkers, peddlers, and pawnbrokers, no one has the right to follow such an occupation within the limits of such city, without first obtaining a license. The business is a privilege, not a right, and he who avails himself of it and derives its benefits, must bear its burdens by conforming to the law in force regulating the occupation; *St. Joseph v. Levin*, 128 Mo. 588; 49 Am. St. Rep. 577.

CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI.

RICHARDSON v. FOSTER.

[73 MISSISSIPPI, 12.]

NEGOTIABLE INSTRUMENTS—CHARACTER OF INDORSEMENT—PAROL EVIDENCE.—If the name of a person, and nothing more, appears upon the back of a promissory note by irregular indorsement, parol evidence is admissible to show the character in which he signed.

NEGOTIABLE INSTRUMENTS—INDORSEMENT BEFORE DELIVERY.—If a promissory note is indorsed before its delivery, the liability of the indorser is that of an original promisor and co-maker.

NEGOTIABLE INSTRUMENTS—INDORSEMENT BEFORE DELIVERY—INCONSISTENT WORDS ABOVE INDORSEMENT—PAROL EVIDENCE.—If one member of a firm signs a promissory note as his individually but indorses it with his firm name, parol evidence is admissible to show that the indorsement was contemporaneous with the execution of the note, and made to bind the firm as co-promisors, although the words, "We hereby waive notice, demand, and protest, and all other formalities," appear above the firm name, because, if the note was indorsed before delivery, these words are inconsistent with the obligation of the firm as co-promisors, and will not be allowed to control or vary it.

APPEAL—WHEN COMPETENCY OF EVIDENCE WILL NOT BE REVIEWED.—If the complaint on a promissory note has a count for money had and received, and certain evidence is admissible under that count, but not under a count on the note, the competency of the evidence, under the count on the note, will not be considered upon appeal, where the defendant, upon the plaintiff's failure to recover upon the count for money had and received, took no steps to have the evidence excluded from the jury.

NEW TRIAL—INTOXICATION OF JUROR.—If a party proceeds in a trial after knowing that one of the jurors has been under the influence of intoxicants, thus taking a chance of securing a verdict in his favor, this precludes him from making the irregularity the ground of a motion for a new trial. It is not material that the court also knew the fact, and punished the juror.

J. H. Wynne and Nugent & McWillie, for the appellant.

Yerger & Percy and N. B. Scott, for the appellee.

¹⁷ COOPER, C. J. Foster brought this suit against W. E. Ringo individually, and against W. E. Ringo and W. P. Richardson, late partners in trade under their firm name of W. E. Ringo & Co., upon the following note:

"\$3,800. Mound Landing, Miss., April 3, 1893.

"On January 1 after date I promise to pay to the order of B. P. Foster thirty-eight hundred dollars, value received, with interest at the rate of eight per cent per annum from maturity until paid.

(Signed) W. E. RINGO."

Indorsed on back:

"We hereby waive notice, demand, protest and all other formalities.

(Signed) W. E. RINGO & CO."

The declaration contains three counts. In the first, all parties are sued as makers. In the second, Ringo is sued as maker, and Ringo & Co. as indorsers. The third is a common count for money lent to the defendants or paid out and expended for their benefit.

¹⁸ The defendant Ringo made no defense, and a judgment by default was taken against him, from which no appeal is prosecuted. The appellant, Richardson, pleaded, under oath, that the name of the firm was not signed to the note as maker or indorser thereof by authority of said firm, and that the same was not the signature of said firm, and, to the third count, he pleaded non-assumpsit. The said defendant further pleaded specially: 1. That the name of Ringo & Co. was written on the back of said note as surety or accommodation indorser, and that, in August, 1894, the plaintiff, in consideration of security given him by Ringo, individually, extended the time for the payment of said note until November, 1894, without the consent of this defendant; and 2. That in consideration of security given to the plaintiff by Ringo, in August, 1894, the plaintiff agreed not to make any claim against the firm of Ringo & Co. on their indorsement on said note, on all of which pleas issue was joined.

On the trial, the plaintiff read in evidence the instrument sued on, and was then sworn as a witness. He was proceeding to state the circumstances under which the note was given, and that the firm name was indorsed on the back thereof as copromisors with Ringo, and contemporaneously with his signing, that, in

truth, the sum named in the note was loaned to said firm, and on its credit, and not to Ringo, whose name is signed to the note, when the defendant Richardson objected to the competency of any oral testimony, on the ground that its effect would be to contradict the written contract of the parties. This objection was by the court overruled, and the testimony admitted, and this ruling gives rise to the principal assignment of error.

Counsel for appellant concede that where the name of one, and nothing more, appears upon the back of an instrument by irregular indorsement, parol evidence is admissible to show the character in which he signed, as has been frequently decided by this court: *Thomas v. Jennings*, 5 Smedes & M. 627; ¹⁹ *Jennings v. Thomas*, 13 Smedes & M. 617; *Polkinghorne v. Hendricks*, 61 Miss. 366; *Holmes v. Preston*, 70 Miss. 152. But it is contended by counsel that parol evidence is admissible under such circumstances, because only of ambiguity, and it is said that the rule cannot apply here, because above the name of Ringo & Co. are written the words, "We hereby waive notice, demand, and protest, and all other formalities," which words counsel contends are appropriate only when applied to indorsers, and so, by legal intendment, the contract of Ringo & Co. should be held, on the face of the writing, to be that of indorsers. But counsel disregards the controlling rule, that if the indorsement was made before the delivery of the note, the liability of Ringo & Co. is fixed by law as that of original promisors and comakers of the note: *Polkinghorne v. Hendricks*, 61 Miss. 366. If in law such was the nature of the obligation of Ringo & Co., the use of inconsistent and inappropriate words written above their names could not control nor vary the contract.

Pearson v. Stoddard, 9 Gray, 199, is on all fours with the present case. In that case, the name of Darius Whithead appeared on a promissory note by irregular indorsement, and the words "waiving demand and notice" were written above it. There, as here, it was argued that these words controlled the character of the indorsement. But the court said: "The words 'waiving demand and notice,' written above the name of the defendant, although certainly more appropriate words to accompany an indorsement of a note by a regular indorser, yet do not change the relation of the defendant, or his liability to be charged as maker, if, in fact, when he signed the note the same had not been negotiated by the payee and indorsed by him. The evidence shows that this was the fact, and, of course, con-

trols any inference which might otherwise be drawn from the use of the words."

The appellee, Foster, and Ringo were examined as witnesses touching the transaction in which the note sued on was executed—the 2^o appellee in his own behalf, and Ringo as a witness for the appellant. They concur in the statement that the note was delivered to the appellee in the form it now appears, with the name of Ringo subscribed thereto and that of Ringo & Co. indorsed on the back, for the purpose of securing from the appellee a loan of the sum of money for which it was given, and, this fact being proved, it follows, from what we have said, that Ringo & Co. were liable as copromisors with W. E. Ringo. But, as to all other substantial circumstances, these witnesses are in direct and irreconcilable conflict. Ringo testifies that the loan was made to him personally, to enable him to pay a balance standing against him on the books of his firm, and that he wrote his firm's name on the back of the note, intending to bind it as his surety or accommodation indorser. The appellee testifies that he would not have loaned the money to Ringo individually; that, having the money in hand, he spoke to Ringo, who was the resident and managing partner of the firm, and asked him, if he should learn of any one desiring to borrow such a sum, to inform appellee of the fact; that a few days thereafter, Ringo came to him and said: 'I find that we can use the money here.' He got a lot of securities, I think amounting to five or six thousand dollars, in notes, and he and I went over the same, and he said, 'I have a mortgage on some property,' but he did not have it with him, but that he would get it and give that security with the firm's note. I told him I thought he could get the money. Soon after that he drove down to my house to see about the money. I carried the money up the next day, and he made the note in its present form, and he said, 'The mortgage that I hold is in the bank, and I will deliver all the securities at once.' When the note was drawn this way, I asked him was that binding on Ringo & Co., and he said, 'Yes; I waive all demand, protest, and formalities,' and that the note was as binding as he could make it on Ringo & Co."

It was proved by the appellant that he never had any knowledge 2¹ of the execution of the note, and that, after its maturity, the appellee received security from Ringo, in consideration whereof he extended the payment of the note for several months. On this phase of the case, the appellant contends that

Ringo had no authority to bind the firm as his surety, and, if he had, that the subsequent extension of time for the payment of the debt, without his consent, released him from all liability. But in this it is assumed that the relation of the firm was that of surety; that the money was loaned to Ringo personally, and not to the firm, and the verdict of the jury, which in this aspect of the case was correctly instructed, resolves this point in favor of the appellee.

The appellant objected in the court below to the introduction of evidence that the money loaned by the appellee went to the use of the firm of Ringo & Co., contending that the liability of the firm, if any existed, must spring from the contract under which the money was borrowed, and not from the use of the money after it had been loaned to Ringo.

We think it clear, from the instructions given and refused by the court, that this evidence was admitted under the count for money had and received, under which it was clearly admissible, but that the court, on the final submission of the cause to the jury, being of opinion that no recovery could be had on that count, so instructed the jury. We express no opinion as to the competency of the evidence under the count on the note. If counsel desired to reserve this exception, he should have moved the court to exclude the evidence when the testimony had been closed, and the plaintiff had failed to maintain the count for money had and received to his use.

The criticism of the charges for the plaintiff, in view of the instructions given for the defendant, is too refined. The instructions for the parties do not conflict, but those for the defendant supplement and explain those for the plaintiff. It is impossible to believe that the jury could have understood the instructions of the court as announcing liability on the part of ²² appellant if the money was loaned to Ringo personally, and afterward used by the firm.

Having proceeded with the trial after knowing that one of the jurors was under the influence of intoxicants, the defendant cannot assign that for error. It is not material that the court also knew the fact, and punished the juror. It remains true that the defendant, with knowledge of the fact, proceeded without objection with the trial, and took the chance of securing a verdict in his favor. It is this which precludes him from making the irregularity the ground of motion for a new trial.

The judgment is affirmed.

NEGOTIABLE INSTRUMENTS—INDORSEMENT BEFORE DELIVERY—JOINT MAKERS.—A person, other than the payee, who writes his name on the back of a note after its execution and before delivery, is *prima facie* liable thereon as a joint maker: *Donohoe-Kelly etc. Co. v. Puget Sound etc. Bank*, 13 Wash. 407; 52 Am. St. Rep. 57, and note.

NEGOTIABLE INSTRUMENTS—INDORSEMENT.—PAROL EVIDENCE IS ADMISSIBLE to prove that persons whose names appear on a note as indorsers signed their names thereon before it was delivered, and are therefore liable as makers: *Bank of Jamaica v. Jefferson*, 92 Tenn. 537; 36 Am. St. Rep. 100. As between the original parties and subsequent indorsers with notice, parol testimony is admissible to show the true relation of the parties to the note and to each other, according to their own intention and agreement: *Note to Kulenkamp v. Groff*, 15 Am. St. Rep. 287. Parol evidence is admissible to fix the indorser's liability as maker, indorser, or guarantor, according to the intention of the parties: *Peterson v. Russell*, 62 Minn. 220; 54 Am. St. Rep. 634.

APPEAL—ADMISSION OF EVIDENCE—COMPETENCY.—The admission of evidence alleged as error cannot be considered on appeal, if no ground of objection is stated at the trial: *Bowell v. De Wald*, 2 Ind. App. 303; 50 Am. St. Rep. 240. An objection to the competency of a witness as an expert not made in the lower court will not be noticed on appeal: *Robinson v. Marino*, 3 Wash. 434; 28 Am. St. Rep. 50.

NEW TRIAL—MISCONDUCT OF JURY—DRINKING INTOXICATING LIQUORS.—The drinking, by jurors, of intoxicating liquors during the progress of a trial will not warrant a new trial, unless it influenced the verdict, or could have done so, taking all the circumstances of the case into consideration: See notes to *Davis v. State*, 9 Am. Rep. 764; *Hilton v. Southwick*, 35 Am. Dec. 258; *Brown v. State*, 45 Am. St. Rep. 183.

GOOD v. GOLDEN.

[73 MISSISSIPPI, 91.]

SUBROGATION—PAYMENT BY VOLUNTEER OF PART OF SECURED DEBT.—One who pays a debt under circumstances making him a prime volunteer is not entitled to subrogation, as mere payment alone does not entitle one to subrogation. Hence, if the debtor gives a note, secured by a deed of trust, for money loaned to him, one who, at the debtor's request, pays a part only of the secured debt, and who is under no legal obligation to pay, is not entitled to subrogation, where there is no agreement, express or reasonably inferable from the facts, that the trust deed should be kept alive for the security of the person making such payment.

Bill for subrogation filed by the appellant, Mary A. Good. The appellees, R. T. Golden and Mary, his wife, owed the sum of eight hundred and eighty dollars to the Bank of Greenwood. They gave the bank a note for that sum, which was secured by a deed of trust on R. T. Golden's homestead. The appellees were unable to meet this indebtedness when it fell due, and the

bank threatened to foreclose. They asked the appellant for assistance, and prevailed on her to pay to the bank the sum of three hundred and eight dollars, which was applied by the bank as a credit on the note and trust deed. In consideration of this payment, the bank abandoned its foreclosure and extended the time for payment of the balance due. Golden and his wife afterward obtained a loan from other sources, discharged the debt due to the bank, and obtained a discharge and cancellation of the trust deed. They failed, however, to pay to the appellant the three hundred and eight dollars. Mary Golden died intestate and insolvent, leaving an only child, the appellee, Reuben Golden. It was also alleged that R. T. Golden was insolvent. The appellant, therefore, by reason of the facts stated, prayed for a personal decree, and for subrogation to the benefits of the trust deed, sale of the lands, etc., and general relief.

Rush & Gardner, for the appellant.

Coleman & Somerville, for the appellees.

⁹⁴ WHITFIELD, J. There was no subrogation here, legal or conventional. One who discharges for the debtor to the creditor, who holds an encumbrance or lien securing the debt, such debt, by agreement, express or reasonably inferable from the facts of the particular case, that he shall have the encumbrance or lien kept alive for his benefit, is protected within the rule for conventional subrogation. ⁹⁵ In such case, there is an agreement, equally whether it be express or so implied, and the agreement is for, and secures, subrogation. One who discharges to the creditor holding such lien or encumbrance the debt, when he is, himself, under some legal obligation to pay the debt, is protected within the rule for legal subrogation, quite independently of agreement, express or implied. But he who discharges to the creditor holding such lien or encumbrance a debt of the debtor, under circumstances making him a prime volunteer, is not entitled to subrogation. Mere payment, in and of itself, never entitles to subrogation, and appellant's case rests on mere payment alone. Here a note was taken for the money loaned from the debtor, with no agreement, express or reasonably inferable from the facts, that the trust deed should be kept alive for the security of the lender, who was under no legal obligation to pay, and who paid only a part of the secured debt: *Staples v. Fox*, 45 Miss. 681; *Howell v. Bush*, 54 Miss. 445; *White v. Cannon*, 125 Ill. 412; *Sheldon on Subrogation*, secs. 3, 241, 240,

245, 246. It makes no difference that the money is loaned to pay off a lien, if that bare fact be all: Sheldon on Subrogation, sec. 243; Gardenville etc. Assn. v. Walker, 52 Md. 452. The reason why one who has innocently acquired an invalid title at a sale is subrogated to the rights of him to whom his money has been paid is, as very correctly put by counsel for appellee, "that the payee has not knowingly undertaken the risk of his payment of the encumbrance, lien, or purchase money."

In Chaffe v. Patterson, 61 Miss. 28, there was no appeal by Mrs. Henry from the decree of the chancellor in the litigation between her and John Chaffe & Sons holding Chaffe & Sons entitled to subrogation to the rights of her vendor against the Montgomery lands. That holding was clearly erroneous, and would have been reversed on appeal. But it stood unreversed, and so was the law of that particular case; and Patterson et al., in their litigation with Chaffe & Sons, were affected with notice ⁹⁰ that it was the law of that case, the decree standing unreversed and unappealed from. And that is all that is held in that case.

The decree is correct, and it is affirmed.

SUBROGATION—VOLUNTEERS—PART PAYMENT.—A mere volunteer is not entitled to subrogation: See monographic note to Mobile Ins. Co. v. Columbia etc. R. R. Co., 44 Am. St. Rep. 736, on the right of an insurer to subrogation: Campbell v. Foster Home Assn., 43 Am. St. Rep. 818. A surety is not entitled to subrogation unless he pays the debt in full: Musgrave v. Dickson, 172 Pa. St. 629; 51 Am. St. Rep. 765.

ALABAMA AND VICKSBURG RAILWAY CO. v. JONES.

[73 MISSISSIPPI, 110.]

IGNORANCE OF GENERAL LAW does not excuse, but ignorance of one's personal, private right, under the law, arising out of existing facts, does excuse.

RELEASE AND DISCHARGE—IGNORANCE OF RIGHTS—UNFAIRNESS—INSTRUCTIONS.—In an action for damages, by an old and ignorant man, for injuries received by a "kicked" car, necessitating the amputation of a foot, where the railroad company, within two days after the injury, and within twelve hours after the amputation, and while he was suffering from pain and the effects of opium, and therefore incapable of acting rationally, induced him to release his claim for a small cash payment, it is proper, where the company relies upon such release, to instruct the jury that the plaintiff had a right to know the facts of the injury, and their effect upon his right to repudiate the release, voidable for fraud, and that

the release was not binding, unless he, subsequently, when competent to act, with full knowledge of the facts, and his rights under them, and of his right to disaffirm, ratified the same.

RELEASE AND DISCHARGE—VOIDABLE RELEASE—IGNORANCE OF RIGHTS AS GROUND OF RELIEF.—The right which one has to nullify an alleged ratification by him of a voidable release executed by him, by showing that, when he was alleged to have so ratified, he was not aware of his private legal right arising out of the facts, to repudiate such release, is a substantive right, and not the mere rule by which a court of chancery administers his right; and, as such substantive right, it is available in avoidance of such alleged release, as well at law as in equity.

STATUTES—IMPOSING LIABILITY WITHOUT REGARD TO CONTRIBUTORY NEGLIGENCE—CONSTRUCTION.—A statute which prohibits flying, running, walking, or kicking switches within the limits of a city, and makes a railroad company liable for damages for an injury occasioned by such a switch, "without regard to mere contributory negligence of the party injured," imposes liability where his negligence consisted in the want of ordinary care, and was such as usually and ordinarily contributes to the injury, and without which it would not have occurred; but it does not impose any liability for an injury resulting from the voluntary, deliberate, willful, and reckless exposure of the person injured.

Action by Jones against the defendant railway company for personal injuries caused by the act of its servants in making a "kicking switch," in the city of Jackson, and switching a car, which ran over and crushed one of the plaintiff's feet in such a manner that the foot had to be amputated. The plaintiff was an old and ignorant negro, standing upon or going across the switchtrack at the time of the injury, and the attendant circumstances might be said to have been such as to indicate a want of ordinary care on his part. The following provision of the code was in force: "It shall not be lawful for any railroad company or other person to switch a railroad car in the manner commonly known as a 'flying,' 'running,' 'walking,' or 'kicking' switch, within the limits of a municipality; and, in case of injury resulting to any person or property from switching in violation of this section, the railroad company shall be liable in damages, without regard to mere contributory negligence of the party injured." The defendant relied on a release in writing, executed by the plaintiff on the second day after the injury, and within twelve hours after the plaintiff's foot was amputated. The plaintiff introduced the testimony of persons present at the settlement to the effect that it was fairly entered into, and with full knowledge of its nature on the part of the plaintiff, together with the fact that the plaintiff had spent all of the money paid to him in settlement, from which last circumstance it was in-

sisted that acquiescence and ratification were deducible. The evidence introduced for the plaintiff tended to show that he knew nothing of the settlement for about two weeks, having been, at the time it was made, stupefied from pain and the effects of opium; that when told of it, he at once said that he would not have made it but for his mental incapacity from the causes stated; that he then, as soon as possible, consulted with his white friends, and employed an attorney; that he remained in bed for about two months; and that, several months after the injury, and after he had spent the money received in settlement, he tendered back the amount received to the company. In many respects, the evidence was conflicting, particularly as to the manner in which the car that injured the plaintiff was switched. The fifth instruction, as modified and given, for the plaintiff is in the opinion. The sixth instruction, as modified and given, for the defendant was as follows: "If the jury believe, from the evidence, that the plaintiff, while in the possession of his mental faculties, or while he understood what he was doing, became conscious that he had signed the release and was informed of its nature and character and of his right to disaffirm it and be restored to his original right, and that he had received the money in consideration therefor from the railroad company, did not promptly disaffirm the contract, but used and appropriated the money received for himself and family, this is an acquiescence, and you will find for the defendant on the release, even though you should believe he was wrongfully entrapped into making the contract." The seventh instruction as modified and given for the defendant was as follows: "There are two questions for the jury to settle as to the release: 1. Was the plaintiff mentally capable of contracting when he signed it? and 2. Did he expend the money paid him after he became conscious of the source from which he obtained it, and after he was capable of understanding the nature and consequences of the contract he had made, and of his right to annul and repudiate it? If, on either proposition, your answer be in the affirmative, you will find for the defendant." The modification of instructions for the defendant appear in the opinion, and were inserted by the court, of its own motion, over the defendant's objection. There was a verdict for the plaintiff, and the defendant appealed.

Nugent & McWillie, for the appellant.

Williamson & Potter, for the appellee.

¹²⁰ WHITFIELD, J. The fifth instruction for the plaintiff was in these words: "The court instructs the jury that if they believe, from the evidence, that the agents of defendant, who procured the release, knew that plaintiff, on account of prostration from suffering, or the stupefying effects of drugs administered for his release from pain, was not in a condition to consider, weigh, and understand any business proposition or transaction, and that defendant's agents, desiring to take advantage of, surprise, and overreach plaintiff, then came to his bedside, and obtained a settlement and release, and that the plaintiff did not and could not weigh, consider, or understand the nature, scope, and meaning of the same, and was not in a rational state of mind, then such conduct and procurement would be fraudulent, and plaintiff would not be bound by the settlement, unless, after being fully informed of all the facts, and of his rights in the premises, he concluded to treat it as a final settlement, notwithstanding such imposition upon him." The words "and of his rights in the premises" were a modification by the court. The court also modified the sixth charge given for the defendant by inserting after the words "was informed of its [the release's] nature and character," the words "and of his right to disaffirm it, and be restored to his original right." And in the seventh instruction for the defendant the court inserted after the words "he was capable of understanding the nature ¹²¹ and consequences of the contract he had made," the words "and of his right to annul and repudiate it."

It is insisted that these modifications were erroneous and were in the face of the maxim, "Ignorantia juris haud excusat." The instructions should all be viewed together as a whole, and, thus viewed, looked at, further, in the light of the particular case made by the facts. If the modifications of these instructions meant (what it is insisted they mean) that the plaintiff should not have been presumed to know "the general law of the land"—the sense in which the word "jus" is used in the maxim—undoubtedly the modifications were erroneous. Mr. Pomeroy says (2 Pomeroy's Equity Jurisprudence, sec. 841): "Mistake of law may be on ignorance or error with respect to some general rules of the municipal law applicable to all persons, which regulate human conduct, determine rights of property, of conduct and the like—such as the rules making certain acts criminal, and those controlling the devolution, acquisition, or transfer of estates, and those prescribing the modes of entering

into agreements. On the other hand, the term may mean the ignorance or error of a particular person with respect to his own legal rights and interests which are affected by, or which result from, a certain transaction in which he engages." And in section 842 he says the maxim has "no application to the mistakes of persons as to their own private legal rights and interests." And in section 849 he tells us the reason of the distinction is that "a private legal right, title, estate, interest, duty, or liability is always a very complex conception. It necessarily depends so much upon conditions of fact that it is difficult, if not impossible, to form a distinct notion of a private legal right, interest, or liability, separated from the facts in which it is involved and on which it depends. Mistakes, therefore, of a person with respect to his own private legal rights and liabilities may be properly regarded—as in great measure they really are—and may be dealt with, as mistakes of fact": See, further, 2 Pomeroy's Equity Jurisprudence, secs. 841-850, and the notes, with the authorities.

¹²² We have most carefully examined the authorities on this distinction, and, without burdening this opinion with quotations, feel no hesitancy in saying it is clearly shown and most abundantly established by the highest authority. We append a few of the authorities: See, especially, *Blakeman v. Blakeman*, 39 Conn. 320, a strong and very striking case; 1 Wharton on Contracts, secs. 198-201, specially sec. 199; Pollock on Contracts, 1st Am. from 2d Eng. ed., 446-448, and notes a, b, 448; Clarke on Contracts, ed. 1894, 306, and the authorities in notes 40, 41; *Toland v. Corey*, 6 Utah, 396 (the court saying, as to the maxim, "It is only applicable when the mistake is as to the general law, not to a case where a party is mistaken as to the effect of existing circumstances in relation to his private rights"); *Griffith v. Sebastian Co.*, 49 Ark. 24; *Wilson v. Maryland Life Ins. Co.*, 60 Md. 150; 1 Beach on Modern Equity Jurisprudence, secs. 37, 38; *Macknet v. Macknet*, 29 N. J. Eq. 54; 1 White and Tudor's Leading Cases in Equity, p. 2, Eng. notes top p. 825, Am. notes 830. And see, as illustrative, *Vasse v. Smith*, 6 Crauch, 226; 1 Am. Lead. Cas. 310; Lawson on Contracts, ed. 1893, sec. 144; *Fetrow v. Wiseman*, 40 Ind. 156; *Flexner v. Dickerson*, 72 Ala. 322; *Owen v. Long*, 112 Mass. 404; and, especially, the exhaustive note to *Craig v. Van Bebber*, 18 Am. St. Rep. top p. 706, the author noting a distinction in the application of the rule under discussion in this illustrative class of cases to the case

where a disability has been removed: *Hunt v. Rousmaniere*, 1 Pet. 1.

We think the modifications of these instructions fall within this distinction, and not within the general rule. When the court charged that appellee should be informed of "his right in the premises," of "his right to disaffirm and be restored to his original right," and of "his right to annul and repudiate the release," it did so in charges presenting this concrete case on all its facts, and meant merely that he should, after being informed of the facts attending the execution of the release and ¹²³ subsequent thereto, up to the time he was competent to act, be informed, also, or know, of his personal, private right, arising out of these facts, existing when he was called upon to ratify or repudiate, to repudiate it. He had a right to know these facts, and also their effect upon his right to repudiate the release voidable for fraud. We think this is, manifestly, the fair meaning of these modifications, and they were not, therefore, erroneous.

The verdict of the jury must be accepted as a finding both that appellee was guilty of no willful and wantonly reckless conduct, and that the car was "kicked." The statute does not mean that one who wantonly puts his foot on a rail, to have it cut off by a kicked car, can shelter himself under its terms by saying contributory negligence is no defense. The negligence which usually and ordinarily contributes proximately to the injury, without which the injury would not have occurred, consisting in the want or ordinary care in the situation, is what is meant by the statute, not the voluntary, deliberate, willful, reckless exposure of one's self to injury. We find no error.

Affirmed.

¹²⁶ WHITFIELD, J., delivered the opinion of the court in response to the suggestion of error.

The point with respect to the pleadings, now earnestly pressed upon the court, was only incidentally referred to on the former argument of the cause, and, we think, with good reason, for the rejoinder to the first replication to the defendant's second plea distinctly put in issue the validity of the alleged ratification, and the rebutter thereto traversed it.

¹²⁷ On the modifications of the charges by the court, we are satisfied, after a careful re-examination of the authorities, we announced the correct rule in our former opinion. The authorities are not confined to cases in equity.

The right which one has to nullify an alleged ratification by him of a voidable release executed by him, by showing that when he was alleged to have so ratified, he was not aware of his private legal right arising out of the facts, to repudiate such release, is a substantive right, and not the mere rule by which a court of chancery administers his right; and, as such substantive right, it is available in avoidance of such alleged release, as well at law as in equity. If such person filed his bill to cancel an alleged written ratification, on such ground, all that the court does is to cancel and annul the alleged written ratification, so that it shall not form the basis for the assertion of any right resulting therefrom to the party holding it against the person filing the bill. When such person is allowed to show at law want of knowledge of such private legal right to repudiate the release, the same end is accomplished, the proof cancels and annuls the alleged written ratification. It is the same substantive right, inhering in the very truth and justice of the case administered in both instances—administered in one form in one forum and in another form in another. Here the ratification alleged rests wholly in parol. How is the party seeking to be relieved to cancel, by bill in equity, an alleged parol ratification?

Suggestion of error overruled.

Ignorance of One's Rights as a Ground of Relief.*

Definitions.—Ignorance means a want of knowledge, and the subject is usually treated under two heads: ignorance of law, and ignorance of fact. As one's rights may, therefore, be affected by ignorance either of law or of fact, it will doubtless conduce to clearness to define those terms. Ignorance is distinguishable from error. Ignorance is the lack of knowledge; error is the nonconformity or opposition of ideas to the truth. Considered as a motive of actions, ignorance differs but little from error. They are usually found together, and what is said of one is said of the other: Bouvier's Law Dict., tit. Ignorance. A mistake of law occurs when a party knows the state of the facts, but is ignorant of the legal consequence: *Mowatt v. Wright*, 1 Wend. 355; 19 Am. Dec. 508. In *Hurd v. Hall*, 12 Wis. 125, 138, it is said that: "A mistake of law happens when a party, having full knowledge of the facts, comes to an erroneous conclu-

* REFERENCE TO MONOGRAPHIC NOTES.

Ignorance of law: 10 Am. Dec. 323-328; 15 Am. Rep. 171-384.

Distinction between ignorance and mistake of law: 23 Am. Dec. 164, 165.

Avoidance of contracts for mutual mistake of facts: 45 Am. Dec. 631-634.

Ignorance of fact: 30 Am. Rep. 617.

Possession taken and held through ignorance or mistake: 24 Am. St. Rep. 353-390.

Carelessness as a bar to relief: 32 Am. St. Rep. 384-388.

slon as to their legal effect. It is a mistaken opinion or inference, arising from an imperfect or incorrect exercise of the judgment, upon facts as they really are; and, like a correct opinion, which is law, necessarily presupposes that the person forming it is in full possession of them. The facts precede the law, and the true and false opinions alike imply an acquaintance with them. Neither can exist without it. The one is the result of a correct application to them of legal principles, which every man is presumed to know, and is called law; the other the result of a faulty application, and is called a mistake of the law." It has been held that a mistake of law differs from ignorance of the law in that the former is capable of proof, the latter not; that the former acts after reasoning, the latter without: *Lawrence v. Beaubien*, 2 Bail. 623; 23 Am. Dec. 155, and note. But an examination of the distinction taken in some cases between ignorance of law and mistake of law, and also of the numerous cases where relief has been asked, grounded upon mistake of law, will show that such a distinction is of little or no value, as ignorance of law and mistake of law do not differ in results: See monographic note to *Lawrence v. Beaubien*, 23 Am. Dec. 164, discussing the subject. The rule, therefore, in equity, where relief is asked against a mistake or ignorance of law, is, that there is no distinction between mistake and ignorance of law: *Gwynn v. Hamilton*, 29 Ala. 233. Compare *Champlin v. Laytin*, 18 Wend. 407; 31 Am. Dec. 382.

A mistake of fact is a mistake not caused by the neglect of legal duty on the part of the person making the mistake, and consisting in an unconsciousness, ignorance, or forgetfulness of a fact past or present, material to the transaction, or in the belief in the present existence of a thing, material to the transaction, which does not exist, or in the past existence of a thing which has not existed: *Pomeroy's Equity Jurisprudence*, 2d ed., sec. 839. A mistake of fact occurs when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist: *Mowatt v. Wright*, 1 Wend. 355; 19 Am. Dec. 508. In some of the earlier cases, a distinction was made between ignorance of fact and mistake of fact, as well as between ignorance of law and mistake of law: *McDaniels v. Bank of Rutland*, 29 Vt. 230; 70 Am. Dec. 406; note to *Lawrence v. Beaubien*, 23 Am. Dec. 164; but the courts seem to deal with the error or ignorance of a person with respect to his own private legal rights and liabilities as mistakes of fact: *Pomeroy's Equity Jurisprudence*, 2d ed., sec. 849. *Dixon, C. J.*, in *Hurd v. Hall*, 12 Wis. 125, 139, observed that, in legal parlance, a mistake of fact has a much more enlarged signification than a mistake of law," and extends to and includes the case of a party who, through mere ignorance of the existence or nonexistence of a material fact, is induced to do an act, or enter into a contract injurious to himself, where, if he had been informed of the existence or nonexistence of such fact, he would not have performed such act or made such contract. Ignorance of the existence or nonexistence of a

material fact precludes the idea that the party, at the time of the transaction, should have been influenced by it, for it is impossible that the mind should be moved by that of which it knows nothing. This ignorance of facts must be excusable; that is, it must not arise from the intentional neglect of the party to investigate them. The rule which formerly prevailed, that if a party might, by the exercise of reasonable diligence, have ascertained the facts, he would not, on the ground of ignorance or mistake, be relieved from his contract, has of late been very much relaxed. The later cases establish the doctrine that whenever there is a clear bona fide mistake, ignorance, or forgetfulness of facts, the contract may, on that account, be avoided." Mistake, relievable in equity, is defined by the code of Georgia to be some unintentional act, omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence. It may be either of law or of fact: *Allen v. Elder*, 76 Ga. 674; 2 Am. St. Rep. 63. Ignorance of law signifies ignorance of the laws of one's own country, consequently, ignorance of the laws of other states of the Union, or of foreign laws, is deemed to be ignorance of fact: *King v. Doolittle*, 1 Head, 77; *Bank of Chillicothe v. Dodge*, 8 Barb. 233; *Morgan v. Bell*, 3 Wash. 554, 576; *Haven v. Foster*, 9 Pick. 112; 19 Am. Dec. 353; *Norton v. Marden*, 15 Me. 45; 32 Am. Dec. 132; *Patterson v. Bloomer*, 35 Conn. 57; 95 Am. Dec. 218; note to *Trigg v. Read*, 42 Am. Dec. 467.

Presumptions.—Every man is presumed to understand his legal rights, provided he has full knowledge of the facts: *Champlin v. Laytin*, 18 Wend. 407; 31 Am. Dec. 382. In other words, every one is presumed to know the law: *State v. Paup*, 13 Ark. 129; 56 Am. Dec. 303; *Gilberts v. Rabe*, 49 Ill. App. 418; and is bound as if he had a knowledge of the law, whether he has it or not; but there is no rule which conclusively presumes such knowledge as a fact, where that fact is important: *Black v. Ward*, 27 Mich. 191; 15 Am. Rep. 162. The maxim, "*Ignorantia juris non excusat*," is founded upon the presumption that every one competent to act for himself knows the law, but the presumption that he knows it is not conclusive and may be rebutted: *Hart v. Roper*, 6 Ired. Eq. 349; 51 Am. Dec. 425. Thus, where the record of a village board did not show at the time an ordinance was violated that it had been passed by the affirmative vote of a majority of the board, but the record was subsequently amended so as to show the fact, it was held that a person violating the provisions of the ordinance was presumed to have known that the law authorized the board to amend its record by adding any omitted fact, and that he could acquire no vested right that the prosecution for his wrongdoing should be governed by the record in its incomplete form. When he undertook to violate the ordinance because he thought that the village would not be able to prove its passage, he took the risk of such proof being made, and had no right to insist that the proof should not be made: *Gilberts v. Rabe*, 49 Ill. App. 418. Ignorance of the law of the place of a contract by a nonresident contracting party is no more a

ground of relief than if he were a citizen of the state, for he is bound to know the laws of the country on the basis of which he deals: *Tyson v. Passmore*, 2 Pa. St. 122; 44 Am. Dec. 181.

General Rule as to Ignorance or Mistake of Law.—"Ignorantia legis non excusat is a maxim of the common law founded not only in expediency or policy, but in necessity. If ignorance of law could be admitted, in judicial proceedings, as a ground of complaint or of defense, courts would be involved and perplexed with questions incapable of any just solution, and embarrassed by inquiries almost interminable, until the administration of justice would become, in effect, impracticable. There would be but few cases, in which one party or the other would not allege it as a ground of exemption; and the extent of the legal knowledge of each individual suitor, not his acts or words, would be the material fact on which judgments would be founded. The fact itself is incapable of proof by evidence of the character demanded in courts of justice. It is really insoluble, for it is in its very nature rather matter of conjecture, or mere inference, than of fact": *Hardgree v. Mitchum*, 51 Ala. 151, 153, per Brickell, J. We understand, too, that the maxim that every man is supposed to know the law means more than that he is supposed to know the letter of the law, and that it charges him with a knowledge of his legal rights, whether depending upon the constitution, the statutes, or the decisions of the courts: *Evans v. Hughes County*, 3 S. Dak. 244. Professor Pomeroy, in section 849 of the second edition of his work on Equity Jurisprudence, ventures to formulate the following general rule "as being eminently just and based on principle, and furnishing a simple criterion defining the extent of the jurisdiction" of equity to relieve from mistakes of the law pure and simple, in all cases of relief sought where a party is mistaken as to his own existing legal rights, interests, or relations. His rule is, that: "Wherever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities, or other relation, either of property, or contract, or personal status, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact." He states that "this rule has no application to cases of compromise, where doubts have arisen as to the rights of the parties, and they have intentionally entered into an arrangement for the purpose of compromising and settling those doubts. Such compromises, whether involving mistakes of law or of fact, are governed," he says, "by special considerations." This general rule has been approved and applied in a few cases: See *Renard v. Clink*, 91 Mich. 1; 30 Am. St. Rep. 458; *Toland v. Corey*, 6 Utah, 392. Thus, in the case last cited, it is said that the rule that equity will not interfere to cancel a contract made through

mistake of law applies to a mistake as to the general law, and not to a case where a party is mistaken as to the effect of existing circumstances in relation to his private rights. Hence, where the appellant, a woman, who was unacquainted with business, was misled as to her legal rights by the respondents, and the lawyer aiding them, who misrepresented matters to her, and overpersuaded her to deed away her own property for less than half its value and to pay debts that neither she nor her property was liable for, under the mistaken belief that her premises were subject to certain mortgages; and where she, believing that she was without remedy, signed the deed for the property under protest and acknowledged it unwillingly, it was held that equity would relieve her against the deed: *Toland v. Corey*, 6 Utah, 392.

It is not perfectly clear how a person may be charged with a knowledge of the law and yet not be chargeable with a knowledge of his legal rights. The principle laid down by Professor Pomeroy may be supported by many decisions, and serve to explain a great many more; but as we read the decisions the majority of the courts proceed upon the theory that the jurisdiction of chancery in giving relief, founded upon a mistake of law, is one grounded upon exceptions rather than upon fixed rules, and that any attempt, therefore, to frame a rule which shall guide courts in their application of such relief, must err through its comprehensiveness. It is conceded that equity will not, as a rule, relieve against ignorance or mistake of law, and the cases in which it does give such relief are regarded as exceptions to the rule, and we have classified our cases in conformity with this notion. The general rule, however, that everyone who engages in a transaction is presumed to act with a knowledge of the law, and of the legal effects and consequences of the transaction, though justified by considerations of public policy, is a harsh one, and, being founded upon a presumption so arbitrary, it ought to be modified, in its application, by every exception which can be admitted without defeating its policy. It has, therefore, been the constant practice of the courts of chancery to grant relief where the case did not depend upon a mere mistake of law, stripped of all other circumstances, but an admixture of other ingredients, going to establish misrepresentation, imposition, undue confidence, undue influence, or advantage taken of another's situation: *Moreland v. Atchison*, 19 Tex. 303.

The result of the authorities is, that ignorance or mistake of law alone, and hence of one's rights, does not, as a rule, excuse, and that it is no ground for either defensive or affirmative relief in equity, and such ignorance or mistake includes misconception of the law, erroneous deductions, and misapprehension of legal rights: *Emerson v. Navarro*, 31 Tex. 334; 98 Am. Dec. 534; *Plerson v. Armstrong*, 1 Iowa, 282; 63 Am. Dec. 440; *Iverson v. Wilburn*, 65 Ga. 103; *Fisher v. May*, 2 Bibb, 448; 5 Am. Dec. 626; *Smith v. McDougal*, 2 Cal. 586; *Shafer v. Davis*, 13 Ill. 396; *Wood v. Price*, 46 Ill. 439; *Wintermute v. Snyder*, 3 N. J. Eq. 489; *Good v. Herr*, 7 Watts & S.

253; 42 Am. Dec. 236; Shotwell v. Murray, 1 Johns. Ch. 512; Arthur v. Arthur, 10 Barb. 9; Lyon v. Sanders, 23 Miss. 530; Nabours v. Cocke, 24 Miss. 44; People v. O'Brien, 96 Cal. 171; State v. Paup, 13 Ark. 129; 56 Am. Dec. 303; McAninch v. Laughlin, 13 Pa. St. 371; McMurray v. St. Louis Oil Mfg. Co., 33 Mo. 377; Hunt v. Rousmaniere, 1 Pet. 1; 8 Wheat. 174, 215; United States Bank v. Daniel, 12 Pet. 32; Upton v. Tribilcock, 91 U. S. 45, 50; State v. Williams, 36 S. C. 493; Snell v. Insurance Co., 98 U. S. 85; Weed v. Weed, 94 N. Y. 243; Mowatt v. Wright, 1 Wend. 355; 19 Am. Dec. 508; Ruffner v. McConnell, 17 Ill. 212; 63 Am. Dec. 362; Lawrence v. Beaubien, 2 Bail. 623; 23 Am. Dec. 155, and note; Allen v. Elder, 76 Ga. 674; 2 Am. St. Rep. 63, and notes; Lane v. Holmes, 55 Minn. 379; 43 Am. St. Rep. 508; Moe v. Northern Pac. R. R. Co., 2 N. Dak. 287; Ohlander v. Dexter, 97 Ala. 476; Conyne v. Jones, 51 Ill. App. 17.

The rule may be illustrated as follows: Ignorance of the law does not excuse a wrong done or a right withheld: Lawrence v. Beaubien, 2 Bail. 623; 23 Am. Dec. 155. Relief from liabilities under the law, arising from a known state of facts, will be denied: State v. Reigart, 1 Gill, 1; 39 Am. Dec. 628; Prescott v. Cooper 37 La. Ann. 553; Fisher v. May, 2 Bibb, 448; 5 Am. Dec. 626. A court cannot correct a mistake of law, as where there is an omission of some statutory requirement in a deed, essential to its validity: Gebb v. Rose, 40 Md. 387; Dickinson v. Glenney, 27 Conn. 104. Ignorance of the law, with a full knowledge of the facts, cannot generally be set up as a defense; nor will it protect a party from the operation of the rule in equity, when the circumstances would otherwise create an equitable bar to the legal title: Storrs v. Barker, 6 Johns. Ch. 166; 10 Am. Dec. 316. Where the parties understand the facts, an erroneous deduction of law is no cause for annulling a contract: Fisher v. May, 2 Bibb, 448; 5 Am. Dec. 626. If the husband, under the erroneous supposition that his marital rights do not attach to certain personal property belonging to his wife, delivers it to the distributees of her estate, this is a pure mistake of law: Gwynn v. Hamilton, 29 Ala. 233. A debtor may prefer one creditor to another, if the instrument designed to effect the object contains the requisite provisions; but if, through a mistake in law, the parties select and use such an instrument as cannot effect their object without the aid of a court of equity, the court will not correct the mistake by reforming the instrument, to the prejudice of the general creditors of a debtor in very embarrassed circumstances: Anderson v. Tydings, 8 Md. 427; 63 Am. Dec. 708. If creditors, by reason of a mistake in law, in drawing a deed, obtain a legal advantage, they will not be deprived of it by a court of equity, which is asked to rectify the deed for the benefit of parties whose claim rests upon no stronger equity than theirs: Anderson v. Tydings, 8 Md. 427; 63 Am. Dec. 708. If a woman, believing and representing that she owns one-half of a piece of land, and that her children are the owners of the other half, is a party to a

bill in equity representing that it would be better for the infant heirs that the tract should be sold, and their share of the proceeds invested, and the court is asked to render a decree for such sale, which it does, she cannot, after the sale is confirmed, whether the ignorance or mistake was the result of inadvertence, or of an entire misconception of her legal rights, be heard to say that she was mistaken as to her rights, that she was the owner of the entire tract, and that the sale should be set aside because an error was committed in paying one-half the principal money to the heirs, instead of the whole amount to herself. The mistake as to her rights is simply one of law, and a court of equity will afford no relief in such a case: *Zollman v. Moore*, 21 Gratt. 313. Equity will not relieve against a pure mistake of law, if there is no fraud, imposition, misrepresentation, undue influence, imbecility of mind, misplaced confidence, or other special circumstances of a similar character, inferable from the transaction. And there is no distinction, in this respect, between mistake and ignorance of law: *Gwynn v. Hamilton*, 29 Ala. 233; *Champlin v. Laytin*, 18 Wend. 407; 31 Am. Dec. 382; *Thurmond v. Clark*, 47 Ga. 500; *State v. Reigart*, 1 Gill, 1; 39 Am. Dec. 628; *Boggs v. Fowler*, 16 Cal. 559; 76 Am. Dec. 561; *Kenyon v. Wetty*, 20 Cal. 637; 81 Am. Dec. 137; *Hawralty v. Warren*, 18 N. J. Eq. 124; 90 Am. Dec. 613. As every person is bound to know the law, both civil and criminal, it has been held that no one can complain of the misrepresentations of another respecting it: *Platt v. Scott*, 6 Blackf. 389; 39 Am. Dec. 436. For example, the plaintiff, proposing to buy of the defendant his interest in certain lands, was informed of all the facts affecting the title. An attorney acting for both parties, upon consideration of those facts, advised the parties that the defendant had a certain interest in the lands. The plaintiff, acting upon that advice, purchased the supposed interest. This advice being incorrect, it was held that the mistake was one of law only, and that the plaintiff could not recover the purchase money: *Burkhauser v. Schmitt*, 45 Wis. 316; 30 Am. Rep. 740. An executor will not be relieved in equity from a purchase made by him at a sale of lands of the estate by himself and coexecutors, under a mistake or ignorance of the law as to the power of sale conferred upon them by the will: *Dill v. Shahan*, 25 Ala. 694; 60 Am. Dec. 540. Equity will not relieve against a mistake of law where, after discovering the mistake, the parties preserved and tried their remedy at law: *McNaughten v. Partridge*, 11 Ohio, 223; 38 Am. Dec. 731. Ignorance or mistake of the law applicable to the settlement and distribution of a decedent's estate, where full knowledge of the facts is had by all the parties interested therein, is no ground for equitable relief against an amicable settlement and distribution already completed: *Good v. Herr*, 7 Watts & S. 253; 42 Am. Dec. 236. A surety executed a new note in consideration of the surrender of an old one on which he was surety. He had legally been released from liability on the old note by the action of the insolvent principal, but

both parties, although they knew all the facts, were ignorant of the law and supposed him still liable. It was held that he was bound by the new note: *Churchill v. Bradley*, 58 Vt. 403; 56 Am. Rep. 563.

Equity will not, for misconception alone, interfere to overturn an agreement made to prevent a domestic feud: *Lies v. Stub*, 6 Watts, 48. So, a mere misconception of the law as an abstract proposition, not entering as an ingredient into the transaction, is not sufficient to confer a power of revocation, or to entitle the party who claims to be aggrieved to relief: *Fellows v. Herrmans*, 4 Lans. 230. As a court of equity will not, ordinarily, grant relief against, or correct a mistake or misapprehension of the law, a party who designs to and performs an act, under a mistaken view of the law affecting the transaction, will be held, as a rule, to the obligation incurred: *Goltra v. Sanasack*, 53 Ill. 456. It will not relieve him from an injudicious bargain, if he acts upon a misapprehension of his legal rights, and not upon a mistake of facts: *Campbell v. Carter*, 14 Ill. 286. An officer's ignorance or mistake of the law cannot excuse his nonreturn of an execution, as where he construes the statute requiring a return to be made within days to mean within a calendar month: *Cowan v. Sloan*, 95 Tenn. 424. Ignorance of the measure of damages is no ground for relief in equity: *McKean v. Reed*, Litt. Sel. Cas. 395; 12 Am. Dec. 318. So ignorance of the requirements of army regulations, by an officer appointed to act as regimental quartermaster, during the war, while the quartermaster was temporarily absent, is no excuse for failure to transmit duplicate payrolls, on which money was paid out to extra-duty men: *United States v. Wade*, 75 Fed. Rep. 261.

A court has no power to permit a redemption of real estate by one who has lost his title thereto by a regular sale on judgment and execution, and a conveyance by the sheriff to the purchaser pursuant to the sale, after the time for redemption given by statute has expired, although the time for redemption was permitted to pass through a mistaken belief that his interest in the property was not subject to sale on execution, where the party had full knowledge of all the facts, for the mistake is simply one as to legal rights, and, therefore, not a ground for relief in equity: *Weed v. Weed*, 94 N. Y. 243. Equity will not grant leave to a citizen of a foreign country to file a bill of review on the ground of his ignorance of the laws of the United States or of a state therein, where he employed counsel in such state, and there is nothing to indicate that such counsel was not competent or skillful: *Schaefer v. Wunderle*, 154 Ill. 577.

On the other hand, the law extends its protection and shield to those ignorant of its provisions, as much as to those most learned in it. As no one can plead ignorance of the law as an excuse, so ignorance of the law deprives no one of its protection: *Louisville etc. Ry. Co. v. Red*, 47 Ill. App. 662.

The maxim that ignorance of the law does not excuse prevails in a court of equity, as it does in a court of law: *Hardigree v. Mit-*

chum, 51 Ala. 151, 154; State v. Paup, 13 Ark. 129; 56 Am. Dec. 303; Upton v. Tribilcock, 91 U. S. 45, 50; and applies in civil cases as well as in criminal: Platt v. Scott, 6 Blackf. 389; 39 Am. Dec. 436; State v. Paup, 13 Ark. 129; 56 Am. Dec. 303; Lawrence v. Beaubien, 2 Bail. 623; 23 Am. Dec. 155. This "highly artificial and rigid doctrine" is well said to be confined "to cases of pure, unmixed mistake of law," in which there is no mistake of fact, and no trust or element of fraud entering in, and conducing to the making of the contract: King v. Doolittle, 1 Head, 77.

Exceptions to the General Rule.—Firmly settled as is the foregoing general rule, that ignorance or mistake of the law does not excuse, it is equally well settled that there are particular instances in which equity will grant defensive or affirmative relief from mistakes of law, pure and simple, as well as from those accompanied by other inequitable incidents. These instances are exceptions to the general rule, or rather cases in which the maxim is not rigidly enforced; but it is difficult to draw any sharply defined lines by which all these instances may be accurately determined. It is said that the maxim, Ignorantia legis neminem excusat, is not universally applicable, but only when damages have been inflicted or crimes committed: Brock v. Weiss, 44 N. J. L. 241. It has been held that any departure from the maxim, under any circumstances, should be distinctly marked, and so guarded as to leave the general rule unimpaired. Yet some courts, in trying to uphold the maxim, have in cases of peculiar hardship, distinguished between ignorance of the existence of a law and of its legal effect: State v. Paup, 13 Ark. 129; 56 Am. Dec. 303. The rule that equity will not grant relief where the mistake is one of law is, at best, a harsh one, and applies only where the mistake is simply one of law, and the party had full knowledge of all the material facts and circumstances. "All the cases which deny a remedy for mere mistake of law on one side are careful to add the qualification that there must be no improper conduct on the other": Haviland v. Willets, 141 N. Y. 35, 50, per Finch J. Two facts have been found in addition to a mistake of law in nearly all cases where relief has been granted; namely, that there has been a marked disparity in the position and intelligence of the parties, so that they have not been on equal terms, and that the party obtaining the property persuaded or induced the other to part with it, so that there has been "undue influence" on the one side and "undue confidence" on the other: Jordan v. Stevens, 51 Me. 78; 81 Am. Dec. 556. Hence, if in addition to a mistake of law, there are circumstances which tend to show misrepresentation, surprise, undue influence, imbecility of mind, misplaced or undue confidence, unfair or deceptive conduct, or any kind of fraud or species of imposition, it is the right and duty of equity to award relief; and ignorance of the law may be one of the ingredients of fraud on which the court will act; for when there is gross ignorance, or a plain and palpable mistake, of a plain and familiar principle of law, it may well give rise to a presumption, with admixture of other, and even slight cir-

circumstances, that there has been undue influence, imposition, mental imbecility, surprise, etc., or that the confidence of the party has been abused. A mistake of law, therefore, which is caused by fraud, imposition or misrepresentation, etc., may be relieved against in equity: *Kyle v. Fehley*, 81 Wis. 67; 29 Am. St. Rep. 866; *Rankin v. Mortimere*, 7 Watts, 372; *Haviland v. Willets*, 141 N. Y. 35, 50; *Jordan v. Stevens*, 51 Me. 78; 81 Am. Dec. 556; *Benson v. Markoe*, 37 Minn. 30; 5 Am. St. Rep. 816; *Hardigree v. Mitchum*, 51 Ala. 151; *Moreland v. Atchison*, 19 Tex. 303; *Haden v. Ware*, 15 Ala. 149; *State v. Paup*, 13 Ark. 129; 56 Am. Dec. 303; *Trigg v. Read*, 5 Humph. 529; 42 Am. Dec. 447; *Lane v. Holmes*, 55 Minn. 379; 43 Am. St. Rep. 508; *Dill v. Shahan*, 25 Ala. 694; 60 Am. Dec. 540. The power to relieve against a mistake in equity must, however, be exercised with caution. To justify it the evidence must be clear, unequivocal, and decisive as to the mistake. It must arise from ignorance, surprise, imposition, or misplaced confidence, and be un-mixed with negligence: *Iverson v. Wilburn*, 65 Ga. 103. Equity will not, as a rule, relieve from an act done under a mistake of law and advice of counsel, unless there is some additional ground for equitable relief: *McDaniels v. Bank of Rutland*, 29 Vt. 230; 70 Am. Dec. 406. For a mistake of law, pure and simple, there is generally no remedy, but relief may be afforded in equity if the surrounding circumstances are of such a nature that the adverse party is seeking to avail himself of the opportunities afforded by the mistake, and is attempting to enforce an unconscionable advantage without consideration, provided the other party is not blamable: *Lane v. Holmes*, 55 Minn. 379; 43 Am. St. Rep. 508, and note; *Benson v. Markoe*, 37 Minn. 30; 5 Am. St. Rep. 816. It has been held that, if two parties enter into a contract under a mistake of law, equity will relieve upon the ground of surprise, and if one party is mistaken as to the law, and the other, with knowledge, contracts with him, it will relieve upon the ground of fraud: *State v. Paup*, 13 Ark. 129; 56 Am. Dec. 303. A mistake or ignorance of the law, to be relieved against in equity, must be gross and palpable, and, in a case having circumstances to justify it, such as would warrant the belief that undue advantage was taken of the party, owing either to his imbecility of mind, or the exercise of some improper influence over him by the one with whom he deals, or with some other person with his knowledge, consent, or procurement: *Dill v. Shahan*, 25 Ala. 694; 60 Am. Dec. 540. The four principal exceptions to the rule that no relief can be obtained against a mistake of law may be summed up as follows: 1. Where there is a marked disparity in the position and intelligence of the two parties, with the result that on the one side undue influence is exercised, while on the other, undue confidence is reposed; 2. Where one, through mistake as to his legal rights, acknowledges himself under an obligation which the law will not impose; 3. Where it is perfectly evident that the only consideration of a contract was a mistake as to the legal rights and obligations of the parties; 4. Where there is a mistake of law

on both sides, owing to which the objects of the parties cannot be attained: *Note to Renard v. Clink*, 30 Am. St. Rep. 461.

As said above, ignorance of law, pure and simple, is sometimes relieved against in equity. In other words, mistakes of law may, in some cases, afford good cause for relief in equity: *Wilson v. Ott*, 173 Pa. St. 253; 51 Am. St. Rep. 767; *Lowndes v. Chisholm*, 2 McCord Eq. 455; 16 Am. Dec. 667; *Hunt v. Rousmanier*, 8 Wheat. 174, 215; *Evants v. Strode*, 11 Ohio, 480; 35 Am. Dec. 744; *McNaughten v. Partridge*, 11 Ohio, 223; 38 Am. Dec. 731. The relief granted, however, seems to be based upon the hardship of peculiar cases, and the facilities for proving them rather than upon any well-defined and established principle of equity jurisprudence. To illustrate: When it is perfectly evident that the only consideration of a contract was a mistake as to the legal rights or obligations of the parties, and there has been no fair compromise of bona fide and doubtful claims, it has been held that the contract may be avoided on the ground of a clear mistake of law and a total want, therefore, of consideration or mutuality: *Underwood v. Brockman*, 4 Dana, 309; 29 Am. Dec. 407. If a grantee, in a deed gives a mortgage, for the value of the land granted, upon other land, under a misapprehension that the grantor, as recited in the deed, owns the land in fee, while in fact he owns only a life estate therein, the grantee cannot be compelled to pay, in a suit to foreclose the mortgage, more than the value of the life estate: *Wilson v. Ott*, 173 Pa. St. 253; 51 Am. St. Rep. 767. So relief will be granted in equity against a forfeiture of land incurred by the nonperformance of a condition in a will for the payment of taxes, upon the payment of taxes, interest, and costs, when it appears that the refusal of the defaulting party to pay was not willful, but was due to her ignorance of her rights and duties in the matter, and that she was ignorant of the ways of doing business: *Tibbetts v. Cate*, 66 N. H. 550. If a purchaser at an execution sale thinks he is buying a fee simple, where only an equity of redemption can pass, he will be considered a mortgagee in possession and accountable for the rents and profits: *Lowndes v. Chisholm*, 2 McCord Eq. 455; 16 Am. Dec. 667. If one, through mistake as to his legal rights, acknowledges himself under an obligation, which the law does not impose, he is not bound thereby: *Warder v. Tucker*, 7 Mass, 449; 5 Am. Dec. 62. So, if a man, by a misapprehension of his counsel as to the client's legal liability, binds himself further than he is legally liable, and there is no reason to believe that he intends his obligation to extend beyond his legal liability, he is relievable in equity: *Fitzgerald v. Peck*, 4 Litt. 125; and, if a man is clearly under a mistake of law which is occasioned by the representations of the other party, he can be relieved as in case of a mistake in matter of fact: *Drew v. Clarke*, Cooke, 373; 5 Am. Dec. 698.

Ignorance or Mistake of Facts.—Equity will not permit the just rights of a party to be lost through a mistake or ignorance of fact, when such relief is not prejudicial to the rights of others: *Fears*

v. Albea, 69 Tex. 437; 5 Am. St. Rep. 78; and it is a general rule that an act done, or a contract made, under mistake or ignorance of a material fact, is voidable and relievable against in equity, when such mistake or ignorance constitutes a material ingredient in the contract, or the motive of the act done by the parties, and disappoints their intention by a mutual error: *Ross v. Armstrong*, 25 Tex. Supp. 354; 78 Am. Dec. 574; *Nabours v. Cocke*, 24 Miss. 44; *Shafer v. Davis*, 13 Ill. 396. We shall not go into any extended and minute discussion here concerning ignorance of facts as a ground of relief, as "avoidance of contracts for mutual mistake of facts" is discussed in the monographic note to *Miles v. Stevens*, 45 Am. Dec. 631-634. This note shows that the mistake, in order to be a ground for equitable relief, must be material and free from culpable negligence. A mistake of a material fact of which the party was ignorant at the time will be relieved in equity: *Emerson v. Navarro*, 31 Tex. 334; 98 Am. Dec. 534. It has been held, too, that equity will never give any relief from a mistake or ignorance, if the party could, by reasonable diligence, have ascertained the real facts: *McDaniels v. Bank of Rutland*, 29 Vt. 230; 70 Am. Dec. 406; *Fahie v. Pressey*, 2 Or. 23; 80 Am. Dec. 401. Thus, if there is neither accident nor mistake, misrepresentation, nor fraud, a court of equity has no jurisdiction to afford relief to a party, on the ground that he has lost his remedy at law, through mere ignorance of a fact, the knowledge of which might have been obtained by due diligence and inquiry, or by a bill of discovery: *Penny v. Martin*, 4 Johns. Ch. 566; *Fahie v. Pressey*, 2 Or. 23; 80 Am. Dec. 401. But Professor Pomeroy, in his work on Equity Jurisprudence, section 856, says that: "A moment's reflection will clearly show that these rules cannot possibly apply to all instances of mistake, and furnish the prerequisites for all species of relief. Their operation is, indeed, quite narrow; it is confined to the single relief of cancellation, and even then it is restricted to special kinds of agreements," such as compromises and speculative contracts. The rule that a contract made under a mistake, or in ignorance of, a material fact, is voidable and relievable in equity applies not only to cases where there has been direct concealment of facts, which would amount to fraud, but also to many cases of innocent ignorance of material facts, and mutual mistake: *Miles v. Stevens*, 3 Pa. St. 21; 45 Am. Dec. 621. Equity will relieve against the legal effect of a covenant "to pay current money" upon proof that the covenant was executed under a mutual mistake, each party supposing that "current money" meant the actual currency: *Bryan v. Masterson*, 4 J. J. Marsh. 226. No ratification or estoppel can arise when the act set up as such was done in entire ignorance of the material facts prompting action: *Tanney v. Tanney*, 159 Pa. St. 277; 39 Am. St. Rep. 678. A wife is not estopped by her mere silence from afterward asserting her rights, where land in fact belonging to her, but supposed to belong to her husband, is sold under decree of foreclosure, the wife not having been served in the

sult; nor is she to be regarded as having ratified the proceedings by the acceptance of a part of the purchase money of the sale: *Fahle v. Pressey*, 2 Or. 23; 80 Am. Dec. 401. As ignorance of foreign laws is a mistake of fact, which we have above shown, an answer by a nonresident, setting up his ignorance of the laws of the state in which the action is brought governing the descent of community property, and in such ignorance contracted for the conveyance of lands which he did not own, states an equitable defense: *Morgan v. Bell*, 3 Wash. 554. Where a vendor residing in the state of New York made a contract for the sale of a quarry in the state of Connecticut, and of personal property valued at twenty-five thousand dollars connected with it, the whole for fifty-five thousand dollars, of which five thousand dollars was to be paid down, the balance to be secured by a mortgage back, but where he made the agreement under the mistaken belief that a chattel mortgage would be valid security in Connecticut without a retention of possession by him, and where the purchaser was insolvent, it was held that he was justified in refusing to convey, and that he ought not to be compelled to convey, in the exercise of the discretion of a court of equity: *Patterson v. Bloomer*, 35 Conn. 57; 95 Am. Dec. 218. If a majority of electors, through ignorance of law or fact, vote for one ineligible to office, the votes are not nullities; but while they fail to elect, it by no means follows that the office shall be given to the qualified person having the next highest number of votes. The election is a failure, and a new election must be had: *People v. Clute*, 50 N. Y. 451; 10 Am. Rep. 508. In a case where the plaintiff is claiming as heir at law of her deceased husband, and her right, if any, depends upon the surrender of a deed which her husband had executed to the intestate of the defendants to defraud the husband's creditors, and which surrender occurred some years before the death of the husband, her ignorance of the fact affords no legal excuse for her delay to bring suit. The plaintiff being in privity with her husband, and he having had knowledge of the fact, his knowledge is imputable to her: *Gorman v. McAuliffe*, 93 Ga. 295.

Specific Instances — Appeal — Court Proceedings — Overruled Decisions, etc.—We shall here give a few illustrations of the general principles above stated as applied to specific titles of the law. A misconstruction of the law in relation to bills of exception upon appeal to the supreme court is not "good cause shown," within the meaning of a statute relative to settling a bill of exceptions, for settling the bill or statement after time: *Moe v. Northern Pac. R. R. Co.*, 2 N. Dak. 282. A mistake of counsel in not moving for a new trial, or of defendant in calculating when the trial would be reached, is no ground for relief in equity: *Yancey v. Downer*, 5 Litt. 8; 15 Am. Dec. 35. The invalidity of an adjudication as against one who had no notice of it cannot be set up by another person having no privity with him: *Hussman v. Durham*, 165 U. S. 144. A contract entered into by parties under a mutual supposition that the law affecting

the subject of the contract was in accordance with a previous decision of the supreme court upon a similar state of facts, will not be set aside because of a subsequent decision, by that court, overruling the former one, and declaring a different rule upon the subject: *Kenyon v. Welty*, 20 Cal. 637; 81 Am. Dec. 137. The fact that an inferior court made an erroneous decision upon a question of law, and that the plaintiff was misled thereby and suffered a loss is no ground for relief in equity: *Jacobs v. Morange*, 47 N. Y. 57.

Bonds and Warrants.—There can be no innocent purchaser of void bonds, where the defect is a matter of law, with a knowledge of which every person is chargeable. The maxim that "ignorance of the law excuses no one" is applicable to purchasers of bonds void for some defect which is matter of law unmixed with matter of fact. Hence, innocent parties cannot be relieved against mutual ignorance and mistake of law, if there is no element of fraud or bad faith introduced or relied upon: *Rochester v. Alfred Bank*, 13 Wis. 432; 80 Am. Dec. 746. Under a contract to deliver state bonds, not yet issued, but which both parties suppose will bear interest at four per cent, a delivery of such bonds, when issued, though they bear but three and one-half per cent, is a compliance with the agreement: *Grannis v. Quintard*, 69 Fed. Rep. 206. One who purchases from another county warrants, invalid upon their face, is presumed to know the law, and, in the absence of fraud or misrepresentation, cannot recover the price paid for them: *Christy v. Sullivan*, 50 Cal. 337; 19 Am. Rep. 655.

Compromise, Release, and Discharge.—The compromise of a doubtful right, procured without such deceit as would vitiate any other contract, concludes the parties. In other words, a compromise of a doubtful claim, fairly made, is binding on both parties, though ignorant of the extent of their rights: *Hoge v. Hoge*, 1 Watts, 163; 26 Am. Dec. 52, and note; *Converse v. Blumrick*, 14 Mich. 109; 90 Am. Dec. 230; *Knotts v. Preble*, 50 Ill. 226; 99 Am. Dec. 514; *Jordan v. Stevens*, 51 Me. 78; 81 Am. Dec. 556; note to *Bailey v. Philadelphia*, 46 Am. St. Rep. 696; *Bosley v. McKim*, 7 Har. & J. 468; *Fisher v. May*, 2 Bibb, 448; 5 Am. Dec. 626; *Allis v. Billings*, 2 Cush. 19; *Montgomery v. Ellis*, 6 How. Pr. 326; *Kelly v. Perseverance Building Assn.*, 39 Pa. St. 148. While compromises, though made under a mistake of law, are, as a rule, upheld in equity, yet, if the parties are not on equal terms, and one misleads the other, and obtains property thereby, against right and equity, as well as against law, he will be compelled to restore it: *Jordan v. Stevens*, 51 Me. 78; 81 Am. Dec. 556. A compromise procured from a confirmed invalid, whose mental faculties, through long illness and confinement, may reasonably be supposed to have become weakened, and who has been induced to enter into the compromise solely by threats of legal proceedings, when there was no legal foundation for any claim whatever against him, and such compromise being unreasonable and unjust in its provisions, may be set aside in equity; *Underwood v. Brockman*, 4 Dana, 309; 29 Am. Dec. 407. A compromise

obtained through misrepresentation is not binding: *Hoge v. Hoge*, 1 Watts, 163; 26 Am. Dec. 52; and there are cases, contrary to the general rule, which hold that a compromise obtained through an obvious mistake of plain law, or from a party ignorant of his rights, will be set aside, especially where there is any element of fraud: See principal case; *Anderson v. Bacon*, 1 A.K. Marsh, 48; *Underwood v. Brockman*, 4 Dana, 309; 29 Am. Dec. 407. Thus, if ignorance of the law exists on one side, and that ignorance is known to and taken advantage of by the other, the former will be relieved, especially if the mistake was encouraged or induced by the misrepresentation of the party seeking to profit by it. Hence, one who has been induced to accept in full satisfaction of a loss, under a policy of insurance, one-half of the amount due through fraud and imposition upon him and willful misrepresentation made by the agents of the insurer, he being, as they knew, ignorant of his legal rights under the contract, may maintain an equitable action to rescind such contract of satisfaction: *Titus v. Rochester German Ins. Co.*, 97 Ky. 567; 53 Am. St. Rep. 426. A party to a compromise entered into in ignorance of important facts connected therewith, is not, of course, bound by it: *Ross v. McLauchlan*, 7 Gratt. 86; and an agreement by the owner of personal property wrongfully withheld from him by another, on the latter's surrendering possession thereof, that it shall be returned to him, if his vendor, on a trial for stealing it, shall not be convicted, cannot be supported as a compromise, and is therefore void: *Fink v. Smith*, 170 Pa. St. 124; 50 Am. St. Rep. 750.

A release procured without fraud, deception, or artifice, if the releasor is in the full possession of all his faculties, is valid and binding and an absolute bar to any right of action growing out of the original injury: *Retzer v. Dold Packing Co.*, 58 Mo. App. 264, So, where the defendant has performed its part of a release agreement, and the plaintiff admits its execution, and understands at the time its legal effect, such release is a bar to an action at law until set aside in equity: *Homuth v. Metropolitan Street Ry. Co.*, 129 Mo. 629.

But it is often claimed by the releasor that he signed the release without a knowledge of its contents, that he was imposed upon, that the release was obtained by fraud, that he was ignorant of his rights, and that, therefore, the release should either be canceled, or overruled as a defense in an action for damages by the releasor. If the releasor does not know what he is signing, it is his plain duty to inquire. He has no right to act as one who understands what he is doing, unless he intends to lead those with whom he is dealing to believe that he does understand the act that he does. If he has the ability to inform himself as to the contents of the instrument which he signs, he cannot, in the absence of fraud or excusable mistake, be heard to say that he did not sign it, or be relieved from the operation thereof. One who signs a written release in ignorance of its contents is presumptively guilty of gross negligence,

and the burden of proof rests upon him to rebut the presumption. He has no right to repose a blind confidence in the releasee, but must use reasonable diligence to ascertain for himself the facts upon which he acts, and can avoid the consequences of his failure to read the release before signing it only by clear proof that his failure to do so was induced by fraud or excusable mistake. The rule, therefore, is, that one who has signed a written instrument, without being induced thereto through fraud or deception, cannot avoid its effect on the ground that at the time he signed the paper he did not read it or know its contents, but relied upon what another said about it: *Albrecht v. Milwaukee etc. Ry. Co.*, 87 Wis. 105; 41 Am. St. Rep. 30; *Stewart v. Chicago etc. Ry. Co.*, 141 Ind. 55, 61; *Spitze v. Baltimore etc. R. R. Co.*, 75 Md. 162; 32 Am. St. Rep. 378; *Jenkins v. Clyde Coal Co.*, 82 Iowa, 618; *Barker v. Northern Pac. Ry. Co.*, 65 Fed. Rep. 460; *Vickers v. Chicago etc. R. R. Co.*, 71 Fed. Rep. 139; *Och v. Missouri etc. Ry. Co.*, 130 Mo. 27; *Mateer v. Missouri Pac. Ry. Co.*, 105 Mo. 320; *Lumley v. Wabash Ry. Co.*, 71 Fed. Rep. 21; *Wallace v. Chicago etc. Ry. Co.*, 67 Iowa, 547; *Shanley v. Laclede Gaslight Co.*, 63 Mo. App. 123. And the fact that the party could not read English or understand the contents of the paper signed is no excuse: *Albrecht v. Milwaukee etc. Ry. Co.*, 87 Wis. 105; 41 Am. St. Rep. 30. Compare *Spitze v. Baltimore etc. R. R. Co.*, 75 Md. 162; 32 Am. St. Rep. 378, and monographic note thereto on carelessness as a bar to relief. Where a compromise, release, and discharge of a disputed liability for personal injuries has been deliberately entered into between the parties, it should not be canceled or set aside by a court of equity except upon the most satisfactory proof. For cases in which the proof has been held not satisfactory or sufficient to show fraud or excusable mistake or ignorance of rights, see *Chesapeake etc. Ry. Co. v. Mosby*, 93 Va. 93; *Homuth v. Metropolitan Street Ry. Co.*, 129 Mo. 629; *Alabama etc. Ry. Co. v. Turnbull*, 71 Miss. 1029; *Nelson v. Minneapolis Street Ry. Co.*, 61 Minn. 167; *Shanley v. Laclede Gaslight Co.*, 63 Mo. App. 123; *Denver etc. R. R. Co. v. Sullivan*, 21 Colo. 302.

If, in an action against a railway company to recover damages for injuries caused by negligence, the defendant sets up a written release of all claims for damages, signed by the plaintiff, and the latter, not denying its execution, sets up that it was signed by him in ignorance of its contents, at a time when he was suffering great pain from his injuries, and in a state approaching to unconsciousness, caused by his injuries, and by the use of opiates, the question of his capacity to execute a release is for the jury, under proper instructions from the court: See principal case; *Union Pac. Ry. Co. v. Harris*, 158 U. S. 326; *Gibson v. Western etc. R. R.*, 164 Pa. St. 142; 44 Am. St. Rep. 586; *Och v. Missouri etc. Ry. Co.*, 130 Mo. 27; *Bliss v. New York etc. R. R. Co.*, 160 Mass. 447; 39 Am. St. Rep. 504. The question of ratification of a release, after the execution thereof, is also a question for the jury: See principal case; *Jones v. Alabama etc. Ry. Co.*, 72 Miss. 22; *Gibson v. Western etc. R. R.*,

164 Pa. St. 142; 44 Am. St. Rep. 586. A finding that a release was obtained by fraud will not be disturbed where the evidence shows that it was signed by the releasor when he was incapable of transacting any important business or exercising an intelligent judgment on any subject: See principal case; St. Louis etc. Ry. Co. v. Phillips, 66 Fed. Rep. 85; Union Pac. Ry. Co. v. Harris, 63 Fed. Rep. 800; Northwestern etc. Ins. Co. v. Woods, 54 Kan. 663; Jones v. Alabama etc. Ry. Co., 72 Miss. 22; Sanford v. Royal Ins. Co., 11 Wash. 653.

The mere fact, however, that a person, at the time of making a settlement for personal injuries, was still sensitive of his injuries, and had been taking medicine, is not a ground for rescission, if the medicine was such as not to impair his mental faculties, nor the pain such as to subvert his judgment; and the settlement of a claim for personal injuries will not be set aside merely because it is improvident: Barker v. Northern Pac. Ry. Co., 65 Fed. Rep. 460.

If a release has been procured by fraud, it is not necessary to return or offer to return the sum paid before the injured party brings his action for damages: See principal case; Jones v. Alabama etc. Ry. Co., 72 Miss. 22; Shaw v. Webber, 79 Hun, 307; and one who seeks to recover part of the damages accruing from an accident is not bound to return money received by him on account of a release given by him of the other part of the damages: Lumley v. Wabash R. R. Co., 76 Fed. Rep. 66; but, ordinarily, one cannot bring an action or have a settlement for injuries received without having offered to return the money received thereunder: Barker v. Northern Pac. Ry. Co., 65 Fed. Rep. 460; Retzer v. Dold Packing Co., 58 Mo. App. 264; Och v. Missouri etc. Ry. Co., 130 Mo. 27; Drohan v. Lake Shore etc. Ry. Co., 162 Mass. 435.

If a release is given, and specific mention is therein made of particular injuries known and considered as the basis of settlement, general language following does not include a particular injury then unknown to both parties of a character so serious as to clearly indicate that, if it had been known, the release would not have been signed: Lumley v. Wabash R. R. Co., 76 Fed. Rep. 66; Union Pac. Ry. Co. v. Artist, 60 Fed. Rep. 365. A release discharges rights of which the releasor was merely ignorant, unless some advantage is taken of the situation, in which case it would be otherwise: Kirchner v. New Home Sewing Machine Co., 135 N. Y. 182, reversing the same case, 59 Hun, 186. The fact that the releasor is not aware of the strength of his case, is ignorant of certain important facts and of the witnesses by whom he can prove them, is, no fraud or undue advantage appearing, to be regarded merely as his misfortune: Vickers v. Chicago etc. R. R. Co., 71 Fed. Rep. 139. On the contrary, it has been held that if an instrument is so general in its terms as to release the rights of a party of which he was ignorant, and which were not at the time within the contemplation of the agreement, it will be restrained to the purposes of the agreement and confined to the rights intended to be released: Blair v. Chicago etc. R. R. Co.,

89 Mo. 383. The release of a claim for damages against a railroad company for the killing of her husband and son, her only means of support, given by an illiterate woman, in ignorance of her rights, and in a state of extreme distress and destitution, in consideration of a railroad ticket worth three dollars and twenty-five cents and seventy dollars in money, is not such a compromise of her rights, as will bar further recovery: *Byers v. Railroad*, 94 Tenn. 345. For instances in which equity has given relief in cases of insurance, where fraud was resorted to in obtaining a release, or where the releasor was unduly influenced or overreached, see *Sanford v. Royal Ins. Co.*, 11 Wash. 653; *Northwestern Mut. Ins. Co. v. Woods*, 54 Kan. 663.

Whether or not a release interposed as a defense to an action for damages for personal injuries was obtained by fraud may be tried as an issue at law and without first resorting to equity for the cancellation of the instrument: *Homuth v. Metropolitan Street Ry. Co.*, 129 Mo. 629. Compare *Bean v. Western etc. R. R. Co.*, 107 N. C. 731. Thus, in an action for damages for personal injuries, the defendant set up in his answer an alleged agreement in the nature of a release or discharge of the cause of action. To that plea, the plaintiff replied that the agreement had been obtained by fraud, while he was unable, because of pain and suffering caused by the injuries, to comprehend his act in signing it, and that he never assented to the agreement. It was held that the reply to the plea of a release was sufficient in an action at law, without resorting to equity to cancel the agreement: *Girard v. St. Louis Car Wheel Co.*, 123 Mo. 358; 45 Am. St. Rep. 556. But in a later case in the same state, it has been held that an absolute release for all damages, if not void, though voidable, is, until set aside in an equitable proceeding for fraud in its procurement, a bar to an action for injuries which are the basis of the settlement: *Och v. Missouri etc. Ry. Co.*, 130 Mo. 27. A court of equity may relieve a party from the effect of a voluntary settlement, where the party executing the instrument, though receiving professional advice, did not comprehend its effect nor intend to make an irrevocable deed of her property: *Gibbs v. New York Life Ins. Co.*, 14 Abb. N. C. 1, and note at pages 9 and 11; *Conkling v. Davies*, 14 Abb. N. C. 499. A party, however, is not entitled to relief on the ground of surprise, when he had the advice of counsel in doing the act complained of: *Sandlin v. Ward*, 94 N. C. 490, a case concerning the discharge of a co-obligor, and in which the complaint did not state a cause of action. If a widow and beneficiary of a member of a beneficial order, on the payment to her of a small sum, releases the order from the payment of her claim for a large amount, upon the false representation of the officers of the order that the deceased was not in good standing at the time of his death and that she had no claim whatever against it, a court of equity, upon proof of good standing and such false representation, will set the release aside; and the fact that she had the advice of counsel will not deprive her of relief, if he was also misinformed by such officers: *Henry v. Imperial Council*, 52 N. J. Eq.

770. And equity will not enforce a release obtained through the use of undue influence. For example, if it appears that a brother and a sister charge another sister with using undue influence in procuring superior benefits under a will, in her own behalf, and threaten to resist the probate of the will and to exhaust the estate in litigation, if she does not surrender those benefits, and thereby procure her signature to an agreement under which she does surrender such benefits, equity will not enforce the agreement, where the defendant alleges that it was obtained from her by the other parties thereto by fraud, and that when she signed it she did so in ignorance of her rights, and where it also appears by the pleading presented by those who seek to enforce the agreement that the defendant was wholly ignorant of all business, had had no experience, was likely to be imposed upon and misled, and that she had no legal advice as to the nature and extent of her rights: *Flummerfelt v. Flummerfelt*, 51 N. J. Eq. 432. A release executed by an heir at law, who was young, needy, and hurried, in consideration of a sum of money, to executors, though men of high character, and who assured the heir that the bequest was considered good, was held invalid in *Wheeler v. Smith*, 9 How. 55. In a suit to cancel a release, if the evidence shows a studious concealment from the plaintiff, by an executor, in whose position and ability the former reposed some confidence, of the precise point essential to his free and intelligent action, it is competent for a court of equity to cancel the release, so far as lawful payments have not been made under it: *Haviland v. Willets*, 141 N. Y. 35.

Contracts.—If certain facts are assumed by both parties to a contract as its basis, and it subsequently appears that such facts did not exist, the contract is inoperative: *Pink v. Smith*, 170 Pa. St. 124; 50 Am. St. Rep. 750; and may be avoided at law: *Ketchum v. Catlin*, 21 Vt. 191; or rescinded in a court of equity: *Daniel v. Mitchell*, 1 Story, 172; *Miles v. Stevens*, 3 Pa. St. 21; 45 Am. Dec. 621; and it has been held that such a contract may be corrected in equity, as this does not defeat, but effectuates, the intention of the parties: *Harrell v. De Normandie*, 26 Tex. 121. Thus, if parties, intending to reduce a parol agreement to writing, and because they are ignorant of the force of language, and misunderstand the meaning of the terms used, make a contract different from that designed, equity will grant relief by reforming the instrument and compelling the parties to execute and perform their agreement as they made it; and it makes no difference whether such a mistake is called one of law or of fact: *Pitcher v. Hennessey*, 48 N. Y. 415. If there is a mistake, whether of law or of fact, in reducing an agreement to form, or in carrying it into effect, equity will grant relief: *Lanning v. Carpenter*, 48 N. Y. 408; *Brioso v. Pacific Mut. Ins. Co.*, 4 Daly, 246.

The general rule is, that when parties, with a knowledge of the facts, and without any inequitable incidents, have made an agreement as they intended it should be, and the writing expresses the transaction as it was understood and designed to be made, equity

will not allow a defense, or grant a reformation or rescission, although one of the parties may have mistaken or misconceived its legal meaning, scope, or effect: *Renard v. Clink*, 91 Mich. 1; 30 Am. St. Rep. 458; *Ashcorn v. Smith*, 2 Pen. & W. 211; 21 Am. Dec. 437; *Pitcher v. Hennessey*, 48 N. Y. 415; *Lanning v. Carpenter*, 48 N. Y. 408; *Smith v. Penn*, 22 Gratt. 402; *Deare v. Carr*, 3 N. J. Eq. 513. Thus, where the parties to a contract adopt the security which is to be used to effectuate their intention, if the security should fail, from ignorance of the law, or from any other cause, to operate as the parties intended, the courts cannot substitute any other security for the one adopted: *Lanning v. Carpenter*, 48 N. Y. 408.

Mere ignorance of one's rights, or mistake of law on the part of one party to a contract, does not, as a rule, authorize a court of equity to set it aside: *Kleimann v. Gieselmann*, 114 Mo. 437; 35 Am. St. Rep. 761; *Rankin v. Mortimere*, 7 Watts, 372; *Trigg v. Read*, 5 Humph. 528; 42 Am. Dec. 447; *Gross v. Leber*, 47 Pa. St. 520; *Robertson v. Smith*, 11 Tex. 211; 60 Am. Dec. 234. A mere mistake of law does not, in the absence of other circumstances, constitute any ground for the reformation of a written contract: *Snell v. Atlantic Ins. Co.*, 98 U. S. 85; though a contract made under a mistake of law, though with full knowledge of the facts, may be set aside in cases where neither party has acquired a right or suffered a loss by the contract: *Lawrence v. Beaubien*, 2 Bail. 623; 23 Am. Dec. 155. But, while mere naked ignorance of the law does not authorize a court of equity to set aside a contract or to reform an instrument, yet, if that ignorance is superinduced by the other party, or if there is a misplaced confidence, or if advantage is taken of weakness of intellect, these and other influences, mixed with ignorance of law, are sufficient: *Sparks v. White*, 7 Humph. 86; *Trigg v. Read*, 5 Humph. 528; 42 Am. Dec. 447; *Robertson v. Smith*, 11 Tex. 211; 60 Am. Dec. 234; *Tyson v. Passmore*, 2 Pa. St. 122; 44 Am. Dec. 181; *Rees v. De Bernardy* [1896], 2 Ch. 437; *Brioso v. Pacific Mut. Ins. Co.*, 4 Daly, 246. Chancery will sometimes relieve a party who was ignorant of his rights at the time of contracting, though no fraud was intended by the other party; thus, if one, through a mistake of law, acknowledges himself under an obligation which the law does not impose, he is not bound thereby: *Warder v. Tucher*, 7 Mass. 449; 5 Am. Dec. 62; *May v. Coffin*, 4 Mass. 341, 347; *Offut v. Parrott*, 1 Cranch C. C. 154.

One who signs a written contract in ignorance of its contents, and without reading it is presumptively guilty of gross negligence, and cannot avoid it on the ground that he did not read it or know its contents: *Albrecht v. Milwaukee etc. Ry. Co.*, 87 Wis. 105; 41 Am. St. Rep. 30; *Weller's Appeal*, 103 Pa. St. 594; *Dellinger v. Gillespie*, 118 N. C. 737; *Picton v. Graham*, 2 Desaus. Eq. 592; *Campbell v. Van Houten*, 44 Mo. App. 231; but he is not negligent if he is unable to read, has asked for it to be read, and it has been misread to him: *Cole v. Williams*, 12 Neb. 440. Equity will relieve against a mistake of material fact in a contract superinduced by a mistake of law,

though not if the mistake is only one of law: *Gross v. Leber*, 47 Pa. St. 520; *Deare v. Carr*, 3 N. J. Eq. 513.

Criminal Cases and Torts.—Ignorance of the law, and innocence of any intent to violate it, excuses no one for its violation: *State v. Downs*, 116 N. C. 1064; *Atkins v. State*, 95 Tenn. 474; *State v. McIntire*, 1 Jones, 1; 59 Am. Dec. 566; *People v. O'Brien*, 96 Cal. 171; *Barlow v. United States*, 7 Pet. 404; and ignorance of a fact or state of things contemplated by a statute will not excuse its violation, though the act is done under the advice of counsel: *Commonwealth v. Weiss*, 139 Pa. St. 247; 23 Am. St. Rep. 182; *State v. Downs*, 116 N. C. 1064; *United States v. Reeder*, 69 Fed. Rep. 965; *State v. Sasse*, 6 S. Dak. 212; post, p. 834. Thus, a party charged with unfair and partial conduct in the exaction of commissions unauthorized by law cannot repel the charge by showing that they were taken honestly and through a mistaken construction of the law: *Stow v. Converse*, 3 Conn. 325; 8 Am. Dec. 189. So one cannot excuse himself from a charge of murder, in killing an officer, who tried to arrest him, by showing ignorance of the authority with which the law had clothed the deceased, the defendant having knowledge of the fact that the deceased was an officer: *State v. Williams*, 36 S. C. 493. A person who has committed a tortious act, in consequence of a mistake of law, will not be relieved, by a court of equity, from the consequences of his act, where the other party was not in fault: *Pettes v. Bank of Whitehall*, 17 Vt. 435. The defendant, on the trial of an indictment for rape has no ground of exception to a refusal to instruct the jury that unless the defendant knew or had good reason to believe that the girl was under sixteen years of age he could not be convicted: *Commonwealth v. Murphy*, 165 Mass. 66; 52 Am. St. Rep. 496.

But there are cases holding that ignorance of facts is a defense in certain criminal cases: *Lee v. Lacey*, 1 Cranch C. C. 263; *Stern v. State*, 53 Ga. 229; 21 Am. Rep. 266; *State v. Yeargan*, 117 N. C. 706. Thus an infant who does not know that playing at a game of chance known as "shooting craps" is unlawful, though he knows the difference between right and wrong, is not indictable for gambling: *State v. Yeargan*, 117 N. C. 706. So a person indicted for selling intoxicating liquors, in violation of statute, may, on the trial, show that at the time he bought the article alleged in the indictment to be intoxicating liquor, it was represented to him to be free from alcoholic properties; that he bought it with the understanding, and believing, that it was not intoxicating liquor, and sold it with such understanding and belief: *Farrell v. State*, 32 Ohio St. 456; 30 Am. Rep. 614, and monographic note thereto discussing ignorance of fact as a defense in criminal cases. One ignorant of the existence of a letter is not subject to a penalty for not delivering it: *United States v. Beaty*, Hemp. 487.

Deeds.—A mistake arising from ignorance of law, and a consequent mistake as to title, is not a ground for reforming a deed founded on such mistake, or for other relief in equity: *Hunt v. Rousmaniere*, 1

Pet. 1; Burt v. Wilson, 28 Cal. 632; 87 Am. Dec. 142; **Whitesides v. Taylor**, 105 Hl. 496; **Trigg v. Read**, 5 Humph. 529; 42 Am. Dec. 447; **Fowler v. Black**, 136 Ill. 363. A court of equity interferes to correct a mistake in a written instrument only for the furtherance of justice. It is under no obligation to correct the mistake, unless its interference is necessary to prevent the perpetration of a fraud or some injustice: **Henderson v. Dickey**, 35 Mo. 120; **Trigg v. Read**, 5 Humph. 529; 42 Am. Dec. 447. If a party can read, it is not open to him after executing a deed, to insist that its terms were different from what he supposed them to be when he signed it: **Eldridge v. Dexter etc. R. R. Co.**, 88 Me. 191. A deed will not be set aside because the grantor did not precisely understand its legal effect, if it was explained to her and she understood its contents: **Taylor v. Duttrick**, 165 Mass. 547; 52 Am. St. Rep. 530. Compare **Page v. Higgins**, 150 Mass. 27. If equity will ever relieve one who has entered into a transaction under a misapprehension of its effect, when the other party failed merely to correct such misapprehension, there being no such peculiar relations between the parties as to place the one who remained silent under any unusual obligation, he who remained silent must have appreciated the legal effect of the transaction and must have known that the other was acting in ignorance of such effect: **Eldridge v. Dexter etc. R. R. Co.**, 88 Me. 191.

A mistake in law in executing a solemn agreement, such as a deed, if tainted by imposition, misrepresentation, undue influence, misplaced confidence, or surprise may be relieved against in equity. If the instrument does not express the true intent and meaning of the parties, by reason of such elements of fraud, equity will upon satisfactory evidence cancel or reform it or give other relief: **Trigg v. Read**, 5 Humph. 529; 42 Am. Dec. 447; **Bush v. Merriman**, 87 Mich. 260; **Whelen's Appeal**, 70 Pa. St. 410; **Bristor v. Tasker**, 135 Pa. St. 110; 20 Am. St. Rep. 853; **Stockbridge Iron Co. v. Hudson Iron Co.**, 107 Mass. 290; **Caspari v. First German Church**, 82 Mo. 649; **Reeder v. Gorsuch**, 55 Kan. 553. A court of equity will set aside a deed made under a mistake as to the rights of the parties: **Hearst v. Pujol**, 44 Cal. 20. While a deed will not be canceled because of a mere misstatement of law by the grantee, which induces its execution, the misstatement is ground for cancellation, if the grantee took advantage of the grantor's ignorance of law or of the relation of trust and confidence between them: **Schuttler v. Braudfuss**, 41 W. Va. 201.

Limitations of Actions.—The rule is, that the statute of limitations commences to run when the cause of action accrues, not when the plaintiff who was ignorant before comes to a knowledge of his rights: **Thomas v. White**, 3 Litt. 177; 14 Am. Dec. 56; **Hecht v. Slaney**, 72 Cal. 363. Ignorance of one's rights, or of the existence of facts entitling one to bring suit does not stop the running of the statute of limitations from the time the cause of action accrued, unless it is occasioned by some improper conduct on the part of the defendant: **Jordan v. Jordan**, 4 Greenl. 175; 16 Am. Dec. 249; **Hoff-**

man v. Parry, 23 Mo. App. 20; Shreves v. Leonard, 56 Iowa, 74; Miller v. Lesser, 71 Iowa, 147; Conner v. Goodman, 104 Ill. 365; Lexington Life Ins. Co. v. Page, 17 B. Mon. 412; 66 Am. Dec. 165; Thrower v. Cureton, 4 Strob. Eq. 155; 53 Am. Dec. 660; Smith v. Bishop, 9 Vt. 110; 31 Am. Dec. 607; and it has even been held that fraud or mistake preventing an assertion of a claim within the statutory period, does not defeat the statutory bar: McCrea v. Purmort, 16 Wend. 460; 30 Am. Dec. 103. A legatee's ignorance of a legacy does not remove the bar of the statute of limitations in an action against the executor who claims the legacy adversely, if there was no fraudulent concealment: Tinnen v. Mebane, 10 Tex. 246; 60 Am. Dec. 205. Ignorance of his rights, on the part of complainant, not superinduced by the fraud or connivance of the defendant, does not take the case out of the statute of limitations: Underhill v. Mobile Fire etc. Ins. Co., 67 Ala. 45. Hence, one holding the superior title cannot set up his ignorance of the claim of right under which his land is occupied by an adverse claimant, in person or by agent, to defeat the statute of limitations: Brownson v. Scanlan, 59 Tex. 222. Ignorance of the existence of fraud has been held not to stop the running of the statute of limitations: Connolly v. Hammond, 58 Tex. 11. But, while the statute of limitations begins to run, as a general rule, from the act done, this rule has its exceptions; and there is no reason, resting on general principle, why ignorance that is the result of the defendant's conduct, and not of the stupidity or negligence of the plaintiff, should not prevent the running of the statute in favor of the wrongdoer: Lewey v. Fricke Coke Co., 166 Pa. St. 536; 45 Am. St. Rep. 684. It has, therefore, been held that the statute does not begin to run against a plaintiff, who has been kept in ignorance of his rights by fraudulent practices on the part of the defendant, until discovery of the fraud. The discovery of the fraud gives a new cause of action: Lewey v. Fricke Coke Co., 166 Pa. St. 536; 45 Am. St. Rep. 684. This has been called the only exception to the general rule that ignorance of one's rights will not prevent the running of the statute: State v. Standard Oil Co., 49 Ohio St. 137; 34 Am. St. Rep. 541; but it has been held in cases of innocent mistake that the statute does not begin to run until the time when the mistake is discovered, or, at any rate, until the time when, by the use of due diligence, it ought to have been discovered: Gould v. Emerson, 160 Mass. 438; 39 Am. St. Rep. 501; Emerson v. Navarro, 31 Tex. 334; 98 Am. Dec. 534. If a failure to discover a mistake is relied on to defeat the statute, the plaintiff must show that he could not, by the exercise of proper diligence, have made an earlier discovery: Lexington etc. R. R. Co. v. Bridges, 7 B. Mon. 556; 46 Am. Dec. 528; but it seems that an allegation of ignorance of fraud until within four years, on the part of the plaintiff, throws the burden of proof of his knowledge before that time on the defendant: Thrower v. Cureton, 4 Strob. Eq. 155; 53 Am. Dec. 660.

Mistake of Law and Fact combined is a good ground for equitable relief especially if it does not result in injury to the opposite party: *Lane v. Holmes*, 55 Minn. 379; 43 Am. St. Rep. 508; *Estate of Woodburn*, 138 Pa. St. 606; 21 Am. St. Rep. 932; *Freeman v. Curtis*, 51 Me. 140; 81 Am. Dec. 564; *Haviland v. Willets*, 141 N. Y. 35; *King v. Doolittle*, 1 Head, 77.

Money Paid under a mistake of law, with knowledge of the facts, cannot, according to the weight of authority, be recovered back, in the absence of any fraud or improper conduct on the part of the payee: *Alton v. First Nat. Bank*, 157 Mass. 341; 34 Am. St. Rep. 285; *Painter v. Polk County*, 81 Iowa, 242; 25 Am. St. Rep. 489; *Freeman v. Curtis*, 51 Me. 140; 81 Am. Dec. 564; *Norton v. Marc u*, 15 Me. 45; 32 Am. Dec. 132; *Champlin v. Laytin*, 18 Wend. 407; 31 Am. Dec. 382; note to *Lawrence v. Beaubien*, 23 Am. Dec. 164; note to *Black v. Ward*, 15 Am. Rep. 173; *Vanderbeck v. Rochester*, 122 N. Y. 285, 289; *Flynn v. Hurd*, 118 N. Y. 19, 26; *Silliman v. Wing*, 7 Hill, 159; *Evans v. Hughes County*, 3 S. Dak. 244, 580; *Louisville etc. R. R. Co. v. Hopkins County*, 87 Ky. 605; *Windbiel v. Carroll*, 16 Hun, 101. Contra, *Ray v. Bank of Kentucky*, 3 B. Mon. 510; 39 Am. Dec. 479; and note to *Lawrence v. Beaubien*, 23 Am. Dec. 164. The government, it is held, is not bound by the act of its officers in making an unauthorized payment under a misconstruction of the law: *Wisconsin Cent. R. R. Co. v. United States*, 164 U. S. 190.

But money paid under a mistake of fact may be recovered back: *Alston v. Richardson*, 51 Tex. 1; *Neal v. Read*, 7 Baxt. 333; *Davis v. Krum*, 12 Mo. App. 279; *Stotsenburg v. Fordice*, 142 Ind. 490; *Glenn v. Shannon*, 12 S. C. 570; *Champlin v. Laytin*, 18 Wend. 407; 31 Am. Dec. 382, and note; *Norton v. Marden*, 15 Me. 45; 32 Am. Dec. 132; *United States v. Barlow*, 132 U. S. 271; *McKibben v. Doyle*, 173 Pa. St. 579; 51 Am. St. Rep. 785; *Buffalo v. O'Malley*, 61 Wis. 255; 50 Am. Rep. 137, and note; *Sharkey v. Mansfield*, 90 N. Y. 227; 43 Am. Rep. 161; note to *Gould v. Emerson*, 39 Am. St. Rep. 504; *Ray v. Bank of Kentucky*, 3 B. Mon. 510; 39 Am. Dec. 479; *Champlin v. Laytin*, 18 Wend. 407; 31 Am. Dec. 382; whether or not the mistake was mutual: *Stotsenburg v. Fordice*, 142 Ind. 490; and although the party paying may have had the means of knowing the facts, and omitted to take advantage of means of knowledge within his reach: *Alston v. Richardson*, 51 Tex. 1; *McKibben v. Doyle*, 173 Pa. St. 579; 51 Am. St. Rep. 785; Contra, *Simmons v. Looney*, 41 W. Va. 738; holding that assumpsit does not lie to recover money paid in ignorance of a fact which the plaintiff was in legal duty bound to ascertain, and which he had the means of ascertaining. As mistake of foreign law is a mistake of fact money paid through ignorance of the law of another of the United States may be recovered back: *Haven v. Foster*, 9 Pick. 112; 19 Am. Dec. 353; *Norton v. Marden*, 15 Me. 45; 32 Am. Dec. 132. It has, however, been held that money voluntarily paid on an unfounded demand cannot be recovered: *Mowatt v. Wright*, 1 Wend. 355; 19 Am. Dec. 508; *Mc-*

Arthur v. Luce, 43 Mich. 435; 38 Am. Rep. 204. **6 Compare Wilson v. Ott**, 173 Pa. St. 253; 51 Am. St. Rep. 767.

Mutual Mistake.—As a contract induced by a mutual mistake in respect to the subject matter is inoperative, and void: **Bedell v. Wilder**, 65 Vt. 406; 36 Am. St. Rep. 871; **Fink v. Smith**, 170 Pa. St. 124; 50 Am. St. Rep. 750; it may be relieved against, or set aside in equity: **Champlin v. Laytin**, 18 Wend. 407; 31 Am. Dec. 382; **Norton v. Marden**, 15 Me. 45; 32 Am. Dec. 132; **Ruffner v. McConnel**, 17 Ill. 212; 63 Am. Dec. 362; **King v. Doolittle**, 1 Head, 77; **Keister v. Myers**, 115 Ind. 312; **Broadwell v. Broadwell**, 1 Gilm. 599; **Griffith v. Sebastian County**, 49 Ark. 24. In cases of mutual mistake going to the essence of the contract, it is not necessary, to warrant the interposition of a court of equity, that there should be any element of fraud. Relief will be granted on the ground of mutual mistake, as to the existence of the thing which constituted the basis of the contract: **King v. Doolittle**, 1 Head, 77; and relief has been granted upon the ground of surprise: **State v. Paup**, 13 Ark. 129; 56 Am. Dec. 303.

The power of a court of equity, however, to afford relief from the consequences of mutual mistakes or ignorance of the parties to written instruments is not strictly limited to mistakes of fact or ignorance thereof, but extends also to mistakes of law: **Benson v. Markoe**, 37 Minn. 30; 5 Am. St. Rep. 816; **Evarts v. Strode**, 11 Ohio, 480; 38 Am. eDec. 744; **Wood v. Patterson**, 4 Md. Ch. 335; **Andrews v. Winkler**, 27 Tex. 170; **Allen v. Elder**, 76 Ga. 674; 2 Am. St. Rep. 63.

There are cases holding that a mutual mistake of law is no ground for relief in equity unless some element of fraud is shown, and that the parties cannot be relieved because they mistook the legal effect of the instrument executed: **McAmrich v. Laughlin**, 13 Pa. St. 37f; **Gordere v. Downing**, 18 Ill. 492; **Juzan v. Toulmin**, 9 Ala. 662; 44 Am. Dec. 448; **Kenyon v. Welty**, 20 Cal. 637; 81 Am. Dec. 137; but, according to the later and better considered decisions, an admitted or clearly established misapprehension of law in the making of a contract creates a basis for the interference of a court of equity, which rests in its discretion, and is to be exercised only in unquestionable and flagrant cases: **Griswold v. Hazard**, 141 U. S. 260; **Nelson v. Davis**, 40 Ind. 366. For example, if there is an honest mistake of law, or ignorance, as to the effect of an instrument on the part of both contracting parties, equity may give relief against it, especially where it operates as a gross injustice to one and gives an unconscientious advantage to the other: **Allen v. Elder**, 76 Ga. 674; 2 Am. St. Rep. 63; **Clayton v. Bussey**, 30 Ga. 946; 76 Am. Dec. 680; **Evants v. Strode**, 11 Ohio, 480; **Lucas v. Lucas**, 30 Ga. 191; 76 Am. Dec. 642; **Benson v. Markoe**, 37 Minn. 30; 5 Am. St. Rep. 816.

Other Illustrations.—For other instances in which relief has been granted or denied according to principles above announced, for mistake or ignorance of rights, see, as to cases of insurance: **Titus v. Rochester German Ins. Co.**, 97 Ky. 567; 53 Am. St. Rep. 426; **Berry v. American Cent. Ins. Co.**, 132 N. Y. 49; 28 Am. St. Rep. 548; **Mc-**

Lean v. Equitable Life etc. Soc., 100 Ind. 127; 50 Am. Rep. 779; as to cases involving judgments: **Note to Oliver v. Pray**, 19 Am. Dec. 606; **Risher v. Roush**, 2 Mo. 95; 22 Am. Dec. 442; **Yarbrough v. Thompson**, 3 Smedes & M. 291; 41 Am. Dec. 626; **Goodenow v. Ewer**, 16 Cal. 461; 76 Am. Dec. 540; note to **Little Rock etc. Ry. Co. v. Wells**, 54 Am. St. Rep. 241; as to cases concerning laches: **Wetzel v. Minnesota Ry. etc. Co.**, 65 Fed. Rep. 23; **Lasher v. McCreery**, 66 Fed. Rep. 834; **Dugan v. O'Donnell**, 68 Fed. Rep. 983; **Lumley v. Wabash Ry. Co.**, 71 Fed. Rep. 21; **Case of Broderick's Will**, 21 Wall. 503; **Griswold v. Hazard**, 141 U. S. 260; **Connolly v. Hammond**, 58 Tex. 11; as to cases regarding mortgages: **Deare v. Carr**, 3 N. J. Eq. 513; **Kyes v. Merrill Furniture Co.**, 92 Wis. 32; **Wilson v. Ott**, 173 Pa. St. 253; 51 Am. St. Rep. 767; as to cases regarding partnerships: **Bispham v. Price**, 15 How. 162; **Dortie v. Dugas**, 55 Ga. 484; **Robertson v. Burrell**, 110 Cal. 568; as to cases concerning rewards: **Marvin v. Treat**, 37 Conn. 96; 9 Am. Rep. 307; **Howlands v. Lounds**, 51 N. Y. 604; 10 Am. Rep. 654; **Stamper v. Temple**, 6 Humph. 113; 44 Am. Dec. 296; **Fitch v. Snedaker**, 38 N. Y. 248; 97 Am. Dec. 791; as to canceling subscription to stock of corporation: **Williams v. Thwing Electric Co.**, 160 Ill. 526; as to liability of sureties on bonds: **Pass v. Grenada Co.**, 71 Miss. 426; **Griswold v. Hazard**, 141 U. S. 260; as to trusts: **Wilson v. Maryland Life Ins. Co.**, 60 Md. 150; **Dugan v. O'Donnell**, 68 Fed. Rep. 983; as to waiver of lawful rights: **Montague v. Massey**, 76 Va. 315; **Moynahan v. Wilson**, 2 Flip., 130, 136; as to ways: **Blakeman v. Blakeman**, 39 Conn. 320.

Placing in Statu Quo.—One obstacle in the way of granting relief in cases where there has been a mistake of legal rights is the difficulty, and sometimes the impossibility, of restoring the parties to their original situation; but in a proper case equity will give relief, and, if possible, restore both parties to their former position: **Griffith v. Sebastian County**, 49 Ark. 24, 36; **Benson v. Markoe**, 37 Minn. 30; 5 Am. St. Rep. 816; **Jordan v. Stevens**, 51 Me. 78; 81 Am. Dec. 556; **King v. Doolittle**, 1 Head, 77; **Kesler v. Zimmerschitte**, 1 Tex. 50; if it can be done without prejudice to the subsequently acquired rights of others: **Macknet v. Macknet**, 29 N. J. Eq., 54. But equity will not afford relief in cases of mutual mistake of legal rights where it is impossible to restore both parties to their former position: **Fink v. Farmers' Bank**, 178 Pa. St. 154.

Pleading.—Ignorance of cause of abatement will never justify the filing of a plea in abatement after the time limited has expired: **Huntley v. Holt**, 59 Conn. 102; 21 Am. St. Rep. 71. In pleading mistake, the facts and circumstances must be alleged: **Fahie v. Pressey**, 2 Or. 23; 80 Am. Dec. 401; **Hoover v. Reilly**, 2 Abb. (U. S.) 471; **Jenkins v. German Lutheran Congregation**, 58 Ga. 125; **Carr v. Dickson**, 58 Ga. 144; **Nicholson v. Caress**, 59 Ind. 39; **New v. Wambach**, 42 Ind. 456. If the plaintiff alleges ignorance of the law, in his bill, the defendant cannot take advantage of it on demurrer: **Hart v. Roper**, 6 Ired. Eq. 349; 51 Am. Dec. 425.

Remedies, Generally.—Courts of equity in the exercise of their jurisdiction to reform written instruments, on account of a mistake or ignorance of rights, proceed with the utmost caution, and will not grant relief in such cases unless the proof is clear, exact, and satisfactory: *Ohlander v. Dexter*, 97 Ala. 476; *Wood v. Price*, 46 Ill. 439; *O'Donnell v. Harmon*, 3 Daly, 424; *Bryce v. Lorillard Fire Ins. Co.*, 55 N. Y. 240; 14 Am. Rep. 249; *Benson v. Markoe*, 37 Minn. 30; 5 Am. St. Rep. 816; *Kyle v. Fehley*, 81 Wis. 67; 29 Am. St. Rep. 866; note to *Wheeler v. Smith*, 9 How. 55. Evidence of a mistake of fact on one side may afford ground for rescinding a contract, but not for rectifying an agreement: *Douglas v. Grant*, 12 Ill. App. 273. A will cannot be corrected because the testator misapprehended its effect: *Arthur v. Arthur*, 10 Barb. 9. They are equally cautious in canceling such agreements: *Crum v. Sawyer*, 132 Ill. 443; and the complainant, to be entitled to a specific performance, "must come with his hands perfectly clean, and his conscience void of offense": *Trigg v. Read*, 5 Humph. 529; 42 Am. Dec. 447. Equity will not, in such cases, decree a specific performance, where the decree would produce injustice, or be inequitable under all the circumstances: *Trigg v. Read*, 5 Humph. 529; 42 Am. Dec. 447; but will be more inclined, where the agreement is inequitable, to sustain an action to rescind it: *Titus v. Rochester German Ins. Co.*, 97 Ky. 567; 53 Am. St. Rep. 426; *Hurd v. Hall*, 12 Wis. 125.

HEARD v. CRUM.

[73 MISSISSIPPI, 157.]

ATTACHMENT--GARNISHMENT--CONTRACT PRICE AS "WAGES."—If one contracts to build a house for a certain amount, and employs laborers to work under him, the contract price is not "wages" within the meaning of a statute exempting, to a specified amount, "the wages of every laborer or person working for wages," although the contractor does some unascertained portion of the work himself.

J. D. Fontaine and Leroy R. Kennedy, for the appellant.

C. Lee Crum, for the appellee.

159 WHITFIELD, J. In *Lang v. Simmons*, 64 Wis. 529, it was held that money due upon a contract with a wood factory, for sawing lumber belonging to assignors, was not "wages." The court say: "They were not persons hired by the assignors to do manual labor for them, nor were they hired persons within the ordinary sense of the words 'hired persons.' They were manufacturers, doing business for themselves and employing other persons to accomplish the work they contracted to do for others. . . . We think it very clear that . . . laborers who can be said to earn wages of an employer must

hold such a relation to the employer that he can direct and control them in and about the work which they are doing for him." And the definition of the Imperial Dictionary is quoted: "In ordinary language, the term 'wages' is usually restricted to sums paid as rewards to artisans, to domestic servants, to laborers employed in manufactures, in agriculture, mines, and other manual occupations."

The case of *Riley v. Warden*, 2 Ex. 59, is exactly in point, and decisive of this case. Defendants were manufacturers of brick, and plaintiff was a subcontractor under them. He contracted to get out clay for the making of the bricks. He engaged eight or nine men to work with him, and worked manually himself. The question was, whether he was a "laborer" within the meaning of an act of parliament of like kind with our statute, but of broader and more liberal terms than our statute as regarded the laborer. Parke, B., said: "Now, it appears to me that, upon the true construction of this act, it is to be taken as applicable to those persons only who strictly contract as laborers—that is, to such as enter into a contract to employ their personal services and to receive payment ¹⁶⁰ for their services in wages. . . . The reward which the plaintiff is to receive is not to be paid for his personal labor, but it is the contract price from which he may derive a profit by the assistance and labor of others. . . . I take it to be clear that, if the plaintiff had undertaken to do a work for one hundred thousand pounds, he would not have been within the act, although he might have done some portion of it himself. It is difficult to draw the line between such a case and the present." And Rolfe, B., said: "It appears to me to be clear that the act applies to those persons who are to receive wages as the price of their labor, and that the term 'wages' is to be understood in its popular sense, and does not include wages which are the price of a contract. The plaintiff here employed several persons under him, and, in that respect, differs from what is popularly understood by a laborer." And Platt, B., added: "It cannot be said that every person who puts the finishing stroke to a work—as, for instance, a master mason engaged to build a house—is within this act."

The facts in the case at bar bring it squarely within the principle of this case. The plaintiff employed laborers who worked under him. He himself did a part of the work. He says he could not say what proportion. His contract was to build a house for one hundred and five dollars. Clearly he was a con-

tractor, and the sum agreed to be paid was the "price of his contract," not wages within the meaning of section 1963, paragraph 10a of the annotated code of 1892—"the wages of every laborer or person working for wages."

The view taken by the learned judge below was correct, and the judgment is affirmed.

EXEMPTION OF WAGES—CONTRACTOR—LABORER.—A contractor is not a laborer or employé, within the meaning of a statute exempting wages from attachment or execution: Note to Johnston v. Barrills, 50 Am. St. Rep. 722; and the contract price is not, therefore, subject to levy as laborers' wages: Henderson v. Nott, 36 Neb. 154; 38 Am. St. Rep. 720.

RICHBERGER v. AMERICAN EXPRESS COMPANY.

[73 MISSISSIPPI, 161.]

MASTER AND SERVANT—LIABILITY OF MASTER FOR TORT OF SERVANT.—The old rule that the master was never liable for the willful or malicious act of his servant is not now the law. He is answerable if the act was done in his master's business, and this is the true test of his liability.

MASTER AND SERVANT—INJURY CAUSED BY SERVANT'S INFIRMITY OF TEMPER—MASTER'S LIABILITY.—A master who puts his servant in a place of trust or responsibility, or commits to him the management of his business or care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty and authority and inflicts an unjustifiable injury upon another.

MASTER AND SERVANT—INJURY CAUSED BY SERVANT'S INFIRMITY OF TEMPER—MASTER'S LIABILITY—ILLUSTRATION.—An express company is answerable in damages to one who pays an overcharge on an express package, who complains thereof, and who demands that such excess be refunded, where the local agent, immediately after refunding the excess, while taking a receipt therefor, and while the sender still remains in the office, willfully, wantonly, oppressively, and wrongfully curses, abuses, insults, and maltreats him, and especially where the whole transaction consumes but a few moments and all of its features constitute but one continuous and unbroken occurrence, while the provoking cause of the tort is the lawful demand made for the excess, as the injurious act is not thus so separated by time and logical sequence from the refunding of the excess and taking of the receipt, which are the business of the master, as to relieve the master of liability.

Cook & Yerger, for the appellant.

D. A. Scott, for the appellee.

¹⁶⁷ WHITFIELD, J. Plaintiff had been made to pay an overcharge on express matter from Clarksdale to Tutwiler, in

this state, by the local agent of appellee, and the general agent had been seen, and stated that the matter would be arranged. Plaintiff saw the local agent about it on December 25, 1894, but was put off. Subsequently, the declaration avers, "said plaintiff, on or about the first day of January, 1895, went to the office of said express company upon business with said company, when said agent of said company in charge of the office informed plaintiff that he then and there desired to refund to plaintiff the said overcharge, and did then and there pay to plaintiff said overcharge, and required plaintiff then and there to sign a receipt for the same, and, when the said plaintiff signed and delivered said receipt to said agent, the said agent did, then and there, immediately upon the reception of said receipt, and while plaintiff was there in the office of said company, willfully, wantonly, oppressively, and wrongfully, curse, abuse, insult, and maltreat plaintiff, because plaintiff had demanded and received from said company said overcharge," etc. The odd doctrine of *McManus v. Crickett*, ¹⁶⁸ 1 East, 106, that the master is never liable for the willful or malicious act of his servant—like the early doctrine that a corporation was never so liable, which latter doctrine arose out of the early misconception of the nature of a corporation (see 5 Thompson on Corporations, secs. 6275, 6277, 6280, 6298)—has long since been repudiated. Cowen, J., put the whole argument, for the opposite view, in a single sentence when he said, in *Wright v. Wilcox*, 19 Wend. 343, 32 Am. Dec. 507, that "the dividing line was the willfulness of the act." But the whole argument against liability on such reasoning is definitely and conclusively answered in Thompson on Corporations, where the whole question is exhaustively treated. Says this author in section 6298: "The courts which have so ruled have proceeded on the theory that authority from the master to the servant to commit a willful wrong will not be implied, and that the servant, when so acting, will therein be deemed to act, not for his master, but for himself. If he makes use of his master's property in committing this wrong, he will be deemed, according to the fantastic reasoning of Lord Kenyon in *McManus v. Crickett*, 1 East, 106 (borrowed from Rolle's Abridgment), to have acquired, for the time being, a special property therein. The fallacy of this reasoning was, that it made a certain mental condition of the servant the test by which to determine whether he was acting about his master's business or not. Moreover, with respect of all intentional acts done by a

servant in the supposed furtherance of his master's business, it clothed the master with immunity if the act was right, because it was right, and, if it was wrong, it clothed him with a like immunity because it was wrong. He thus got the benefit of all his servant's acts done for him, whether right or wrong, and escaped the burden of all intentional acts done for him which were wrong. Under the operation of such a rule, it would always be more safe and profitable for a man to conduct his business vicariously than in his own person. He would escape liability for the consequences of many acts connected with his business springing from the imperfection of ¹⁶⁰ human nature, because done by another, for which he would be responsible if done by himself. Meanwhile, the public, obliged to deal or come in contact with his agents, for intentional injuries done by them, might be left wholly without redress. . . . A doctrine so fruitful of mischief could not long stand unshaken in an enlightened system of jurisprudence." And he states that it is repudiated by eminent text-writers and the great weight of modern authority, citing quite freely the authorities to date.

He then correctly shows the true test to be, not whether the tort was committed in pursuance of orders from the master, or against orders, whether the master ratified or not, whether the tort was willful and malicious or not, but whether, and solely whether, the act constituting the tort was done in the master's business. As well said in *Passenger R. R. Co. v. Young*, 21 Ohio St. 518, 8 Am. Rep. 78: "If the nature of the injurious act is such as to make the master liable for its consequences, in the absence of the particular intention, it is not perceived how the presence of such intention can be held to excuse the master": *Thompson on Corporations*, secs. 6299-6316.

He also clearly points out that the rule is not one of logic, but of public policy and necessity, a view concurred in by Judge Andrews in *Higgins v. Watervliet Turnp. Co.*, 46 N. Y. 27, 7 Am. Rep. 293, the reasoning in which case, and in *Rounds v. Delaware etc. R. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597, is unanswerable. To the same effect see *Palmeri v. Manhattan R. R. Co.*, 133 N. Y. 261; 28 Am. St. Rep. 632; *Cooley on Torts*, 626 (1); *Mechem on Agency*, secs. 740, 741, and the authorities cited by these writers.

Judge Thompson is not alone in his criticism of *McManus v. Crickett*, 1 East. 106. Chief Justice Ryan, in *Craker v. Chicago etc. R. R. Co.*, 36 Wis. 657, 17 Am. Rep. 504, points out the fact

that *McManus v. Crickett*, 1 East, 106, rested on *Middleton v. Fowler*, 1 Salk. 282, the only case cited in its support, and that that case was not a case of malice, but of negligence, and said, with great pertinency and power, that "one employing another in good ¹⁷⁰ faith to do his lawful work would be as little likely to authorize negligence as malice," and that "either would be equally dehors the employment": See, also, *American Ex. Co. v. Patterson*, 73 Ind. 430; *Southern Ex. Co. v. Fitzner*, 59 Miss. 581; 42 Am. Rep. 379; *Williams v. Planter's Ins. Co.*, 57 Miss. 759; 34 Am. Rep. 494.

It thus appears that *McManus v. Crickett*, 1 East, 106, is not now law. Counsel for appellee relies upon and cites this case, and the cases of *McCoy v. McKowen*, 26 Miss. 487, 59 Am. Dec. 264, and *New Orleans etc. R. R. Co. v. Harrison*, 48 Miss. 112; 12 Am. Rep. 356. It is true that both these cases are based on *McManus v. Crickett*, 1 East, 106. It is also true that both expressly declare that "it is immaterial whether or not the tortious act be committed while the agent is engaged in the rightful business of his employer, which he is attending to by his direction; for if he transcends his authority while so engaged, his acts do not bind his employer unless sanctioned by him"; thus declaring immaterial that which is the very test of liability in this class of cases. So far as this declaration is concerned, these cases are hereby overruled expressly, that they may not further mislead. They have been practically overruled by repeated subsequent decisions of this court: *Williams v. Planters' Ins. Co.*, 57 Miss. 759; 34 Am. Rep. 494. As to *New Orleans etc. R. R. Co. v. Harrison*, 48 Miss. 112, 12 Am. Rep. 356, it is correctly said by Judge Thompson, section 6300, bottom of page 4929, that "the true reason of the decision was, not that the act was willful or malicious, but that it was plainly outside the line of duty of the servant."

But it is urged that, however applicable this doctrine may be to carriers of passengers, it is not applicable to an express company. Doubtless there is a difference in the extent of the application of the principle, as between carriers of passengers and express companies, measured exactly by the difference in the things done by them in the discharge of their duties respectively. But the principle applies to both. An express company does not transport passengers, and cannot be made liable as a carrier of passengers might for willful torts committed by its agents on passengers in their transportation; but it keeps

¹⁷¹ offices for the transaction of its proper business, a business calling to its offices every day thousands of citizens, and in its dealing with its customers, in its offices, in its business, it is bound, in Judge Story's language, "for respectful treatment and for decency of demeanor."

It is impossible to say, on the allegations of this declaration, that the tort committed immediately upon the delivery of the receipt to the agent, and because of the demand for the refunding of what was plaintiff's conceded due, was so separated in time or logical sequence as not to have been an act done in the master's business. The whole transaction occurred in the shortest time, and was one continuous and unbroken occurrence. The cursing and abusing and maltreatment were all administered in connection with the taking of the receipt and immediately upon its delivery, and because of the demand for his rights in that matter, and while plaintiff was in appellee's office to transact, and transacting, this very business. What was said and done thus immediately upon the delivery of the receipt, was part of the *res gestae*. As well said by Judge Thompson (Thompson on Corporations, sec. 6299, top p. 4928): "In this view, even under the modern doctrine, the acts or declarations of the servant or agent tending to show his state of mind at the time of the act complained of, would be admissible in evidence as part of the *res gestae*." We have heretofore quoted from the masterly opinion of Judge Andrews in *Rounds v. Delaware etc. R. R. Co.*, 64 N. Y. 136, 21 Am. Rep. 597, in *Illinois Cent. R. R. Co. v. Latham*, 72 Miss. 32, to show when, in this character of case, the corporation would not be liable. Complementary to that, we close this opinion with the words of the same great judge in the same case, at page 134, to show here a case of liability: "The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances ¹⁷² and the occasion, goes beyond the strict line of his duty and authority and inflicts an unjustifiable injury upon another."

Reversed, demurrer overruled, and cause remanded.

MASTER AND SERVANT—LIABILITY OF MASTER FOR TORT OF SERVANT.—A master is answerable for the tort of his servant, when done within the scope of the latter's employment: See mono-

graphic note to Goodloe v. Memphis etc. R. R. Co., 54 Am. St. Rep. 85, on acts of servant for which master is not answerable: Ritchie v. Waller, 63 Conn. 155; 38 Am. St. Rep. 361. Thus, where one employé, left in charge of a railway ticket office by another employé, returned to a purchaser of a ticket too little change, and assaulted the buyer upon being asked for it, the company was held liable: Fick v. Chicago etc. Ry. Co., 60 Am. Rep. 878.

SCHLOTTMAN v. HOFFMAN.

[73 MISSISSIPPI, 188.]

WILLS—COURTS CANNOT REFORM AND CORRECT.—No court can decree the reformation and correction of a will to make it conform to the purpose and intention of the testator not expressed in the instrument as executed by him.

WILLS—ONLY QUESTION OPEN AFTER BAR OF CONTEST.—After the statutory limitation of two years from the probate of a will has expired, thereby barring a contest, the only question remaining open is that of the true construction of the instrument, as a court cannot decree its reformation and correction.

WILLS—RULES AS TO ADMISSION OF PAROL EVIDENCE.—In construing a will, the court will take into consideration the attending circumstances of the testator, the quantity and character of his estate, the state of his family, and all facts known to him which may reasonably be supposed to have influenced him in the disposition of his property; and, if the will, as made, may, without violence to its terms, be so construed as to effectuate the purpose of the testator, as disclosed by the will and attending circumstances, the courts will so construe it, but no circumstances are sufficient to control the clear and unambiguous language of the will.

WILLS—PATENT AMBIGUITY REMOVABLE BY PAROL—ILLUSTRATION.—If a testator, after disposing of his whole estate, adds a codicil creating pecuniary legacies in favor of persons not otherwise provided for, and the amounts to be paid the legatee are respectively indicated by the figure 5 following a dollar mark, with two ciphers, linked together, following this figure, but without a decimal mark, and so separated from it, and so situated above the line, as to make it uncertain, in the absence of the decimal mark, whether five hundred dollars, or only five dollars, was intended by the testator, a patent ambiguity appears upon the face of the instrument, such as may be removed by parol evidence, for it is not true that an ambiguity appearing on the face of the paper, if that alone be looked to, cannot be explained by parol.

WILLS—PATENT AMBIGUITY NOT REMOVABLE BY PAROL.—If parol evidence is for the purpose of adding a material term to an instrument, or when the court, having looked to the circumstances of the parties, the subject matter of the instrument, and all proper collateral facts, remains uncertain as to what the meaning of the written words is, a patent ambiguity appears, which parol evidence cannot aid.

WILLS—LATENT AMBIGUITY—WORDS OF DOUBLE MEANING.—The difficulty of distinguishing between patent and latent ambiguities has led to the recognition of an intermediate class,

partaking of the nature of both patent and latent ambiguities; as where the words in question are all sensible, and have a settled meaning, but at the same time admit of two interpretations, according to the subject matter in the contemplation of the parties. The more satisfactory solution of the difficulty, however, is to assign ambiguities of this character to the class of latent ambiguities.

Frederick Speed, for the appellant.

Wade R. Young, for the appellees.

195 COOPER, C. J. The appellees, Jerry and Rufus Hoffman, exhibited their bill in this cause against John Schlottman, executor of the will of their mother, Martha Hoffman, and against Ella Hoffman, the devisee of the general estate of the said Martha, to enforce certain legacies given to them by the testatrix, and which complainants aver are charged by the will upon the property devised to said Ella.

By her will, dated December 18, 1885, Mrs. Hoffman devised and bequeathed her whole estate to her daughter Ella for life, with remainder over to such of the children of her daughter Emma Schlottman as should survive Ella, and, if none of the such children should survive the said Ella, then the remainder was given to the said Emma Schlottman. On the — day of May, 1886, the testatrix executed the following codicil, viz: "Confirming and not revoking any of the provisions of the foregoing will, I direct that there shall be paid by her, out of **196** the estate bequeathed by me to my said daughter, Ella Hoffman, to my son, Jerry Hoffman, the sum of five dollars, and to my son, Rufus Hoffman, the sum of five dollars, as mementoes of my affection for them, the same to be in full of all claims and demands by them against my estate."

The will of Mrs. Hoffman was probated in August, 1886, and this bill was exhibited on June 21, 1894.

The executor, Schlottman, and the devisee, Ella Hoffman, answered the bill, and made their answer a cross-bill against the complainants. By the answer and cross-bill it is averred that the testatrix owned at her death no personal estate, except a small quantity of household and kitchen furniture of little value, and that her real estate consisted of her home; that for a long time before her death the testatrix was an invalid, dependent for her support upon the exertions of the defendant, Ella, who, in the residence of the testatrix, kept a boarding-house, and supported not only her mother, but the complainants in this suit; that after the death of the testatrix, the said

Ella has supported an afflicted brother, and that complainants, from that time up to within six months of the institution of this suit, boarded with said Ella, the complainant, Jerry, having a family of three persons; and that during all this time neither of complainants has contributed anything to the support of themselves, the family of Jerry, or said afflicted brother. The crosscomplainant, Ella, charges that if in fact a charge was fixed by the testatrix on the property for the payment of the legacies claimed by the complainants, that the sum due has been more than paid by her in supplying them and the family of Jerry with board and lodging, and she prays an account of the amount due her before and since the death of the testatrix, and that the same may be applied to the payment of the legacies claimed.

The cross-bill further charges that, "at the time when the said will and codicil thereto was made, said Martha could neither read nor write, and was wholly dependent upon others, who read to her said will and codicil, and that all of the contents ¹⁹⁷ thereof were read to her when they were severally executed; that it was the intent and purpose that the sum of five dollars should be given to each of the complainants, and that when said codicil was read to her and executed by her, the sum mentioned as bequeathed to them was read as five, and not five hundred dollars, and it was the intent and purpose of the person who wrote the words [figures] alleged to be five hundred dollars to write five dollars, and, in truth and in fact he did so write, and, if it appears otherwise, it is a mere clerical error of the person who wrote the same."

The plaintiffs prayed that the court would construe the will "according to the true intent and purpose of the testatrix," but, if the court should be of opinion that the will as written, by clerical error of the scrivener, was made to express a different purpose than that intended by the testatrix, then, that the same should be by proper decree corrected and reformed so as to express her true purpose; and, finally, that if it should be decreed that complainants were entitled to a legacy of five hundred dollars each, then that the court would direct an account to be stated, showing the amount due by each of them to the plaintiff, Ella, and the sums so found due be applied to the discharge of the legacies. The complainants answered the cross-bill, denying the averments thereof.

On final hearing, the chancellor suppressed the evidence taken by the plaintiffs, which will be alluded to hereinafter, and ren-

dered a final decree directing the sale of the real estate of the testatrix for the payment of a legacy of five hundred dollars to each of the complainants, with interest thereon from August, 1887—one year from the probate of the will—and from this decree all parties appeal.

The executor and Ella Hoffman assign for error the action of the court in decreeing the amount of the legacies to be five hundred instead of five dollars, and the complainants assign for error his refusal to allow interest on the legacies from the probate of the will.

¹⁰⁸ The original will is certified to us for inspection, and, from such inspection, it is manifest that the christian name of the legatee, Rufus, and the characters and figures \$5 00 in the codicil are in a different handwriting from the body of the codicil. The real controversy in the case is whether these characters and figures express the sums of five or five hundred dollars.

It is well settled that no court can decree the reformation and correction of a will to make it conform to the purpose and intention of the testator not expressed in the instrument as executed by him: 1. Because the testator has passed beyond the jurisdiction of all earthly courts; 2. Because a will is a voluntary conveyance, and, if the court had jurisdiction of the testator, it could not compel him to make a will of any sort; 3. Because the statute of wills provides for the devolution of property by wills actually made, and not by those parties intend, however definitely, to make but do not make: *Rhodes v. Rhodes*, L. R. 7 App. Cas. 198; *Schouler on Wills*, sec. 220; *Ehrman v. Hoskins*, 67 Miss. 192; 19 Am. St. Rep. 297; 2 *Pomeroy's Equity Jurisprudence*, sec. 871; *Bingel v. Volz*, 142 Ill. 214; 34 Am. St. Rep. 64; 10 L. R. Ann. 321, and note.

If, when the will was presented for probate, or within two years thereafter (Code 1880, sec. 1961), the validity of the codicil had been contested, it would have been competent, under the issue of *devisavit vel non*, to challenge the codicil as not in fact a part of the will of the testatrix. In this contest it might have been shown that the testatrix was unlearned and unable to read or write; that the codicil was read to her as one giving five dollars instead of five hundred to the complainants, and, because of such fact, that she did not, in fact, execute understandingly a codicil giving them the larger sum. In short, anything might have been proved the legal effect of which would show that the paper offered for probate was not, in whole or in part, her will.

But our statute declares that "if no party shall appear within ¹⁹⁹ two years to contest the will, the probate shall be final and forever binding, saving to infants and to persons non compos mentis the period of two years to contest the will after the removal of their respective disabilities": Code 1880, sec. 1961.

Nearly eight years intervened after the will of Mrs. Hoffman was admitted to probate before the bill in this cause was exhibited, and, as to the parties to this controversy, the probate is "final and forever binding," conclusively establishing that the particular instrument, as written, was and is the legal will of the testatrix. The single question left open for consideration and decision by the courts is the true construction of the instrument thus adjudicated to be the last will of Mrs. Hoffman: 1 Jarman on Wills, 33.

The first inquiry, when we come to the construction of the will, is whether the court is shut up to a mere inspection of the instrument, or may look to extraneous evidence for the purpose of discovering the meaning of the testatrix as found in the language she has employed. Counsel for complainants contend that parol evidence is inadmissible, because the will is an unambiguous instrument; that no parol testimony can elucidate its plain language, and that to create an ambiguity by resorting to other evidence, and then to solve it by giving controlling effect to such evidence, would be to substitute for the will actually made by the testatrix one which the court thinks she intended to make.

Our examination of the authorities cited by counsel, and of many others, has failed to discover a case which in its concrete facts is analogous to the one before us. But cases are not of great value so long as well-settled principles light our way.

It is a well-settled canon for the construction of wills that the court will take into consideration the attending circumstances of the testator, the quantity and character of his estate, the state of his family, and all facts known to him which may reasonably be supposed to have influenced him in the disposition of his property; but that, when viewed in this light, and ²⁰⁰ from the standpoint of the testator, if the language of the will cannot reasonably be so construed as to carry out his discovered purpose, the will and not the intent of the testator must control. In other words, if the will as made may, without violence to its terms, be so construed as to effectuate the purpose of the testator, as disclosed by the will and attending circumstances,

the courts will so construe it, but no circumstances are sufficient to control the clear and unambiguous language of the will: 1 Jarman on Wills, 428; 1 Redfield on Wills, 418-443.

Keeping in view the distinction between the interpretation of the written words and the direct evidence of intention independent of the instrument, let us recur to the written will viewed in the light of the circumstances of the testatrix. It appears from the evidence that the estate of the testatrix consisted of an insignificant quantity of personal property and her home, which was worth about three thousand five hundred dollars. The family consisted of the testatrix, who for some months before her death was an invalid, of an invalid son, of two adult sons (the complainants), and of a daughter, who was the support of the family. Besides these members of the household, there was a married daughter, Mrs. Schlottman, who resided with her husband.

By the will Mrs. Hoffman gave her entire estate to the daughter Ella for life, with remainder to the children of Mrs. Schlottman. After the execution of the will, an officious neighbor, who pretended to know the law, advised Mrs. Hoffman that her will would be subject to attack unless she gave to each of her sons as much as five dollars each, and, though advised correctly by her attorney that this was unnecessary, she persisted in executing a codicil whereby they would be given these sums. The attorney drew the codicil, leaving blanks for the insertion of the christian names of the sons, and the amount to be given.

Mrs. Hoffman, desiring to execute the codicil, called in one Speiler, a machinist, and requested him to fill in the blank ²⁰¹ amounts by writing in each the sum of five dollars, and Speiler, in executing her directions, wrote the character \$, the figure 5 and two ciphers in the manner hereinafter set out. Speiler is now dead, but the other subscribing witness to the codicil, Sproule, was examined as a witness, and testified that he remembered the instructions given by Mrs. Hoffman, and that Speiler, attempting to write the sum of five dollars, wrote the character and figures, as above stated. This witness thinks Speiler read the codicil to Mrs. Hoffman, reading the sums inserted as five dollars, but his memory is not clear as to this.

It is difficult to express in words the precise manner in which the figures are written. We trace them as best we can, and the words and figures appear thus: "To my son, Jerry Hoffman, the sum of \$5 00 dollars, and to my son, Rufus

Hoffman, the sum of \$5 00 dollars, as mementoes of my affection for them," etc. Now, these figures, if written in one way, would express the sum of five hundred dollars; if written with the decimal mark (\$5.00) would mean five dollars, and, so also, if written alone, without the decimal mark, either with the ciphers in the position of a numerator (\$5 00) or distinctly and unequivocally removed by sufficient space from the figure 5. An inspection of the original codicil shows the ciphers in each case connected together, removed by a distinct space from the 5, in the one instance somewhat above, and in the other distinctly above the line.

Where different sums may be expressed by the use of the same characters or figures according to their collocation, and, as arranged, an uncertainty as to their meaning is suggested, an ambiguity appears upon the face of the instrument; and such, we think, is disclosed by the codicil in this case. We cannot say whether the sum given to the legatees is five dollars or five hundred dollars. There is an absence of the decimal mark, but the ciphers are linked together, removed by an unusual space from the figure they qualify, and written, not on the line, but somewhat above it. Now, this ambiguity, being a patent ²⁰² one; it is contended by counsel for complainants, cannot be explained by parol testimony. This argument is made to keep out the parol testimony, for he perceives, of course, that when that is looked to a flood of light fatal to the complainants' cause is let in. But if, as we have said, there exists an ambiguity on the face of the codicil, then, unless parol evidence may be received, the codicil is inoperative (except under the rules of election), because the court would not know what sum to decree to be paid. The rule against the introduction of parol testimony in cases of patent ambiguity is very generally stated too broadly—frequently for the reason that, with reference to the case before the court, the rule, however broadly stated, is correct in its application. But it is not true that an ambiguity appearing on the face of the paper, if that alone be looked to, cannot be explained by parol, nor that all latent ambiguities may be. When the parol evidence is for the purpose of adding a material term to an instrument, or when the court, having looked to the circumstances of the parties, the subject matter of the instrument, and all proper collateral facts, remains uncertain as to what the meaning of the written words is, a patent ambiguity appears, which parol evidence cannot aid: 1 Greenleaf on Evidence, secs. 299, 300.

The difficulty of distinguishing between patent and latent ambiguities led Judge Story to suggest that there was an intermediate class, partaking of the nature of both patent and latent ambiguities—i. e., “when the words are all sensible and have a settled meaning, but at the same time consistently admit of two interpretations, according to the subject matter in the contemplation of the parties.” The subject is fully discussed in the notes by Cowan & Hill, and Edwards to 2 Phillips on Evidence, chapter 8, section 3. The solution of the difficulty by Professor Greenleaf, in assigning ambiguities of this character to the class of latent ambiguities, is perhaps as satisfactory as can be suggested, and reconciles many apparently conflicting statements of the rule.

Looking in the case before us to the situation of the testatrix, ²⁰³ the condition of her family, the character and quality of her estate, and the *res gestae* of the execution of the will, we see clearly what she meant and intended to do, and no violence is done to the words she has employed, nor is anything added thereto, by accepting the figures of the codicil as meaning five instead of five hundred dollars, for they may mean indifferently the one or the other.

Let the decree be reversed and cause remanded.

WILLS—AMBIGUITIES—PAROL EVIDENCE.—In construing a will, the court can only aid the testator's intention and purpose. It cannot devise a new scheme or make a new will: *Tilden v. Green*, 130 N. Y. 29; 27 Am. St. Rep. 487. The circumstances, situation, and surroundings of a testator, at the time of executing his will, may be shown by extrinsic evidence, if there is any ambiguity or obscurity in the language used, to place the court in his situation, and thus enable it to understand the meaning and application of the language he has adopted: See monographic note to *Chappell v. Missionary Soc.*, 50 Am. St. Rep. 285, on extrinsic evidence to explain wills. Any evidence is admissible which, in its nature and effect, simply explains what the testator has written: *Warner v. Miltenberger*, 21 Md. 264; 83 Am. Dec. 573. If there is some absurdity or ambiguity on the face of a will, ascribable to something either omitted or inserted, and there is clear and satisfactory proof that the insertion or omission was not intended by the testator, the court is bound to pronounce for the will; not in its actual state, but with its errors removed or corrected: *Eatherly v. Eatherly*, 1 Coldw. 461; 78 Am. Dec. 499. The admission of extrinsic evidence to explain wills, and the subject of patent and latent ambiguities, is discussed at length and illustrated in the extended note to *Chappell v. Missionary Soc.*, 50 Am. St. Rep. 279-294, showing that any ambiguity explainable by extrinsic evidence must appear upon the face of the will.

COWAN v. LONDON ASSURANCE CORPORATION.

[73 MISSISSIPPI, 321.]

INSURANCE—CONFLICT OF LAWS.—A foreign insurance company that has not paid the privilege tax and procured the license required to carry on such business in this state, nor otherwise complied with the laws of this state respecting the transaction of its business here, cannot maintain an action for premiums due on a policy of insurance upon property in this state, whether issued in or out of the state.

Action for premium due on a policy of insurance, brought by the appellee, a foreign marine insurance company, against the appellant, Cowan, a cotton broker, residing at Vicksburg. The subject of the insurance was cotton belonging to Cowan. The property insured was in the city of Vicksburg, state of Mississippi, and the contract of insurance was, in fact, made in the city of New York. The events out of which the controversy arose occurred prior to the adoption of the code of 1892. On a former appeal from a judgment in favor of Cowan, the supreme court held that the company was entitled to recover, reversed the judgment, and remanded the cause for a new trial: See London Assur. Corp. v. Cowan, 71 Miss. 928. In the present case, it was pleaded that the insurance company had not complied with the laws of the state of Mississippi respecting the transaction of business by foreign insurance companies in that state, and that the contract of insurance was, therefore, void. There was a judgment in favor of the company, and Cowan appealed.

Dabney & McCabe, for the appellant.

Booth & Anderson, for the appellee.

327 WOODS, J. This is an action by a foreign insurance company which has not complied with our statutes in any of the particulars prescribing the method to be pursued by such companies desiring to do business in this state, and which had not paid the privilege tax and procured the license required to carry on such business in this state, for premiums due on a policy of insurance issued to appellant.

The policy of our law is to protect our citizens against irresponsible companies—against insurance which does not insure—and, to that end, certain important acts are to be done, in the manner and at the time prescribed, as preliminary to taking any risks or transacting any business of insurance in this state.

Plainly, the appellee has done none of these acts, and, equally plainly, this suit is an effort to use the courts of the state to coerce payment of premiums alleged to be due on a policy issued by the appellee without such compliance with our law. ³²⁸ It is the transaction of insurance business to collect premiums, and a most important transaction to both the insurer and the insured. Surveys of property cannot be made in the state by companies failing to comply with our statutes, applications cannot be taken for insurance in the state, and losses cannot be adjusted in the state, for all these are acts done in the transaction of insurance business in the state. No agent of such foreign insurance company can come into the state and collect premiums on a policy issued even elsewhere by such company, for the prohibition is sweeping, inflexible, and universal. That the courts of the state cannot be used for the compulsory collection of premiums on policies so issued is too plain for extended argument.

In *Moses v. State*, 65 Miss. 56, it was held that an agent of a foreign company, which had not complied with our laws so as to be entitled to do business here, could not come into the state, after the destruction by fire of the insured property, to examine into the loss, take proofs, and determine the amount thereof. This question is perfectly covered by the case just cited and by the case of *Lemonius v. Mayer*, 71 Miss. 514: See *Rose v. Kimberly etc. Co.*, 89 Wis. 545; 46 Am. St. Rep. 855; *Seamans v. Temple Co.*, 105 Mich. 400, ante, p. 457, cases almost identical, in their leading features, with the case in hand.

Reversed and remanded.

³²⁹ COOPER, C. J., delivered the opinion of the court in response to the suggestion of error.

Counsel for the appellee do not give to the prohibition declared by section 1073 of the code of 1880 its full effect, and therefore are impressed with the conviction that our decision is erroneous. Grant the premise that the thing done was not forbidden by the statute, and it follows as a corollary that the action for the premium may be maintained; but if the thing done was in violation of the law, it is equally certain that, from the forbidden act, no right of action to be pursued in the courts of this state could arise. The statute declared that "it shall not be lawful for any agent of any insurance company, incorporated by any other state than the state of Mississippi, directly or indirectly, to take risks or transact any business of insurance, in

this state, without first procuring a certificate of authority from the auditor of public accounts," etc. The plaintiff's declaration, and all the evidence, shows that the property ³³⁰ insured was in the city of Vicksburg, in this state. The declaration in truth avers that the policy was "issued and delivered" in said city, but, as the evidence discloses that the contract was in fact made in the city of New York, and the pleadings might be amended to show that fact, we have dealt with the case as though the real allegations of the declaration corresponded with the proof.

We have held, and we think correctly, that a contract made in New York by a citizen of this state, with a foreign insurance company, which has not complied with our laws, insuring property situated in this state, is a violation by such company of our statute, and, hence, that our courts are closed against such company's seeking to enforce any right springing out of or resting on the contract; that the insurance company is, in such case, taking a risk and transacting business in this state.

The cases cited in our opinion are precisely in point. In *Seamans v. Temple Co.*, 105 Mich. 400, ante, p. 457, the court, responding to the argument that the contract was not made in the state, said: "If it be conceded that the contract was made in Wisconsin, and that the premiums and loss, if any, are payable there, it is as much in contravention of the policy of this state as though it had been made here. It cannot be supposed that the statutes were intended merely to prevent the act of making the contract in this state. The object is to protect the citizens of this state against irresponsible companies, and to prevent insurance by unauthorized companies upon property in this state." In *Rose v. Kimberly etc. Co.*, 89 Wis. 545, 46 Am. St. Rep. 855, the court said: "The evil to be corrected is not the writing of a policy by an unlicensed company in this state, but the writing of a policy at all." The whole question, however, was definitely settled in *Moses v. State*, 65 Miss. 56. In that case a contract of insurance had been made in the city of New Orleans, Louisiana, by a citizen of Georgia, with a company organized under the laws of Louisiana, but insuring property situated in this state. The property was destroyed by fire, and an adjuster of the company came into the state to ³³¹ examine into the loss. He was indicted and convicted for acting as an agent of a foreign company doing business in this state without having complied with our laws, and that conviction was affirmed by this court and afterward by the supreme court of the United States.

Moses was indicted under sections of the code which declared what acts should fix the character of agent for insurance companies on the actor, and making it a misdemeanor to so act for a foreign insurance company which had not complied with our laws. Among other acts creating such agency, it was, *inter alia*, declared that any person "who solicits insurance, . . . or who shall receive or deliver a policy of insurance of any such company, or who shall examine or inspect any risk, or receive, collect, or transmit any premiums of insurance . . . other than for himself, or who shall examine into or adjust, or aid in adjusting, any loss for or on behalf of any such insurance company, . . . shall be held to be the agent of the company for which the act is done."

Moses was indicted and convicted for coming into this state to adjust a loss arising under a policy issued under a contract of insurance, made in another state, on property situated in this state. Now, by the same statute, it is as much a misdemeanor to "collect and transmit a premium" as to adjust a loss. It would be a strange condition of things if the courts of this state should be open to enforce against Cowan the payment of a premium which no person could lawfully have received from him and transmitted to the company. What would be done with the money if a judgment should be rendered requiring its payment? The zealous and estimable counsel who represent the appellee could not accept and transmit it, for it is sued for as a premium, would be paid as a premium, and transmitted as a premium collected on a contract prohibited by law, and the receipt and transmission of premiums on which is, by law, made a misdemeanor. The act of March 9, 1882 (Acts, p. 166), did not operate as a repeal of the code provisions. By the first ³³² section of that act, authority was given to the municipality of Vicksburg, extended also by the fifth section to other municipalities having organized fire departments, to levy and collect a privilege tax upon each fire insurance company transacting business in said city. By the third section it was provided that persons having insurance, on property in the city, in companies not authorized to do business in the state, should pay to the city one-fourth of one per cent of the amount insured. This was levied upon the policy holders for the manifest reason that such foreign companies could not be directly reached, and, hence, the policy holders, having the benefit of the security afforded by the fire department, were themselves taxed. But there is in the act no suggestion of a purpose

to mitigate the consequences declared by the code against foreign companies which had not complied with our laws.

We are entirely satisfied with the judgment we have heretofore rendered, and a suggestion of error overruled.

A FOREIGN INSURANCE CORPORATION PROHIBITED BY STATUTE from issuing policies upon property within the state without express authority and from doing business or maintaining actions therein without complying with certain regulations and conditions cannot, without complying with such requirements, maintain an action in that state on a contract of insurance on property situated therein, no matter whether such contract is made in that state or in the state of the domicile of the corporation: *Seamans v. Temple Co.*, 105 Mich. 400; ante, p. 457; *Rose v. Kimberly*, 89 Wis. 544; 46 Am. St. Rep. 855; *Wood v. Cascade etc. Ins. Co.*, 8 Wash. 427; 40 Am. St. Rep. 917.

BERKSON v. Cox.

[78 MISSISSIPPI, 339.]

LIMITATIONS OF ACTIONS—JUDGMENTS.—If the limitation of an action on a judgment is seven years next after its rendition, the right of action upon it is barred after the lapse of that period, notwithstanding the issuance of an execution before the lapse of that time and within seven years preceding the institution of the suit.

LIMITATIONS OF ACTIONS—JUDGMENT—NEW PROMISE OR ACKNOWLEDGMENT.—A judgment is not a contract, and an action on it is not, therefore, embraced in the terms of a statute whereby actions upon contracts are taken out of the operation of the statute of limitations, when a new promise or an acknowledgment, in writing, signed by the party chargeable thereby, is shown. Hence, a judgment debtor's written acknowledgment of the justice and validity of the debt evidenced by the judgment, does not take the judgment out of the operation of the statute.

Action upon a judgment brought by the appellants, the Berkson brothers, on December 21, 1894. The judgment was rendered in favor of the plaintiffs on November 28, 1887. The defendants, Cox and others, appellees, pleaded the seven years' statute of limitations, to which the plaintiffs filed two replications. The first set up that an execution had been issued on the judgment on December 28, 1887, and within seven years next preceding the institution of the suit, on which there had been a return of nulla bona on March 14, 1888. The second replication averred that, on April 18, 1890, and on May 6, 1890, and at other times within seven years next before suit brought, the defendants, in letters written and signed by them, had acknowl-

edged the justice and validity of the debt evidenced by the judgment. Demurrers to these replications were sustained, and the action was dismissed. The statute required an action on a judgment to be brought within seven years next after the rendition of the judgment.

E. F. Noel, for the appellants.

Hooker & Wilson, for the appellees.

³⁴² WOODS, J. The judgment of 1887 was clearly barred: *Buckner v. Pipes*, 56 Miss. 366; *Stith v. Parham*, 57 Miss. 289; *Hall v. Green*, 60 Miss. 47.

Counsel is in error in supposing that *Hall v. Green*, 60 Miss. 47, is not in perfect harmony with the two former cases. The error is not unnatural, however, regard being paid only to the collocation of the sentence quoted from that opinion by counsel, to the effect that "the judgment was valueless except as affording the basis for the issuance of executions or the bringing of a new suit." The remark was made in an inappropriate connection. Evidently, the meaning is, that the judgment in a federal court, unenrolled in the proper county, created no lien on the debtor's property in such county, and was valueless, except for the purposes indicated in that opinion.

The demurrer to the second replication, in which an acknowledgment, in writing, within the period of limitation of seven years, was sought to be set up in answer to defendant's plea of the bar of the statute, was also properly sustained. An action on a judgment is not embraced in the terms of section 2688 of the code of 1880, whereby actions upon contracts are taken out of the statute's operation, when a new promise or an acknowledgment, in writing, signed by the party chargeable thereby, is shown. By the almost universal agreement of text-writers and courts, in this day, judgments are held not to be contracts. The question is discussed in both *Freeman on Judgments* and *Black on Judgments*, and nothing could well be added to what is said by these authors: See cases cited in discussion of the question by each. In *Wood on Limitation of Actions*, also, it is said that the replication to a plea of the statute of a new promise is not good in an action upon a judgment of a court of record: See *Wood on Limitation of Actions*, 135, and authorities cited in note 1.

While some earlier authorities and some not well-considered opinions call judgments contracts, the weight of reason and ³⁴³ later authorities is against the confounding of judgments with

contracts. In their striking features, judgments and contracts are markedly dissimilar.

Affirmed.

JUDGMENT AS A CONTRACT.—A STATUTE OF LIMITATIONS prescribing the time within which actions may be brought upon any loan or contract does not control actions on judgments: Freeman on Judgments, 4th ed., sec. 4. Execution cannot issue on a judgment, unless it has been kept alive, after the statutory period of the judgment's existence has expired: *Morse v. Goold*, 11 N. Y. 281; 62 Am. Dec. 103, and note.

MORGAN v. LONG.

[73 MISSISSIPPI, 406.]

COTENANCY—PURCHASE FROM COTENANT IN ADVERSE POSSESSION—ACCOUNTING.—One who purchases agricultural products of a tenant in common holding adverse possession of lands on which the products are grown cannot be compelled to account to the other cotenants for the value of such products, although the purchaser knew when he bought them of the interest of such other cotenants in the land.

COTENANCY—LIEN OF COTENANT—BONA FIDE ENCUMBRANCE OF COTENANT'S INTEREST—PRIORITY.—The lien in favor of one cotenant against the interest of another, which, in the partition of lands held in common, is allowed for what may be found due on an accounting between them touching the receipts and disbursements from and concerning the common estate, is not entitled to priority over a bona fide purchaser or encumbrancer of the interest of one of the cotenants in the common estate.

Proceeding for partition of the lands in controversy, and an accounting as to rents. The appellees, Blanche Long and others, owning an undivided one-fourth interest in the lands, instituted the proceeding. The defendant, Mrs. McHenry, owned a three-fourths interest in the land, and was, and had been for some years, in adverse possession of the whole tract, during which time a part of the agricultural products were turned over to the appellant, Morgan, who held a deed of trust on Mrs. McHenry's interest to secure a debt. When Morgan received the products, he had notice that the complainants were cotenants in the land with Mrs. McHenry, and that the rents due to them had not been paid. The bill prayed for a general accounting as to rents with Mrs. McHenry; that Morgan be required to account for the value of such of the agricultural products as he had received, to the amount of complainant's rent claim; that complainants be decreed to have a lien for the rents found due to

them; and that Morgan's deed of trust be subordinated thereto. The appellant demurred to the bill on the following grounds: 1. That he was not accountable for any agricultural products raised on the lands; 2. That his deed of trust had priority over complainants' rent claim, and could not be properly subordinated thereto; 3. That complainants were entitled to no relief as to him. Morgan appealed from an order overruling his demurrer.

L. P. Yerger, for the appellant.

W. T. Rush, for the appellees.

409 COOPER, C. J. In no aspect of the pleadings can it be said that the complainants have made Morgan a defendant to their bill that an account may be taken as between him and Mrs. McHenry to the end that complainants may redeem the land, upon which they may fix a charge for the rents collected by their cotenant, Mrs. McHenry. He is made defendant for the purpose only of charging him with the value of the rents received by Mrs. McHenry and paid over to him. To this liability he is not subject. The rents collected by Mrs. McHenry were taken by her, as the bill distinctly avers, under an adverse claim, and not in recognition of the right of complainant's ancestor to participate therein. A purchaser of agricultural products grown on land in the adverse possession of another is not liable to account to the true owner of the land for the value of such products, even though he knew at the time he bought them of the want of title to the land of the occupant and who was the real owner of the land. In other aspects this **410** case is covered by the decision in *Burns v. Dreyfus*, 69 Miss. 211; 30 Am. St. Rep. 539.

The decree is reversed, the demurrer of appellant sustained, and, as to him, the bill is dismissed.

COTENANCY—EXCLUSIVE POSSESSION OF ONE COTENANT—ENCUMBRANCE.—If one tenant in common occupies and cultivates the common estate, to the exclusion of his cotenants, the latter have a right to have an account of the profits of the crops produced, but no property in the crops, and therefore a mortgage of such crops by the occupying tenant is good against his cotenants, and the mortgagee is not liable to account to them: Note to *Burns v. Dreyfus*, 30 Am. St. Rep. 541. That a tenant maintaining an adverse holding is liable for the value of use and occupation, though crops raised by one cotenant belong to him exclusively, where he has denied no rights to his cotenants, see monographic note to *Ward v. Ward*, 52 Am. St. Rep. 926, 928, on the liability of one cotenant to another for rents and profits received from and for expenditures made upon their common property.

MANLEY v. PATTISON.

[73 MISSISSIPPI, 417.]

EVIDENCE—PRESUMPTION OF DEATH—CHILDREN.—A statute creating a presumption of death of “any person” from seven years’ absence, without being heard of, refers only to persons having volition and the right of free locomotion, and does not apply to children incapable, by reason of their tender age, of “absenting” themselves from the state, or of “concealing” themselves within it, as where the eldest is only seven years of age.

EVIDENCE—DEATH OF CHILDREN—PRESUMPTION—BURDEN OF PROOF.—One who asserts, in an action, that children, such as those not past eleven years of age, are dead, has the burden of proving it, without the aid of a statute raising a presumption of death of “any person” from seven years’ absence, without being heard of, as it does not apply to such children.

EVIDENCE—DEATH OF CHILDREN—SUFFICIENCY. The fact that persons not related to a family, or associated with it in social or business relations, have not heard from it since its removal from its last known place of residence in the state, about eleven years previous to the trial, is no proof of the death of children of the family, who, at the time of the removal, were of tender years, the eldest being then only seven years old. There must be a sufficient and reasonable effort made to discover under what circumstances the family left, to what place the removal was made, and whether persons acquainted with the family, and who were accustomed to associate with them, have, since the removal, received information which, if properly prosecuted, would lead to the discovery of the children, if alive, or to the fact of death, if they are in truth dead.

William C. McLean, for the appellant.

Stone & Lowry, for the appellees.

419 COOPER, C. J. The appellees, claiming as devisees under the will of Mrs. S. O. Rhew, brought this action of ejectment, to recover the lands demanded, against Manley, who is the guardian of the infant children of Dr. J. P. Rhew, deceased, and against Darby, his tenant. Mrs. S. O. Rhew died before February 9, 1880, having, by her will, made the following disposition of the lands: “I give to Jas. P. Rhew, my adopted son, for his natural life, my dwelling and all the lands I now possess (except that herein donated or given to Miss Sarah Lee), and, upon his death, to his children, if any, and if he should die without leaving any living children, or should die with children and they should die, thereupon, or at their death, the dwelling, the land and all the improvements and appurtenances thereunto belonging to be equally divided between Jodie Calhoun, Bessie Calhoun, and Sue Lee Cossan.”

J. P. Rhew died in 1881, leaving two children, and another was born after his death. In the year 1883, his widow married one Hagard, who removed with the family to Hernando, and then to Hazlehurst, in this state, and, becoming there involved in some trouble, disappeared in the year 1884 from that place with his wife and her children, and has not since been heard from. On the twenty-fourth day of June, 1890, the appellant, ⁴²⁰ Manley, was appointed guardian to the Rhew children and the lands sued for put in his possession.

The plaintiffs claim that, under the will of Mrs. Rhew, they were the devisees in fee of the lands, and entitled to its possession upon the death of J. P. Rhew without leaving children him surviving, or upon the death of the last surviving child, and they further claim that the children of J. P. Rhew are, in fact, all dead.

On the conclusion of the testimony, the plaintiffs and the defendants, respectively, asked the court to give the general charge, and that for the plaintiff was given.

It is said by counsel that the court below was of opinion that the death of the children of J. P. Rhew was sufficiently established by the facts proved, because of our statute, which declares, as a rule of evidence, that "any person who shall remain beyond the sea, or absent himself from this state, or conceal himself in this state, for seven years successively without being heard of, shall be presumed to be dead in any case where his death shall come in question, unless proof be made that he was alive within that time," etc: Code, sec. 1737.

We think the provisions of this statute are not applicable to the case made by the record. The children whose existence is brought in question, were, when last heard of, in the year 1884, of tender years, the eldest being of about the age of seven, and the youngest of three years. They were members of the family of Hagard, who had control of their movements, and could fix their domicile. Whether Hagard, when he disappeared from Hazlehurst for the purpose, suggested by the evidence, of escaping criminal prosecution, went beyond seas or from this state, does not appear; nor is there any evidence to establish the fact that these young children have concealed themselves within this state. Hagard and his wife, it may be true, have concealed themselves and the children, but the statute, which manifestly refers only to persons having volition and the right of free locomotion, does not create the presumption of the ⁴²¹ death of children in-

capable, by reason of their tender age, of "absenting" themselves from the state or of "concealing" themselves within it.

The burden of establishing the death of the children without the aid of the presumption afforded by the statute has not been met and sustained by the plaintiffs. No sufficient and reasonable effort has been made to discover under what circumstances the family left Hazlehurst, to what place the removal was made, or whether persons acquainted with the family at Hazlehurst, and who were accustomed to associate with them, have, since the removal, received information which, if properly prosecuted, would lead to the discovery of the children, if alive, or to the fact of death, if they are in truth dead. One or two of the plaintiff's witnesses seem to have casually met one or more persons who had some knowledge of the fact that Hagard and the children once lived at Hazlehurst, and who have not heard from the children or the family since the removal. But it does not appear that such persons were residents of Hazlehurst, nor, if they were, that they belonged to that class of persons to which information would probably come of the movements or residence of Hagard and his family. The fact that one or more residents of a town or village has heard nothing of a man and his family who, more than seven years ago, removed from that town, may entirely consist with the continued life and health not only of one, but of all the members of that family, and the probability of the death of all the members of a family of five is scarcely suggested by proof that certain persons, not shown to have been related to the family nor to have associated with it or any of its members in social or business relations, have not heard from the family since its removal from the town.

The judgment is reversed.

EVIDENCE—PRESUMPTION OF DEATH.—A presumption of death arises from the absence of a person from his domicile without being heard from for seven years: *Mutual Ben. Co.'s Petition*, 174 Pa. St. 1; 52 Am. St. Rep. 814, and note; *Johnson v. Merithew*, 80 Me. 111; 6 Am. St. Rep. 162; but this presumption may be rebutted by evidence sufficient to satisfy the jury that he has been heard from within that time: *Dowd v. Watson*, 105 N. C. 476; 18 Am. St. Rep. 920. The death may be proved by showing facts from which a reasonable inference would lead to that conclusion: *Johnson v. Merithew*, 80 Me. 111; 6 Am. St. Rep. 162. Absence, alone, of a person during seven years does not raise a presumption of death, but it must appear that he has not been heard of by those persons who would naturally have heard from him during the time, had he been alive. The testimony of witnesses not connected with the family, who have no personal knowledge of the facts of which they speak,

and have not derived their information from persons connected or particularly acquainted with the family, but speak generally of what they have heard and understood, is insufficient to go to the jury: See monographic note to *Wilson v. Brownlee*, 91 Am. Dec. 527, 528, on proof of death; and compare the monographic notes to *Hoyt v. Newbold*, 46 Am. Rep. 761-772, and *Sprigg v. Moale*, 92 Am. Dec. 704-708, on presumption of death. Under a statute raising a presumption of death after seven years' absence, etc., the burden of proof is on the party denying the death: *Hoyt v. Newbold*, 45 N. J. L. 219; 46 Am. Rep. 757. A party must be treated as living when no evidence is introduced to show his death: *Peabody v. Hewett*, 52 Me. 33; 83 Am. Dec. 486.

CHAPMAN v. BERRY.

[73 MISSISSIPPI, 437.]

STATUTES IN PARI MATERIA—CONSTRUCTION.—A statute on garnishment and an independent statute on exemptions must be so construed as to give harmonious effect to both.

ATTACHMENT.—A STATUTE EXEMPTING WAGES FROM GARNISHMENT is designed to secure to laborers and their families the small fruits of their toil, and must be given such construction as will carry its beneficent design into effect.

ATTACHMENT AND GARNISHMENT—WAGES—EXEMPTION.—Under a statute exempting from garnishment the wages of a laborer or other person working for wages, who is the head of a family, to the amount of one hundred dollars, the laborer has the right, on the first of each month, or whenever, by the contract of employment, the wages, not exceeding one hundred dollars, are due and payable, to demand and receive them, notwithstanding his employer may have been garnished. The amount of monthly wages for several months, less one hundred dollars, cannot be tied up, either by successive writs of garnishment, or by a single writ returnable to a term of court long subsequent to its execution, and the garnishee should be discharged.

Chapman, the appellant and judgment debtor, was an employé of the garnishee, the Alabama & Vicksburg Railway Company, working for wages at eighty-one dollars per month, payable monthly. The company was garnished on April 8, 1895, when one month's wages were due. The company retained this money, but, as Chapman informed it that the garnishment proceeding impaired his credit, that he could not live and support his family, unless the company would supply him from month to month from the subsistence car and charge the amount supplied to his wages, and that, if this were not done, he could not continue in its service, the company assented to this proposition, and he was so supplied from month to month. There was due to Chapman, from the company, on the return day of the writ, the sum of one hundred and twenty-one dollars and ten cents, that

being the first month's wages and the monthly balances unexpended. The appellee, Berry, contended that he should have judgment at least for the twenty-one dollars and ten cents, in excess of one hundred dollars, remaining in the hands of the garnishee, even if the whole amount, less the exemption of one hundred dollars, was not subject to garnishment. It was held that the garnishee was bound for the four months' wages earned by Chapman after the service of the writ, less one hundred dollars, the statutory exemption, and judgment was rendered accordingly. A motion to set aside the judgment was overruled, and Chapman appealed.

Nugent & McWillie, for the appellant.

A. H. Jayne and J. C. Ward, for the appellee.

⁴⁴¹ WOODS, J. In the opinion of this court in *Chandler v. White*, 71 Miss. 161, it is said that "the one hundred dollars wages of the laborer having a family, under section 1244, code of 1880, it is declared, shall be exempt from garnishment or other legal process. It is exempt from every garnishment, whether sought to be enforced annually or monthly. Time does not measure the privilege. Whenever the exemption is sought to be subjected, by legal process, to the demand of the creditor, the exemptionist may invoke the protection of the law." In that case, the contention of counsel for the judgment creditor was, that a laborer who receives fifty or one hundred dollars per month cannot claim the same as exempt every month. In the attempted maintenance of this contention, the judgment creditor took five successive writs of garnishment against the employer of the laborer, by which writs it was sought to tie up in the garnishee's hands the wages of the laborer for several months, so that the aggregate sum of the monthly wages should reach and pass beyond one hundred dollars.

In the case at bar, the judgment creditor sought to tie up and have applied to his judgment the entire monthly wages of his debtor for three or four months under one writ of garnishment, executed in April and returnable in July, less one hundred dollars exempt as wages. This view was adopted by the court below and judgment was entered accordingly. This action ⁴⁴² was erroneous, and rests upon a rigid adherence to the letter of the law of garnishment, as contained in chapter 55 of the code of 1892, and, in failing to give vital efficacy to that provision—subdivision a of the tenth head of the first section of our law of

exempt property, found in chapter 45 of the code—by which “the wages of every laborer or person working for wages, being the head of a family, to the amount of one hundred dollars,” are made exempt from seizure under legal process. The humane and wise purpose of this exemption law was to secure, not only to the laborer, but the family of which he was head, and for which, by every obligation, legal as well as moral, it was his duty to provide, the necessities and comforts of life. His wages, by law, are set apart and dedicated to that righteous end. They are made absolutely exempt from seizure under legal process, and we must give our exemption law such construction as will carry its beneficent design into effect. The chapter on garnishment and the independent chapter on exemptions must be so construed as to give harmonious effect to both. The view which we decline to follow would, practically, render nugatory this salutary provision exempting the wages of laborers. If, by successive service of writs of garnishment, as was attempted in *Chandler v. White*, 71 Miss. 161, or by a single writ returnable to a term of court long subsequent to its execution, as was done in the present case, the debtor can aggregate the small monthly wages to an amount in excess of the exemption, and seize this excess, no matter how great his judgment may be, it will be readily seen that both the laborer and his family may come to actual want, and the statute for their protection would be rendered nugatory. Under the mistaken view which prevailed below, the laborer would be deprived of his small wages, payable at short intervals, until his creditor’s debt had been satisfied, if the laborer continued in the service of the same employer, or he would be driven to seek new employment, and, if successful in finding it, he would again be forced to leave the second employment, after a writ of garnishment ⁴⁴³ had been served, and once more engage in his wandering search for a third engagement, and so on infinitely, his family meanwhile being subjected to all the hardship and want incident to such vicissitudes of evil fortune.

The true view is that, on the first of each month, or whenever, by the contract of employment, the wages, not exceeding one hundred dollars, are due and payable, the laborer has the right to demand and receive them, notwithstanding his employer may have been garnished. When the garnishment writ was served—in this case, on April 8, 1895—and the railway company’s answer showed that it owed its servant eighty-one dollars for wages, the judgment creditor took nothing by its writ for

the wages then due, for the wages were not garnishable, and the servant had the right to demand payment of his employer, notwithstanding the service of the writ, and, in like manner, the wages for April, May, and June were, as they respectively fell due (provided, always, the employer did not have more than one hundred dollars of the laborer's wages in his hands), absolutely exempt from seizure under legal process, no matter whether by one writ or a half-dozen successive writs, and the railroad company might and should have paid, according to the tenor of its contract, the monthly wages to the laborer. Similar statutes in other states have received consideration, and such construction given them as we think must be given our own. Our statute was designed to secure to laborers and their families the small fruits of their toil, and we feel bound to give it such proper and liberal interpretation as will give life and force to that wise and humane design: See *Bliss v. Smith*, 78 Ill. 359; *Collins v. Chase*, 71 Me. 434; *Hall v. Hartwell*, 142 Mass. 447. The case of *Bremer v. Mohn*, 169 Pa. St. 91, involves no construction of statutes of exemptions for wages, and, on other grounds, is distinguishable from the case in hand.

It is contended, however, by counsel for appellee that, if their chief contention is thought by us to be not sound, yet, ⁴⁴⁴ under the amended answer of the garnishee, judgment should be rendered for twenty-one dollars and ten cents. The answer does not admit an indebtedness of one hundred and twenty dollars and ten cents, but states certain facts by which the various balances, after deducting from each month's wages of one hundred dollars the amounts paid to or accounted for with the laborer monthly, if added to the eighty-one dollars due when the garnishment was served in April amount to one hundred and twenty-one dollars. But we have already seen that this eighty-one dollars wages for March was exempt from seizure under legal process, was not garnishable, and that the judgment creditor acquired nothing by the service of his writ at that time.

Let the garnishee be discharged on its answer. Judgment accordingly.

STATUTES IN PARI MATERIA SHOULD BE CONSTRUED together as if they were one law: See note to *Gill v. State*, 45 Am. St. Rep. 937.

EXEMPTION OF WAGES—STATUTES.—A law allowing an exemption of wages is to be liberally construed in favor of the debtor: See note to *Johnston v. Barrills*, 50 Am. St. Rep. 722; *Pickrell v. Jerauld*, 1 Ind. App. 10; 50 Am. St. Rep. 192, and note. An employer

has a clear right, notwithstanding he has been served with attachment process, to pay to his employé his wages as fast as due, where they are less than the exemption, and necessary for the support of his family: See monographic note to *Brown v. Hebard*, 91 Am. Dec. 422, on exemption of earnings or wages from execution and attachment.

COLUMBUS BUGGY COMPANY v. TURLEY.

[78 MISSISSIPPI, 529.]

FRAUDULENT CONVEYANCES—INSOLVENCY—SALE TO CREDITOR.—A person who conducts a livery and sale stable under a sign having on it his own name, with the addition of the word, "proprietor," may, although he is insolvent, sell the property employed in such business to a creditor in satisfaction of his debt, as, in doing so, he makes only such application of the property as the creditor might have enforced by law.

SALES ON CONDITION—RESERVING TITLE BUT AUTHORIZING RESALE—INNOCENT PURCHASERS.—To permit the vendor in a conditional sale of personal property, bought in the course of trade for resale, to retain title, and, at the same time, authorize the buyer to resell, would operate as a fraud upon innocent purchasers. Hence, if the vendor reserves title in himself until payment is made, but in the same contract authorizes the vendee to resell, the latter may sell to one of his own creditors, and the purchaser, who buys without notice of the vendor's claim, obtains title to the property.

Replevin by the appellant, the Columbus Buggy Company, against the appellees, Turley & Parker, to recover certain vehicles, of which it claimed ownership. The contract upon which the plaintiff relied as showing a reservation of title in itself was in the form of an order for goods. Smitha ordered goods of the Columbus Buggy Company, under a contract by which the buggy company was to retain title until payment was fully made, but the contract also authorized the buyer to resell, the proceeds to be held by Smitha as agent of the Columbus Buggy Company. The vehicles in controversy were a part of the goods received by Smitha on the order given. The appellees claimed under a sale and delivery by Smitha in satisfaction of a debt he owed them. They had no notice of appellant's claim. There was a judgment for the defendants and the company appealed.

Martin & Conner, for the appellant.

Proby & Clinton, for the appellees.

535 WOODS, J. The following excerpt from the agreed statement of facts found in the transcript will demonstrate that appellees were creditors of Smitha in the sum of seventeen hundred

dollars, viz., Smitha being "insolvent and in failing circumstances, and owing the banking house of Britton & Koontz the sum of seventeen hundred dollars, upon notes dated February 27, 1894, and January 11, 1895, shortly falling due, on which the said defendants, Turley & Parker, were accommodation indorsers, proposed to the said defendants that, as he, Smitha, would be unable to meet said notes at maturity, and as they would have them to pay, that if they, Turley & Parker, would take up said notes and assume certain other obligations owing by said Smitha, that he, Smitha, would make them a bill of sale to the property hereafter mentioned; that the said defendants did take up said notes, by the payment of the seventeen hundred dollars, and assumed the payment of six hundred dollars due by said Smitha for rent in arrears. Whereupon, the said Smitha, on the sixteenth day of February, 1895, in consideration of a receipt in full for the seventeen hundred dollars paid by the defendants, and the assumption of the payment of said six hundred dollars, sold his said business, including horses, carriages, buggies, harness, book accounts, etc., to the said defendants, Turley & Parker."

It thus appearing that appellees were creditors of Smitha, under the authority of *Howe v. Kerr*, 69 Miss. 311, they are clearly entitled to be protected by the sale to them by their debtor to the extent of the seventeen hundred dollars. Section 4234 of the code of 1892 (Code 1880, sec. 1300), protects the rights acquired by appellees under the sale to them from their debtor, to the extent indicated. The agreed statement of facts shows that Smitha transacted the business of a livery and sale stable, including the sale of carriages, buggies, etc., and that the only sign used at the place of such business was one with the words ⁵³⁶ "J. M. Smitha, Proprietor," and that the property in this litigation was used and acquired in that business. As to Smitha's creditors, the property was liable for his debts, and was in all respects to be treated as his property in favor of his creditors. As was said in *Howe v. Kerr*, 69 Miss. 311, "they [the creditors] might have subjected it [the property in controversy] to their demands by proceeding at law to judgment and execution, and what the law would have done it was permissible for the parties to do."

As to the debt of six hundred dollars due by Smitha for rent, and assumed by appellees, section 4234 of the code of 1892 has no applicability. To the extent of this six hundred dollars Turley & Parker were purchasers.

This brings us to the remaining contention, viz: Can the purchasers be protected in their title to the property thus acquired from Smitha against the claim of appellants, Smitha's vendors, who, by their written contract with Smitha, retained title to the property conditionally sold him until the purchase price should be paid, Smitha being a trader actively engaged in the business of hiring and selling carriages and buggies, and having authority in the contract itself to sell? The propounding of the proposition discloses features which distinguish the case from those where the conditional sale is made of articles for the use and consumption of the buyer, or where the property is not sold to a trader presumptively for resale, but for the use of the buyer. The books, including our own state reports, abound in cases of these characters, and the rule is well settled with us that here, in such cases, the title of the conditional seller will be protected. The present case is wholly unlike any heretofore decided in this court, and must be determined independently of former adjudications.

In the case before us, the vehicles were presumably sold to Smitha for resale. The course of business and common observation would, perhaps, raise that presumption. But no resort need be necessarily had to presumption. The seller has, in its contract, expressly authorized a resale by its vendee.

⁵³⁷ True, the contract shows a retention of title in the seller until payment is fully made, but true, also, is it, the seller has authorized the buyer to resell. To resell was one of the two purposes had in view by both parties to the contract. Now, what effect shall be given to these conflicting and inconsistent terms of the contract? And, especially, what effect shall be given to these inconsistent terms when the buyer is not only apparently clothed with all the indicia of ownership, but when, by the contract itself, the *jus disponendi* is unequivocally conferred on the buyer? It would seem that only one answer can be returned to these questions. To permit the vendor in a conditional sale of personal property, bought in the course of trade for resale, to retain title, and at the same time authorize the buyer to resell, would operate as a fraud upon innocent purchasers.

This case falls within a well-recognized exception to the general rule that no one can convey to another any better title than he himself has. Benjamin, in his work on Sales, sections 448, 449, states with perspicuity this exception. In section 448, volume 1, 4th American edition, the author uses this language: "The

seller may be estopped from claiming title, as against a bona fide purchaser from the buyer in possession, by giving the buyer evidence of title or authority to sell." And in the succeeding section an elaborate citation from *Leigh v. Mobile etc. R. R. Co.*, 58 Ala. 165, is made, in which this exception to the maxim *nemo dat quod non habet* is strongly presented. Said Brickell, J., in that case: "If the person intrusted with the possession of the goods and with the indicia of ownership or of authority to sell or otherwise dispose of them, in violation of his duty to the owner, sells to an innocent purchaser, the sale will prevail against the right of the owner." To the same effect the following cases will be found: *Wilder v. Wilson*, 16 Lea, 548; *Winchester Wagon Works v. Carman*, 109 Ind. 31; 58 Am. Rep. 382; *Ludden v. Hazen*, 31 Barb. 650; *Fitzgerald v. Fuller*, 19 Hun, 180; *Cole v. Mann*, 62 N. Y. 1; *Armington v. Houston*, 38 Vt. 448; 91 Am. Dec. 366; *Rogers v. Whitehouse*, 538 71 Me. 222; *Burbank v. Crooker*, 7 Gray, 158; 66 Am. Dec. 470; *Haskins v. Warren*, 115 Mass. 514; *McMahon v. Sloan*, 12 Pa. St. 229; 51 Am. Dec. 601.

The only case seen by us in direct conflict with the view which we adopt as the sound one, is that of *Lewis v. McCabe*, 49 Conn. 141; 44 Am. Rep. 217. But that opinion seems to have rested largely upon the idea that the contract in that litigation was made upon and induced by the spirit and drift of the former Connecticut decisions in similar, though not identical, cases. Near the conclusion of that opinion, this language is employed: "Possession, with the *jus disponendi* added, has been regarded by many courts as sufficient reason for declaring a contract colorable and fraudulent without regard to the real intent of the parties: *Bump on Fraudulent Conveyances*, 123, and cases referred to. We concede that there is much force in the reasoning supporting such a rule, but, at the same time, we must bear in mind the spirit and drift of our own decisions, as they may have induced the making of such contracts."

Many states have of late years enacted statutes requiring the recordation of contracts in which title is retained in the vendor, and many adjudications may be found under such statutes, but the cases cited by us were decided independently of statute, and, as it appears, before the enactment of statutes.

Affirmed.

FRAUDULENT CONVEYANCES — INSOLVENCY — PREFER-
RING CREDITORS.—A creditor may receive payment of an honest
debt in property of his insolvent debtor, although he may know at

the time that the debtor's intent in making the payment is, and that the necessary effect of his act will be, to place the property beyond the reach of other creditors: See monographic note to *State v. Mason*, 34 Am. St. Rep. 397, on knowledge of vendee as affecting the validity of fraudulent conveyances: note to *Larrabee v. Franklin Bank*, 114 Mo. 592; 35 Am. St. Rep. 782.

CONDITIONAL SALES—RESALE.—If a manufacturer and wholesale vendor of wagons sells upon credit and delivers them to a retail dealer for the apparent and implied purpose of resale, a condition that the title shall remain in the vendor until the purchase price is paid is fraudulent and void as against a purchaser from the vendee: *Winchester Wagon Works etc. Co. v. Carman*, 109 Ind. 31; 58 Am. Rep. 382. Compare *Pratt v. Burhans*, 84 Mich. 487; 22 Am. St. Rep. 703, holding a different doctrine.

BAGGETT v. McCORMACK.

[73 MISSISSIPPI, 552.]

BAILMENT—LOAN—LOSS OF SUBJECT—BAILEE'S RIGHT OF ACTION.—One who borrows a horse is entitled to bring an action for its value against one whose negligence has caused the death of the animal, the recovery being in trust for the owner.

Action by the appellee, McCormack, against the appellants, Baggett and others, for the value of a horse. McCormack did not own the horse, but had borrowed it to ride. He delivered it to the defendants, the keepers of a livery stable, late one evening, and, on going for his horse the following morning, he was told that the animal was dead. The evidence tended to show that the death of the horse resulted from defendants' negligence. There was a judgment for the plaintiff, and the defendants appealed.

R. H. Thompson, for the appellants.

Chrisman & Brennan, for the appellee.

554 **WOODS, J.** The appellee, as borrower of the horse, had possession of and a special or transient property, for the time, in the animal, and was entitled to bring his action against a wrongdoer by whose negligence the animal was lost or destroyed. He had no legal interest in the animal as against his bailor, but he had a real interest, nevertheless in the custody and care of the property, because he was liable to the lender for it, and his possession of and special interest in the horse gave him an action against a wrongdoer. Either the lender or the borrower may bring suit in cases of this character, but a recovery by one of them may be pleaded in bar of any suit by the other for a like

recovery, the bailee's suit for the naked value only of the property, and a recovery therein being in trust for the real owner: Schouler's Bailment, 63, 64, 86; Story on Bailments, 94, 234; Woodman v. Nottingham, 49 N. H. 387; 6 Am. Rep. 526; 2 Am. & Eng. Ency. of Law, 61, note 2, and cases there cited.

The other contentions appear to us to be without merit.

Affirmed.

BAILEE'S RIGHT TO RECOVER DAMAGES.—A bailee may recover damages for an injury to the property bailed while in his possession. Thus, the hirer of a vehicle is entitled to recover for injuries thereto resulting from the negligence of another in whose custody the hirer placed it, because the latter is answerable to the general owner: American etc. Tel. Co. v. Walker, 72 Md. 454; 20 Am. St. Rep. 479, and note.

WASHINGTON v. SORIA.

[73 MISSISSIPPI, 665.]

PLEADING—DEMURRER—ENTIRETY.—A demurrer, either at law or in equity, is an entirety and must stand or fall as a whole. It should not, therefore, be overruled in part and sustained in part.

PLEADING—PRACTICE—A GENERAL DEMURRER SHOULD BE OVERRULED, WHEN.—To interpose a general demurrer to a whole bill or declaration, and then to assign some causes of demurrer going only to specific parts thereof, is an unwarranted practice. If, therefore, there is no ground of demurrer good as to the whole bill or declaration, the demurrer should be overruled.

VENDOR AND PURCHASER—CONTRACT FOR SALE OF LAND—STATUTE OF FRAUDS.—PART PERFORMANCE of an oral contract for the sale of lands does not take it out of the statute of frauds.

VENDOR AND PURCHASER—CONTRACT FOR SALE OF LAND—STATUTE OF FRAUDS.—AFTER FULL PERFORMANCE, by one of the parties to an oral agreement for the sale of land, the statute of frauds does not apply.

VENDOR AND PURCHASER—ACTION FOR UNPAID PURCHASE MONEY—STATUTE OF FRAUDS.—Under a statute allowing all rights to be redressed by an action on the case, a vendor of land can maintain such an action to recover unpaid purchase money, where the vendee has taken possession under a conveyance reciting a consideration of a certain amount paid in cash, and the vendor has reserved a lien in the deed to secure the balance which is to be paid in installments at specified dates; and the statute of frauds does not prevent a recovery of the unpaid purchase money, although the vendee may not have signed any written promise to pay.

VENDOR AND PURCHASER—RECOVERY OF UNPAID PURCHASE MONEY—STATUTE OF LIMITATIONS—CONCURRENT JURISDICTION OF LAW AND EQUITY.—A vendor of land can maintain an action at law for unpaid purchase money, or he may proceed in equity to enforce his lien therefor. Hence, if he pro-

ceeds in equity, his cause of action does not rest upon the "existence of a trust not cognizable by the courts of the common law," and is not controlled by a statute limiting to ten years the period within which proceedings of that character may be brought, but is controlled by a statute declaring that, "whenever there be a concurrent jurisdiction in the courts of the common law and in the courts of equity, of any cause of action, the provisions of this chapter limiting a time for the commencement of a suit for such cause of action in a court of common law, shall apply to all suits to be brought for the same cause of action in a court of equity."

VENDOR AND PURCHASER—RECOVERY OF UNPAID PURCHASE MONEY—STATUTE OF LIMITATIONS.—If a vendor of land gives the vendee possession under a conveyance reciting a consideration of a certain amount paid in cash and a balance to be paid in installments at specified dates, the vendor's right of action to recover the unpaid purchase money, whether he elects to proceed on the promise contained in the deed or that implied by law from the vendee's acceptance of the deed, rests, not upon a contract provable by parol, but one provable by a writing, as the promise to pay is a promise to perform a written, and not an unwritten contract. The statute of limitations which is, therefore, applicable to such a case, is not that of three years, governing unwritten contracts, but that of six years, respecting all actions for which no other time is fixed.

W. G. Evans, Jr., and E. J. Bowers, for the appellant, Washington.

J. P. Caldwell and Nugent & McWillie, for the appellee, Mrs. Soria.

671 COOPER, C. J. Mrs. Soria exhibited her bill in the chancery court of Harrison county, to subject certain land therein described, theretofore conveyed by her to the appellant, Washington, to the payment of the purchase price thereof. The bill, which was filed December 5, 1894, charges that, on July 26, 1887, in consideration of the sum of five hundred dollars to her in cash paid, and of the payment of a like sum to be made twelve months therefrom, and of the payment of a like sum to be made eighteen months therefrom, she conveyed the land to the defendant, **672** reserving in the conveyance a lien upon the land until payment of the full purchase price; that though the defendant executed no writing promising to pay the deferred payments, he received and put to record the deed, and entered upon and has enjoyed the land thereby conveyed.

The defendant filed a general demurrer to the whole bill, and for causes set forth: 1. No equity on the face of the bill; 2. That the contract sought to be enforced, not being evidenced by any memorandum or note thereof signed by the defendant, is unenforceable, under the statute of frauds; 3. That the claim sought to be enforced is barred by the statute of limitations of

three years; 4. That the installment of the purchase money alleged, by the bill, to have been payable twelve months after the execution of the deed, is barred by the six years statute of limitations.

The chancellor entered a decree overruling the demurrer on all the grounds alleged, except the fourth, and on that ground sustained it, but directed the defendant to answer over. From this decree both parties appeal.

Before entering upon a consideration of the real questions involved, we will, for the purpose of again calling attention to a growing irregularity in practice, notice the course of pleading and procedure in the court below. The practice seems to prevail in several circuit and chancery districts in this state of filing a general demurrer to the whole declaration or bill, and incorporating therein, as causes of demurrer, objections going, not to the whole declaration or bill, but to only specific parts thereof; and the judges and chancellors attempting to conform their judgments and decrees to this wholly unwarranted practice will attempt to overrule a demurrer in part, and sustain it in part, whereby great confusion and uncertainty results. The rule in modern practice is well settled--that a demurrer to the whole bill is an entirety, and must stand or fall together: Story's Equity Pleading, sec. 443; Lube's Equity Pleading, sec. 323; Canton etc. Warehouse Co. v. Potts, 68 Miss. 637. When, therefore, a ⁶⁷³ demurrer to the whole bill is interposed, and some causes are assigned which go to a part only of the bill, such causes should be disregarded by the court; for, if there is no ground of demurrer good to the whole extent of the demurrer, the demurrer should be overruled entirely.

For the purpose of evading the defense arising from the six and three years statutes of limitation, it is contended by counsel for complainant that, because of the statute of frauds, the complainant never had any right of action at law against the defendant for the recovery of the unpaid purchase money of the land, and hence, since a court of equity will not permit the defendant to retain the land without paying the purchase price, that the only statute of limitations applicable to this proceeding is the ten year statute, found in section 2763 of the code, by which it is provided that "bills for relief, in case of the existence of a trust not cognizable by the courts of the common law, and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue, and not after," etc.

The defendant, to avoid all liability, contends: 1. That, because of the statute of frauds, no relief could ever have been afforded the complainant, either at law or in equity, and, if mistaken in this, then, 2. That if there ever was a right of action, it existed as well at law as in equity, and was barred within three years after the time named in the deed for the payment of the deferred part of the purchase price of the land.

The contention of neither party can be maintained. In many jurisdictions, it has been held that part performance of an oral agreement takes it beyond the application of the statute of frauds, but this rule was repudiated in this state at an early day, and it has been uniformly here held that part performance is not sufficient to withdraw a case from the control of the statute: *Payson v. West*, Walk. 515; *Beaman v. Buck*, 9 Smedes & M. 207; *Box v. Stanford*, 13 Smedes & M. 93; 51 Am. Dec. 142; *Catlett v. Bacon*, 33 Miss. 269. In *Hairston v. Jaudon*, 42 Miss. 380, the court of the military commander of the district absurdly ⁶⁷⁴ held that a vendee in an oral contract for the purchase of land, who had paid seven hundred and fifty dollars of the purchase price, might recover the same back from the vendor, who was willing to complete the contract and tendered a deed with his plea. This never was the law, and that case is overruled.

It is uniformly held that, after full performance of an oral agreement, the statute of frauds does not apply. The statute neither declares an oral contract to be illegal nor void. It does not prohibit the contract, but simply declares that no action shall be maintained to enforce it. Where the contract has been fully executed by one of the parties, and nothing remains to be done by the other than to pay the consideration, relief is very generally afforded at law by permitting the plaintiff to recover, not upon the special contract, but in assumpsit or on the case, upon the promise implied by law, for the statute has no application to promises implied by law: 2 Reed on Statute of Frauds, section 640. Where there has been a special contract fully performed by the plaintiff, he may recover either in case, on the contract or in indebitatus assumpsit for the consideration: *Fowler v. Austin*, 1 How. (Miss.) 156; 26 Am. Dec. 701; *Hill v. Robeson*, 2 Smedes & M. 541; *Cutter v. Powell*, 6 Term Rep. 320; 2 Smith's Lead. Cas. 1, and note; 2 Devlin on Deeds. sec. 1074. When the vendor has made conveyance of land to the vendee, who has executed no written promise to pay the purchase

price, the courts, while uniformly affording relief, are not very well agreed upon what precise ground the right is rested.

In *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556, the opinion is finally rested upon the conclusion that the recital of the deed accepted by the grantee that he had sealed the same was proof of the fact that the grantee had sealed it by adopting as his seal the corporate seal of the grantor. There is, however, much in the opinion suggesting that, in the absence of this recital, the court would have decided that, by accepting the conveyance, the grantee was bound by estoppel to deny that the deed, as a written contract, was his, though it was not signed by him. ⁶⁷⁵ Mr. Bigelow, in his work on Estoppel, page 346, thus announces the rule: "Nor will the grantee in a deed poll, having accepted the deed and estate, be permitted to deny his covenants or that the seal is his, in an action on the covenants."

In *Trotter v. Hughes*, 12 N. Y. 74, 62 Am. Dec. 137, it was said that "the acceptance of a conveyance, containing a statement that the grantee is to pay off an encumbrance, binds him as effectually as though the deed had been inter partes, and had been executed by both grantor and grantee." "A covenant can only be created by deed, but it may be as well by deed poll as by indenture, for the covenantee's acceptance of the deed is such an assent to the agreement as will render it binding on him; but the party must be named in the deed poll": *Greenleaf's Cruise*, c. 26, tit. 32, sec. 3. The following cases seem to rest upon this ground: *Indianapolis etc. R. R. Co. v. Remmy*, 13 Ind. 518; *Cincinnati etc. R. R. Co. v. Pearce*, 28 Ind. 502; *Bowen v. Kurtz*, 37 Iowa, 240; *Crawford v. Edwards*, 33 Mich. 354; *Grove v. Hodges*, 55 Pa. St. 504; *Schmucker v. Sibert*, 18 Kan. 104; 26 Am. Rep. 765; *Hubbard v. Marshall*, 50 Wis. 322; *Long v. Bullard*, 59 Ga. 358.

Mr. Platt denies that an action of covenant should be maintained on a deed not sealed by the defendant, but admits that the contrary doctrine has been very generally received by the profession, and is, perhaps, too well established to be reversed: *Platt on Covenants*, 18.

In *Finley v. Simpson*, 22 N. J. L. 311, 53 Am. Dec. 252, a very great number of authorities are cited in the briefs of counsel, and the court held that the action of covenant might be maintained upon such a deed, citing in support of its opinion *Coke on Littleton*, 231 a, 230 b, note 1; *Sheppard's Touchstone*, 177; 4 *Cruise's Digest*, 393; 3 *Comyns' Digest*, "Covenant" (A

1); 4 Comyns' Digest, "Fait" (A 2), (C 2); Viner's Abridgment, "Condition," (I, a2); Burnett v. Lynch, 5 Barn. & C. 589.

In Lee v. Newman, 55 Miss. 365, Judge Chalmers, in delivering the opinion of the court, in a case not calling for a decision ⁶⁷⁶ of the question, declared that there could be no recovery in personam against one who had accepted a conveyance by which it was stipulated that, as a part of the purchase price, he should pay a certain mortgage. The proceeding in that case was to charge the land, and it was not sought to fix a personal liability on the purchaser. The observations of Judge Chalmers would apply as well where the obligation was to pay the purchase price to the vendor as to a mortgagee, and a somewhat extended examination by us has failed to discover any instance in which it has been held that in no form of action could relief be afforded where the vendor has fully executed his contract, by conveying the land, and the vendee has accepted the deed and entered into possession. In Massachusetts, it has been held that the technical action of covenant cannot be maintained against the grantee, who has not signed the deed, but that assumpsit, for the nonperformance of the duty or obligation, may be brought: Goodwin v. Gilbert, 9 Mass. 510; Newell v. Hill, 2 Met. 180; Dix v. Marcy, 116 Mass. 416; Locke v. Homer, 131 Mass. 93; 41 Am. Rep. 199. And such is probably the rule in New Hampshire: Burbank v. Pillsbury, 48 N. H. 475; 97 Am. Dec. 633; and Pennsylvania: Clark v. Martin, 49 Pa. St. 289.

With us the forms of action are not material. All rights may be redressed by an action on the case—for it is provided that "the declaration shall contain a statement of the facts constituting the cause of action, in ordinary and concise language; and, if it contain sufficient matter of substance for the court to proceed upon the merits of the cause, it shall be sufficient, and it shall not be an objection to maintaining any action that the form thereof should have been different": Code, sec. 671.

Since the complainant might have brought an action at law against the defendant, her cause of action does not rest upon the "existence of a trust not cognizable by the courts of the common law," and it is not controlled by the provision of section 2763 of the code, limiting to ten years the period within which suit may be brought. It is governed by section 2762, which ⁶⁷⁷ declares that "whenever there be a concurrent jurisdiction in the courts of the common law and in the courts of equity of any cause of action, the provisions of this chapter limiting a time for the com-

mencement of a suit for such cause of action in a court of common law shall apply to all suits to be brought for the same cause of action in a court of equity."

The remaining question is, whether the statute of limitations of three or that of six years applies. By section 2737 of the code, it is provided that "all actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after." No other period of limitation is prescribed, unless it be by section 2739, which is as follows: "Actions on an open account or stated account, not acknowledged in writing, signed by the debtor, and on any unwritten contract, express or implied, shall be commenced within three years next after the cause of such action accrued, and not after."

We are of opinion that the six and not the three years statute applies. The action is not upon a contract provable by parol, but is one provable by a writing. Whether the action which might have been brought at law could have been on the promise contained in the deed, treating it as the deed of the defendant because of his acceptance, and the estoppel operating upon him to deny it to contain his written contract, as the decided weight of authority holds may be done, or whether, as is held by the Massachusetts courts, no action could have been maintained on the deed, but the plaintiff must have sued upon the promise implied by law from the acceptance of the deed by the defendant, is, we think, immaterial. In either event the promise of the defendant, whether it be express or implied, is to perform a contract, the terms of which are written, and not unwritten. The promise to pay is implied by law, but it is a promise to perform a written, and not an unwritten, contract. So much of the demurrer as invoked the protection of the six years statute of limitations, was directed, not to the whole, but ⁶⁷⁸ to a part of the bill. No ground of demurrer is alleged which is good to the whole bill, and, as the demurrer is to the whole bill, it should have been overruled.

The decree is reversed on the appeal of Mrs. Soria, the demurrer overruled, and the defendant required to answer within thirty days after the mandate shall have been filed in the court below.

VENDOR AND PURCHASER—PART PERFORMANCE—STATUTE OF FRAUDS.—Part performance of a parol contract for the sale of land does not take it out of the statute of frauds: *Box v. Stanford*, 13 Smedes & M. 93; 51 Am. Dec. 142. A promise to pay for

land actually conveyed need not be in writing: *Whitbeck v. Whitbeck*, 9 Cow. 266; 18 Am. Dec. 503. Any writing, from a solemn deed down to mere hasty notes or memoranda in books, papers, or letters, is sufficient to satisfy the statute: *Note to Singleton v. Hill*, 51 Am. St. Rep. 870. An undelivered deed, however, is not, by its own force, and aside from any contract to which it may be related, sufficient to meet the requirements of the statute: *Kopp v. Reiter*, 146 Ill. 437; 37 Am. St. Rep. 156.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY v. DAVIS.

[73 MISSISSIPPI, 678.]

WATERS—OBSTRUCTION BY RAILWAY EMBANKMENT—INJURY TO ADJACENT LANDS.—A railroad company, in constructing its road across land which, in a state of nature, is all subject to overflow, has the right to build embankments necessary to raise the roadbed above periodical floods. Hence, although an embankment, made by filling in a trestle, somewhat deepens and prolongs, in time, an overflow of water, thus injuring the lands of an adjacent owner, the company is not liable in damages where the road is otherwise properly constructed, where it has large and numerous trestles to give vent to the surrounding waters, and of greater capacity than the creek and bayous crossed by it, where no streams are obstructed, and especially where it has, by contract or condemnation proceedings, already paid such owner for all injuries flowing from the lawful and proper construction of its roadway.

WATERS—BAYOU—QUESTION FOR JURY.—Whether an obstructed bayou is a watercourse or not is, under the evidence, a question for the jury.

WATERS—CONSTRUCTION OF ROADBED OF RAILWAY—"UNPRECEDENTED" OVERFLOWS—FILLING TRESTLES. It is not the duty of a railroad company to so construct its roadbed as to afford exit for all waters except "unprecedented" overflows, or to preserve the land of an adjoining owner from all injury by reason of water to which it would not have been subject in its natural state. The filling of its trestles on low lands should not, therefore, be treated as obstructions of a watercourse.

RAILROADS—DAMAGES INCLUDED IN PAYMENT FOR RIGHT OF WAY.—If a railroad locates and builds its road under a charter requiring it to compensate the owners of the property taken therefor, either by contract or under condemnation proceedings, the amount paid, in either way includes all such damage from overflows as may be incidental to the proper construction and maintenance of the road.

RAILROADS—RIGHT OF WAY—OVERFLOW OF LAND—DAMAGES.—If the proper construction of a railway will subject adjoining land to overflow, or obstruct its drainage, this is an item of damage which should be estimated and allowed for in condemnation proceedings, and it is conclusively presumed that commissioners, in making their award, in cases of condemnation, have considered and awarded damages for all such injuries.

Action for damages. The defendant prayed for a peremptory instruction that the jury find for it. This was refused. The plaintiffs Davis and others obtained a judgment for four hundred and sixteen dollars and sixty-six cents, and the company appealed from an order denying its motion for a new trial.

Mayes & Harris and Rush & Gardner, for the appellant.

Coleman & Summerville, for the appellees.

⁶⁸⁸ COOPER, C. J. In *Sinai v. Louisville etc. Ry. Co.*, 71 Miss. 547, we held that, under [some] circumstances, a railroad company, whose roadbed obstructed surface water, and threw it back upon the lands of an adjoining owner, would be liable to him for the damages thereby ⁶⁸⁹ inflicted. In *Kansas City etc. R. R. Co. v. Smith*, 72 Miss. 677, 48 Am. St. Rep. 579, we also held that, under some circumstances, a railroad company would not be liable to an adjoining owner for obstructing the flood waters of a stream, which were flowing in an unbroken current along the course of the stream, and which would, ordinarily, under the rules of the common law, be considered and dealt with as a part of the stream.

We need not state the facts of those cases, nor repeat at length what was therein said of the legal principles on which the decisions rest.

In the present appeal the facts are substantially these: The appellees own a tract of land near the junction of Big Sand creek and Yalobusha river; the river flows from the northeast to the southwest, and the general course of the appellant's road is parallel with the river, and from a mile to a mile and a half east thereof; Big Sand creek comes in from the southeast, flowing to the northwest, until near the appellees' land, when it is turned to the northeast, and, after passing a mile or more in that direction, turns to the north, and then, running nearly west, empties into the river; after leaving the lands of appellees, and before reaching the river, Big Sand creek receives the water of Teoc creek, a stream flowing from southeast to northwest. In the irregular parallelogram between the river and the creek, the roadbed of the defendant runs, at a distance of a mile or more from the river, and of a half mile, more or less, from the creek. Running out from the Big Sand creek, and in the direction of the river at its nearest points, are several bayous, with clearly defined, but not deep, channels. These bayous continue as such beyond the line of the railroad, and some of them—possibly all

—lose their character, and are merged into the basin east of the river. When the waters of the creek are high and those of the river are low, the waters from the creek and the overflowing waters and surface waters, run down through these bayous to or toward the river; but ⁶⁹⁰ when the waters of the river are at flood, they run eastward, through the bayous, to the creek.

This was the condition of things before the railroad was built, and from this it appears that the lands of the plaintiff, situated between the creek and the river, are in a sort of basin, which have, to a greater or less degree, been always subject to overflow, the waters of the Big Sand creek overflowing them from east to west, when the river was low and the creek high, and the waters from the river overflowing them from west to east when the river was at flood. East of the creek are other lands of the plaintiff, and damages in this action are sought for injury done to the lands both east and west of the creek.

When the railroad was constructed, in the year 1886, much of it, for the first mile or two south of the point where it crossed Big Sand creek, was built upon trestles. In the year 1892, the company filled up a large portion of these trestles with earth, forming, where filled, a solid roadbed, but, as appears from a map used on the trial of the cause and made a part of this record, there yet remain about eighteen hundred feet of trestle work (including the bridge of three hundred feet across the Big Sand) from the point where the road crosses the creek to the first bayou south of and adjoining plaintiffs' land, and, of these trestles, nearly a thousand feet are over the bayous and along the low lands of the plaintiffs' farm.

The plaintiffs allege that their "said lands are situated in what is known as the Yazoo and Mississippi delta, and are almost level; that there are occasional elevations into ridges of slight elevation, and occasional depressions of slight extent, which latter, at certain seasons, overflowed; that the streams passing through and near to said lands are very shallow, and their waters flow sluggishly; that the beds and banks of the streams are incapable of containing the waters in the rainy seasons, but they are bordered by low or overflowed lands, which, at such times, assist in carrying off the excess; that all of the small streams, bayous, sloughs, and creeks draining the ⁶⁹¹ said lands flow in a westerly direction and empty into the Yalobusha river, which river flows in a southwesterly direction, but with a winding course, about two miles distant from their lands, said lands being about three or

four miles distant from what is known as the 'Hills,' where the surface of the earth rises abruptly into hills of great elevations and dimensions; that there is a gradual slope in the earth's surface westward from the foot of the hills to the Yalobusha river, and the usual and ordinary waters, passing through and near to the lands aforesaid from the east, found egress in a harmless course, by the two creeks, Big Sand and Teoc, into said river; that, in the rainy season, which annually occurs in the spring of the year, as well as at other times of heavy rainfalls, quantities of water rush down from the high lands, and, overflowing the two creeks, passed onto the adjacent low or overflowed lands, and were conveyed from off the lands of the plaintiffs by four streams or bayous, to wit: Sand bayou and a prong of Sand bayou, Stump bayou and a prong of Stump bayou."

The declaration further alleges that, when the railroad was built, trestles of sufficient sizes were left for the passage of the waters, but that the defendant, without due regard to the rights of the plaintiff, in the year 1892, filled up a large part of the trestles, obstructed the bayous, and left insufficient escape for the waters, thus throwing them back upon plaintiffs' lands, increasing the depth of water upon the lands that were accustomed to overflow, overflowing other lands, and materially prolonging the period for which the overflows remained on the lands.

Stating the case as proved most favorably for the plaintiffs, it may be said that their property consists of what is known as low lands," subject to overflow in great part by ordinary floods; with a few ridges of not great extent, parts of which were above ordinary overflows, and possibly a small part not subject to overflow, even in exceptionally high water; that the construction of the road, and the filling in of the trestles ⁶⁹² has, to some extent, deepened the overflows from the surface water and the waters from Big Sand creek, where the Yalobusha river is low, and subjected to overflow on the whole body of the land, from thirty to one hundred acres, which, but for the roadway, might have been brought into cultivation; that no additional land is subject to overflow from the Yalobusha river, but that overflows from that river, as well as from the Big Sand, are somewhat prolonged in time when they do occur. There is no evidence that the road is improperly constructed, except as may be inferred from the foregoing facts; and there is nothing to show that to construct and maintain trestles would be as economical as to make the roadbed, or that, when constructed, they would form

as safe or proper roadway. It is affirmatively shown that the trestles or bridges at the creek, and at all of the bayous except one, are of far greater capacity than the bayous and the creek, and it is not shown that any appreciable or ascertainable injury has resulted from obstructing that bayou, the water flowing through that having been turned southward along the railroad, and emptying now into Stump bayou.

The peremptory instruction prayed by the defendant was properly refused, for the reason that whether this obstructed bayou was a watercourse was, under the evidence, a question for the jury; and, if it was, the defendant was liable to the plaintiffs for such injury as they sustained by its obstruction, and, if no injury could be proved, to nominal damages: *Chapman v. Copeland*, 55 Miss. 476. In all other respects the course of the trial—the instructions given and refused—proceeded along radically erroneous lines.

The fundamental error which colored and controlled the whole case was, that the defendant company was under the duty of so constructing its roadway as to afford exit for all except “unprecedented” overflows, and in treating the filling of its trestles on the low lands as obstructions of a watercourse. Nature failed to afford sufficient exits for the waters which are the ⁶⁹³ source of the plaintiffs’ injury, and it is not the law that the defendant was under the duty of so constructing its roadway as to preserve the land of the plaintiffs from all injury by reason of water to which it would not have been subject in its natural state. The plaintiffs’ farm is so situated as to be subject to a sort of ebb and flow inundation—sometimes from the eastern waters of Big Sand creek, at others from the western waters of the Yalobusha river. Through this basin the company, either by contract or condemnation, obtained a right to locate its roadway. Power was conferred upon it by the legislature to build the road, on condition only that, by contract or condemnation proceedings, it should compensate the owners whose property was to be taken. This it has done, and is the owner of the land, with the right to use it as such for the legitimate purposes for which it was secured. For all injuries flowing from the lawful and proper construction of its roadway, it has already paid.

In condemnation proceedings, all special damages, present and prospective, to the owners of land, resulting or to result from properly constructing and maintaining its road, constitute, as to

such owner, a single indivisible cause of action, and it is conclusively presumed that the commissioners, in making their award in cases of condemnation, have considered and awarded damages for all such injuries; and, if the way has been secured by contract with the owner, that he has demanded and received full compensation therefor. And if it may reasonably be supposed that a proper construction of the road will subject adjoining land to overflow, or obstruct its drainage, such damages should be estimated and allowed for: *Sullivan v. Supervisors*, 58 Miss. 790; *Commissioners v. Harkleroads*, 62 Miss. 807; *Richardson v. Levee Commrs.*, 68 Miss. 539; *Ohio etc. Ry. Co. v. Wachter*, 123 Ill. 440; 5 Am. St. Rep. 532; *Barnes v. Michigan Air Line Ry. Co.*, 65 Mich. 251; *Bell v. Norfolk etc. R. R. Co.*, 101 N. C. 21; *Moss v. St. Louis etc. Ry. Co.*, 85 Mo. 86.

It is evident that to construct a road on lands situated as ⁶⁹⁴ were the plaintiffs' would inevitably, to some extent, obstruct the body of vagrant water, composed of both overflow and surface water, to which, in a state of nature, the plaintiffs' lands were subject. The roadway, except where it crosses the defined banks of the streams and bayous, is in no proper sense within a water-course. The alluvial lands of the Yazoo and Mississippi delta were all built up by the deposits from the rivers. In a state of nature it is all subject to overflow, and, if the roads in that country are to be so constructed as to preserve the nearest possible approach to a natural condition of the waters, they must be placed upon trestles from one end of the valley to the other. We withdraw nothing of what we said in *Sinai v. Louisville etc. Ry. Co.*, 71 Miss. 547. A company having a right to construct its railroad may not, in disregard of the rights of adjoining proprietors, so construct its roadbed as to destroy the value of the lands of third persons, even though the injury be occasioned by turning back surface water upon such lands, if, with due regard to the duty it owes to the public, and in the reasonable use of its own property, and at no undue expense, it can, by putting in trestles, culverts, or other openings, provide a way through which such water may safely be allowed to escape. But that is not this case. On the contrary, to require the company to refrain from building its roadway by putting up embankments necessary to raise its line above the periodical floods, when large and numerous trestles are provided to give vent to the surrounding waters, would be to subordinate its rights of property to the

unfounded demands of the adjoining owner, who has already received full compensation for the injury of which he complains.

The judgment is reversed and cause remanded.

WATERS — RAILROADS — EMBANKMENTS.— If a railroad is properly constructed and does not obstruct a running stream or watercourse, the company is not liable to one injured by reason of overflow water being made deeper and the current stronger by reason of a railroad embankment, where such injury arises from an extraordinary flood, and would have resulted even if the railroad had not been built. A railroad company, in building its road, is not bound to provide against an unprecedented flood, but must provide against ordinary storms: *Kansas City etc. R. R. Co. v. Smith*, 72 Miss. 677; 48 Am. St. Rep. 579, and note. A railroad company is not bound to construct waterways and culverts to carry off surface water, in the absence of any channel or ravine crossing and closed by its embankment; and it is not liable to a landowner for an injury by an overflow of surface water occasioned by the roadbed where it is skillfully constructed: *Note to Kansas City etc. R. R. Co. v. Lackey*, 48 Am. St. Rep. 591.

RAILROADS—EMINENT DOMAIN—DAMAGES.—In estimating damages to property taken by eminent domain for railroad purposes, whatever injuriously affects the property as the direct and necessary result of the location of the road upon it may be considered: *Kersey v. Schuylkill etc. R. R. Co.*, 133 Pa. St. 234; 19 Am. St. Rep. 632; and this may include damages caused by an overflow of waters resulting from the building of a railroad: See monographic note to *Sheehy v. Kansas City etc. Ry. Co.*, 4 Am. St. Rep. 404, on what constitutes damage for public use for which compensation must be made. In the absence of negligence, unskillfulness, and mismanagement in the construction of an embankment for its roadbed over land through which there is no natural channel for the passage of water, a railroad company, having lawful authority to construct such roadbed, is not liable for the injury done by the embankment in causing water to overflow land of an adjoining proprietor: See monographic note to *Ohio etc. Ry. Co. v. Wachter*, 5 Am. St. Rep. 539, on damages recoverable for the construction and maintenance of railways. Compensation made by a railroad company when its road is built includes simply damages arising from the proper construction of the road and does not include subsequent damages arising from the negligence of the company respecting its roadbed: *Kansas City etc. R. R. Co. v. Lackey*, 72 Miss. 881; 48 Am. St. Rep. 589; note to *Ohio etc. Ry. Co. v. Wachter*, 5 Am. St. Rep. 538; *Hunt v. Iowa Cent. Ry. Co.*, 86 Iowa, 15; 41 Am. St. Rep. 473.

HAUENSTEIN v. GILLESPIE.

[73 MISSISSIPPI, 742.]

DEPOSITIONS—EXHIBITS—BOOKS OF ACCOUNT.—If the original books of entry of accounts are produced before a commissioner who is taking depositions, and correct copies of the entries are taken from such books, the books themselves need not be made exhibits to the answers to the interrogatories, especially where the books are the private property of witnesses who are not interested in the litigation.

DEPOSITIONS—EXHIBITS—RECEIPT.—If an original receipt is produced before a commissioner taking a deposition, and the witness furnishes a correct copy of such receipt as the exhibit to his answer to one of the interrogatories, the receipt itself need not be made an exhibit to the deposition, especially where it is the private property of the witness.

GUARDIAN AND WARD—ESTOPPEL OF SURETIES TO DENY RECITALS OF BOND.—The sureties on a guardian's bond, in a proceeding, after the guardian's death, to recover balances due the estate of the ward, are bound by the terms of their bond, and are, therefore, estopped by the recitals therein to deny the validity of the guardian's appointment, where he, by virtue of his qualification as guardian, had taken possession of his ward's estate and exercised control over it for many years.

Suit on a guardian's bond, by Robert Gillespie, by next friend and guardian, against the bondsmen of Joseph Bardwell. In 1867, Gillespie was declared a lunatic by an inquisition of lunacy, and Bardwell, in 1872, was appointed his guardian and gave a proper bond. In 1878, he was required to give a new bond. Under the bond thus executed, Bardwell was Gillespie's guardian until the former's death, in 1893. This suit was brought on the bond given in 1878. The bill alleged that Bardwell, after the execution of the bond sued on, was guilty of many defaults, which were set out in the bill. The defendants' answer denied that Gillespie was declared insane upon a duly authorized inquisition, and that Bardwell was duly appointed guardian, in 1872, as alleged in the bill. As an exhibit to their answer, the defendants filed a copy of the records in the probate and chancery courts of Noxubee county in 1867 and 1872, whereby the adjudication of lunacy and the appointment of Bardwell had been made, and contended that this exhibit showed that Gillespie was a resident of the state of Pennsylvania, in 1867, when the proceedings declaring him a lunatic were had and when Bardwell was appointed guardian, and was not present, and was not made a party to the proceedings, either by service of process on him, or by publication of notice; that the court had no jurisdiction over him and no power to adjudge him insane;

and that the proceedings were wholly null and void. The bond sued on was in the usual form of guardians' bonds, and recited that Gillespie was "of Noxubee county." It was shown that Bardwell, who had died before the institution of the suit, without leaving any property subject to execution, had, on his appointment as guardian, taken possession of the estate of his ward, and exercised over it all the powers pertaining to his office as guardian, collecting rents and profits, selling land and collecting the purchase money, collecting dues of the estate by suit, etc. The complainant introduced the depositions of various witnesses, on the hearing, to show that Bardwell had made the collections alleged in the bill. There were attached, as exhibits, to the depositions of several of the witnesses, copies of their account books and of a receipt, the originals of which the witnesses produced before the commissioner taking their depositions. It was shown that the books were correctly kept, and the witnesses allowed the commissioner to make copies of them. He also made a copy of the receipt. The witnesses had no interest in the litigation, and the account-books and receipt were their private property. The court overruled the defendants' objection to the admission of these exhibits, and the defendants appealed from a final decree for the complainant.

Ham, Witherspoon & Witherspoon, for the appellants.

Ames & Drake, for the appellee.

750 WOODS, J. We find no error in the rulings on the evidence of the learned special chancellor who presided on the trial in the court below. 751 In each instance complained of by appellant, it clearly appears that the original books of entry were produced before the commissioner who took the depositions of the witnesses, and that correct copies of the entries were taken from such books. It would be so very inconvenient to make the books themselves exhibits to the answers to interrogatories as to render that course practically impossible; besides, the books were the private property of the witnesses, and it would be manifestly improper to require them to part with their books, when none of them are in anywise interested in the litigation. These remarks apply with equal force to the action of the court in receiving the copy of the receipt taken from the guardian by Messrs. Yerger & Percy. Mr. Yerger produced the original receipt before the commissioner, and, on his examination, furnished a correct copy of this receipt as the exhibit to his answer to one of the inter-

rogatories. It is not contended that true copies were not given in each instance, but only that the books and the receipts themselves should have been made exhibits to the depositions. We are unable to see any good reason to support this contention of appellant's, and the reasons against it lie upon the surface, and two of them have already been adverted to by us.

We premit any reference to, or examination of, any other questions argued as to the action of the court in any matter antecedent to the final decree, and come at once to the vital inquiry in the case, viz: Are the appellants estopped by the recitals of the bond which they signed as sureties to deny the appointment as guardian of their principal?

By their act in signing this bond of the guardian of the lunatic, he was enabled to take into his possession the entire estate of the lunatic, and, for about fifteen years, by virtue of their voluntary act, he retained the exclusive control, management, and disposition of the estate and its income. Because of their suretyship on his bond, he, year by year, received the rents and profits of the lunatic's estate; he sold lands of the lunatic ⁷⁵² and collected the purchase money, and he instituted proceedings in the courts of the country, on behalf of the lunatic, and carried to successful termination such litigation, and received as the fruits thereof hundreds of dollars. Now, when the guardian is dead, when the lunatic is in need of his own, and when large balances are found to be demandable from these sureties, they seek to prevent any recovery by the unhappy lunatic, whose funds have been wasted or misapplied by the guardian, on the ground of the invalidity of the guardian's appointment. By their bond and its recitals, upon every principle of equity, they are estopped to deny the validity of that appointment. The effort of the appellants is to show the invalidity of the guardian's appointment by disputing the recitals of their bond—the very instrument of their own making, by which the guardian took possession and control of the estate of the lunatic, and part of which has been wasted or misapplied and lost by the guardian, and for which it is now sought to hold these sureties liable—and this, by all right reason, and in all good conscience, they ought not and cannot be permitted to do.

Our only hesitation in making this declaration arises from the fact that forty-five years ago, in *Thomas v. Burrus*, 23 Miss. 550, 57 Am. Dec. 154, it was held that a surety on a guardian's bond was not estopped by the recitals of his bond to deny the validity

of his principal's appointment. This decision is not only clearly opposed to the overwhelming weight of authority, but is out of harmony with many other decisions of this court which deny to an officer and the sureties on his official bond the right to dispute the recitals of the officer's bond and question the validity of his appointment to office. We are utterly unable to conceive any reason, good or bad, for estopping a sheriff to dispute the recitals of the bond whereby he was enabled to seize his office, and yet refusing to recognize the doctrine of estoppel in similar cases where an administrator or guardian has incurred liability. In this case, where the lunatic is seeking to hold to liability the sureties on his guardian's bond, the real inquiry ⁷⁵³ is not, Was the guardian's appointment regular and valid? but, Is this bond—executed by these sureties, whereby their principal acquired authority to take, and in fact did take, into possession and control the lunatic's estate—without equitable or legal obligation to require the guardian, and those who bound themselves, to answer for his faithfulness? It affronts justice to assert that one may take into his hands the estate of another, under the forms of law, giving bond faithfully to administer it and account on the conclusion of his stewardship, and then successfully deny liability for the property thus in his hands, because of some legal infirmity in his appointment. We repeat, the question is not whether the appointment was valid, but whether the guardian and his sureties shall be bound by the terms of their bond. We have no doubt as to their liability.

So far as our research has extended, this case of *Thomas v. Burrus*, 23 Miss. 550, 57 Am. Dec. 154, is without the support of any other single decision, and should not longer be allowed to stand, if the doctrine of equitable estoppel is not to be shorn of its strength by the courts of the country: See *Bigelow on Estoppel*, 361, and references in note 3; *Herman on Estoppel*, 771, and cases cited in note 5; *Cutler v. Dickinson*, 8 Pick. 387; *Williamson v. Woodman*, 73 Me. 163; *Teutonia Nat. Bank v. Wagner*, 33 La. Ann. 732; *Fridge v. State*, 3 Gill & J. 103; 20 Am. Dec. 463; *Iredel v. Barbee*, 9 Ired. 250; *Gray v. State*, 78 Ind. 68; 41 Am. Rep. 545; *State v. Mills*, 82 Ind. 126; *Hines v. Mullins*, 25 Ga. 696; *Shroyer v. Richmond*, 16 Ohio St. 455. No rule of property was created by *Thomas v. Burrus*, 23 Miss. 550, 57 Am. Dec. 154, and we unsettle the property rights of no one, acquired in reliance upon that case. It is unsound and is overruled.

Affirmed and remanded.

SECONDARY EVIDENCE of contents of books of account is not admissible, unless the absence of the books is accounted for: *Hunt v. Roylance*, 11 Cush. 117; 59 Am. Dec. 140. A copy of a written instrument may be admitted in evidence, if the original is shown to be lost: *Bell v. Byerson*, 11 Iowa, 233; 77 Am. Dec. 142.

RECITAL IN GUARDIAN'S BOND—ESTOPPEL.—A recital in a guardian's bond of the fact that he is such guardian is binding both upon himself and upon his surety in an action on the bond: *Fridge v. State*, 3 Gill & J. 103; 20 Am. Dec. 463. The surety on a guardian's bond, executed to enable him to sell his ward's real estate, is estopped, after the sale and receipt of the money, to deny his appointment as guardian: *Gray v. State*, 78 Ind. 68; 41 Am. Rep. 545.

TEBO v. BETANCOURT.

[73 MISSISSIPPI, 868.]

ATTACHMENT—ACTION ON BOND FOR EXPENSES OF SUIT.—A defendant in an attachment suit, after defeating the action upon its merits, cannot recover upon the attachment bond, for attorney's fees and expenses incurred by him in defending the main suit, where he did not own the property attached as his.

Ford & Ford, for the appellant.

E. J. Bowers, for the appellee.

⁸⁷⁰ **WHITFIELD, J.** Manuel sued out an attachment against F. Betancourt, on the ground of nonresidence alone. The only property seized under the attachment was the schooner *Tres Hermanos*, which was the property, not of Betancourt, but of Rosa Betancourt, his wife. The sheriff gave Rosa Betancourt an indemnifying bond. No property at all of F. Betancourt was attached. Rosa Betancourt filed her claimant's affidavit at the return term. F. Betancourt, who was a nonresident, but none of whose property had been in any way attached, appeared, and pleaded to the main suit on the merits, the general issue, and other pleas in bar. Judgment nil dicit was rendered in favor of Manuel on the attachment issue, but, on the trial on the merits, Betancourt won. Mrs. Rosa Betancourt then brought suit on the indemnifying bond for damages sustained by her by reason of the levy on her schooner, and recovered two thousand two hundred dollars, which sum has been paid. F. Betancourt then brought this suit on the attachment bond, for attorney's fees and expenses incurred in the defense of the action of assumpsit against him by Manuel. In the trial of this suit, the defendants asked the court to instruct the jury that, "in this case, because no property of the plaintiff was levied upon under the attach-

ment writ, the plaintiff is not entitled to recover any damages in this case," which was refused, and the refusal of this instruction is the controlling assignment of error.

⁸⁷¹ This case is clearly distinguishable from the case of Buckley v. Van Diver, 70 Miss. 622, by the material fact that, in that case, Mrs. Van Diver's property was seized under the writ of attachment, she being the defendant in the attachment. The attachment in this case was, as to F. Betancourt, mere brutum fulmen. He did not appear, as did Mrs. Van Diver, to secure the release of his property from the attachment writ. There was nothing to show that the attachment was maliciously sued out. F. Betancourt appeared merely to contest the issue of indebtedness with Manuel, and, under the circumstances of this case, he occupies just the position and has just the rights of a defendant sued in any ordinary action.

We are clear, under the facts of this case, that he was not entitled to any damages. Waples thus lays down the rule: "The obligation to pay damages, assumed in the attachment bond, in case of the wrongful causing of the writ to be issued, or the wrongful procedure under the writ, has no reference to the personal action against the debtor, considered apart from the proceeding against his property. The institution of an ordinary action against the debtor is the creditor's right, without affidavit and without bond. The institution of the extraordinary action is not his right, unless he bring himself within the statute and take the required obligation; but, if the defendant should suffer no wrong but what would have ensued from an ordinary suit legally brought but not sustained by evidence, would the plaintiff be liable upon the bond? Take this case: Affidavit and bond being executed and attachment issued, no property is seized and taken from the defendant; the attachment is in the hands of a third person by garnishment, according to the sheriff's return, but the garnishee denies that he is a debtor of the defendant or the holder of any property of his, and is discharged; the personal action goes on, and results in a judgment for the defendant. Whether the defendant can recover or not depends upon the injury he may have sustained by the charges. He may have been seriously slandered by a ⁸⁷² charge of absconding, for instance. If only alleged to be a nonresident, or if it be conceded that he was no more damaged by reason of the attachment than he would have been had an ordinary suit been unsuccessfully brought against him, it would seem that the conditional

obligation of the bond would not have been incurred. Take the case of land attached when the owner is not dispossessed; of personal property only nominally attached, as is sometimes improperly done; of property attached which proves not to be that of the defendant—it seems clear, in such cases, that no obligation is incurred to the defendant for injury done to property.” We approve this as the correct rule.

Mr. Waples (Waples on Attachments, 447, 448) cites many authorities, to two of which we specially refer: *Heath v. Lent*, 1 Cal. 410; *Pinson v. Kirsh*, 46 Tex. 29. In the former there were two defendants, and the property of one only was seized. On this point the court say: “If it appear in evidence that the property of but one of the plaintiffs was attached, then it would seem that he alone should be plaintiff. The direct injury, if any, was suffered by him, and he alone is entitled to the damages, if any should be recovered. If the coplaintiff, whose property was not attached, has suffered in his good name and reputation by reason of the wrongful suing out, that is a consequence, not of the seizure of his coplaintiff’s property, but of the facts stated in the affidavit for the writ, which, if true, or the affiant had good reason to believe to be true, will fully justify the issuing of the writ, and if the contrary, then the party will have a remedy, not upon the bond, but in the criminal code, or by his private action for the tort.” Without reference to the last proposition announced by the court as to suing in tort, and not upon the bond, for the character of damages indicated, it is a direct adjudication of the precise question here presented, as is also the case of *Pinson v. Kirsh*, 46 Tex. 29. To the same effect is *Drake on Attachments*, section 175, the author saying: “But, if the property attached was not the defendant’s, he can recover no damages,” ⁸⁷³ and so, in effect, are 1 *Wade on Attachments*, section 301; *Shinn on Attachment and Guaranty*, secs. 369, 190; and so is *Stauffer v. Garrison*, 61 Miss. 67. The instruction should have been given.

Reversed and remanded.

ATTACHMENT—DAMAGES.—Only actual damages can be recovered where an attachment is wrongfully sued out: Note to *Goodbar v. Lindsley*, 14 Am. St. Rep. 56. The measure of damages recoverable upon an attachment bond is the actual expense and loss resulting from the levying of the attachment, including the fees of counsel for services rendered in relation to the attachment: *Dickinson v. Maynard*, 20 La. Ann. 66; 96 Am. Dec. 379; monographic note to *Burton v. Knapp*, 81 Am. Dec. 473, on actions for wrongful attachments and de-

fenses thereto; but, in exceptional cases, where both the action and the attachment proceeding have been defeated, the reasonable attorney's fee of the defendant in the main action for defending both the action and the attachment, have been included in the damages: See monographic note to *Trapnall v. McAfee*, 77 Am. Dec. 155, on the recovery of attorney's fee on attachment, and other similar statutory bonds.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

GREEN v. STONE.

[54 NEW JERSEY EQUITY, 337.]

DEEDS—STIPULATION BY GRANTEE TO ASSUME MORTGAGE DEBT.—A stipulation in a deed inter partes, that the grantee is to assume and pay a debt secured by mortgage on the premises for the payment of which the grantor is personally liable, is a contract by the grantee with the grantor for the indemnity of the latter; and the obligation of the grantee to pay the debt inures in equity for the benefit of the mortgagee, and he may enforce it against the grantee to the extent of the unpaid part of the mortgage debt after the proceeds of the mortgaged estate have been applied thereon. The remedy in equity is independent of foreclosure.

MISTAKE — REFORMATION OF INSTRUMENT — EVIDENCE.—Courts of equity may grant relief on the ground of mistake, by rescinding the entire contract or reforming it, but such relief is not to be granted in case of a deed, unless upon proof that is entirely satisfactory.

MISTAKE—UNILATERAL—RESCISSION OF CONTRACTS. A court of equity may rescind a contract for a mistake which is unilateral, and in such case the whole contract is set aside and the parties are restored to their original position, and no relief can be granted in such case after the position of the parties has been so changed that their original rights cannot be restored.

MISTAKE—REFORMATION OF INSTRUMENT.—In case of the reformation of a contract or deed by altering or expunging some of the terms contained in it on the ground of mistake, the part improperly introduced is altered or expunged, and the instrument stands as reformed. To warrant such reformation, in the absence of fraud, there must be a mutual mistake.

MISTAKE—RESCISSION OF CONVEYANCE.—If no effort has been made to rescind a conveyance by restoring the parties to their original position until such restoration has become impossible, relief by way of rescission cannot be granted, even if proof of unilateral mistake is entirely satisfactory and convincing.

MISTAKE — REFORMATION OF CONVEYANCE — EVIDENCE.—To justify the reformation of a deed executed, delivered,

accepted, and acted upon, on the ground that it did not correctly express the agreement made by the parties, the proof must be clear and convincing, and upon testimony that is unexceptionable, both with regard to the agreement actually made by the parties, and the mutuality of the mistake through which a different agreement was put in the deed.

MISTAKE — REFORMATION OF DEED—PARTIES.—The defense that a clause in a deed assuming to pay a mortgage debt was inserted by mistake, must be set up by cross-bill, and all of the parties interested must be made parties thereto.

A. H. Swackhamer, for the appellant.

J. J. Crandall, for the respondent.

388 **DEPUE, J.** This is a suit in equity by Green, a mortgagee, against Stone, a purchaser from the mortgagor of a portion of the mortgaged premises, praying a decree that the defendant pay the balance of the mortgage debt remaining unpaid after applying thereto the amount realized from the foreclosure and sale of the mortgaged **389** premises. On final hearing, the complainant's bill was dismissed. From this decree the complainant appealed.

One George S. Beckett was the owner of two tracts of land situate in the county of Gloucester; the one situate in Logan township, containing four hundred and thirty-eight and eighty-one hundredths acres, known as the Middleton farm; the other situate in the township of Harrison. In December, 1885, Beckett gave the complainant a mortgage for fifteen thousand dollars on both tracts, together with a bond for the payment of the mortgage debt. By a deed of conveyance, dated January 25, 1893, Beckett conveyed the farm above mentioned to the defendant. The consideration named in the deed was sixteen thousand dollars, and at the end of the description of the premises and estate conveyed, the deed contained the following clause: "Subject to the payment of a certain mortgage debt of fifteen thousand dollars, with interest thereon at five per centum per annum, made by said George S. Beckett to George G. Green, covering the property hereby conveyed inter alia, which the said Edward B. Stone hereby assumes and agrees to pay as a part of the consideration hereof."

The deed was prepared by George H. Barker, a real estate agent and conveyancer, at the request of Beckett, in pursuance of instructions given by him. It was delivered by Beckett to Stone, on the 3d of February, 1893, at the office of Martin V. Bergen, who was the counsel of Stone, and was placed upon record the same day.

Subsequently, in April, 1894, the complainant filed a bill to foreclose his mortgage. Beckett and wife and Stone were made defendants in the foreclosure suit. A decree of foreclosure and for the sale of the mortgaged premises, including both tracts, was obtained in July, 1894, and the premises were sold by the sheriff, on the 24th of September, 1894, at public auction, by virtue of an execution issued upon the decree, the complainant being the purchaser for a sum which left unpaid a considerable portion of the mortgage debt. This bill was filed to enforce the payment by Stone of such part of the mortgage debt as remained unsatisfied, in compliance with the agreement to assume and pay the mortgage debt contained in his deed.

³⁹⁰ A deed inter partes whereby an estate is conveyed, if accepted by the grantee, is, in legal effect, the deed of both parties, and a stipulation in such a deed by the grantee that he will assume and pay a debt secured by a mortgage on the premises for the payment of which the grantor is personally liable, is a contract by the grantee with the grantor to pay the mortgage debt, especially where the mortgage debt is computed as part of the consideration money for the conveyance. This contract is with the grantor for his indemnity, and the obligation of the grantee to pay the debt inures in equity for the benefit of the mortgagee, and he may enforce it against the grantee to the extent of the unpaid part of the mortgage debt remaining due after the proceeds of the mortgaged estate have been applied thereon. The principle on which the mortgagee in such cases is entitled to enforce the obligation of the grantee is, that by the acceptance of a deed containing an assumption of the mortgage debt, the grantee becomes the principal debtor—the liability of the grantor as between the parties being that of a surety only; and, by a well-settled doctrine of equity, the mortgagee as a creditor may, by way of subrogation, have the benefit of all collateral obligations which a person standing in the situation of a surety for another holds for his indemnity. The contract, being with the grantor for his indemnity, may be released or discharged by him at any time before the mortgagee proceeds to enforce his rights against the grantee; but if, at the time suit is brought by him, the obligation of the grantee to pay the mortgage debt is in existence undischarged, his remedy against the grantee is complete: *Klapworth v. Dressler*, 13 N. J. Eq. 62; 78 Am. Dec. 69; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *Youngs v. Trustees of Public Schools*, 31 N. J. Eq. 290; *Vreeland v. Van*

Blarcom, 35 N. J. Eq. 530; Sparkman v. Gove, 44 N. J. L. 252; Keller v. Ashford, 133 U. S. 610, 622, 623; 1 Jones on Mortgages, sec. 755. All the cases agree that the language contained in this deed creates an obligation on the part of the grantee which the mortgagee may enforce in equity. This remedy of the mortgagee is not affected by the acts of 1880 and 1881. The first section of the act of 1880 regulates simply the form of proceeding in foreclosure suits, and ³⁹¹ the second and third sections, as amended by the act of 1881, apply to suits at law upon bonds secured by mortgages: Rev. Supp., 489, 490. The ancient and familiar doctrine in equity that the creditor shall have the benefit of any obligation or security given by the principal to the surety for the payment of the debt, and the remedy in a court of equity to enforce this equitable doctrine, are not impaired by this legislation. The remedy in equity is independent of the foreclosure suit: Pruden v. Williams, 26 N. J. Eq. 210.

Beckett died in August, 1894, and, after the sale of the mortgaged premises under the foreclosure, Stone filed a bill in equity against Beckett's representatives for the reformation of the deed by eliminating therefrom the covenant of assumption, on the ground that the same was inserted in the deed without his knowledge and by mistake, and that it was not the intention of either of the parties to said deed to have it in the deed. The case was heard by an advisory master on bill, answer, and depositions, and the master denied the relief prayed for and advised that the complainant's bill be dismissed. Upon his advisory opinion, a decree was made accordingly. This decree was affirmed by this court: Stone v. Beckett, N. J. March term, 1896. By force of this decree, it was adjudged as a finality that the contract of the grantee with the grantor to pay the mortgage debt was a valid and subsisting obligation. Inasmuch as the right of the complainant in this case results from the contract between Stone and Beckett, it would follow, as a legal conclusion, that the decree in the former suit, if put in evidence, would determine the rights of these parties, unless some independent equity, extraneous of the conduct of the immediate parties to the deed, be made to appear. The record does not disclose that the decree in the former suit was put in evidence in this case. The case will therefore be examined de novo upon the pleadings and evidence.

The defendant, in his answer, admits that, by the deed of January 25, 1893, Beckett conveyed to him the premises described in the deed. He denies that he accepted the said deed pursu-

ant to any bargain and sale between him and Beckett. He also denies that the said agreement to assume and pay the ³⁹² mortgage was in any form accepted by him, and says neither he nor Beckett ever bargained for such an undertaking, and that he never saw the deed until after the foreclosure suit was begun; that after the process in that suit was served upon him, he inspected the deed for the first time, and until that time he was wholly ignorant of such an undertaking being inserted in the deed. He also alleges in his answer that he took title to the premises for the benefit of one McClung, at the request of Beckett and McClung, and that he held the title as security for the payment to him of one thousand dollars by McClung, and that McClung was the real purchaser.

The facts connected with this transaction, as stated by the vice-chancellor in his opinion, are briefly these: "Edward B. Stone, the defendant, was the owner of four houses and lots in Camden which were subject to mortgages, the equity in the four being considered equal to two thousand dollars. One McClung was desirous of becoming the owner of said farm, and not having the cash with which to make the purchase, and knowing that Beckett wanted to sell his farm, and that Stone was willing to dispose of his houses and lots, adopted the following scheme, with the view of ultimately securing the title in himself, and in so doing to limit the number of conveyances as much as possible. He procured the consent of Stone to make conveyance of his said four lots directly to Beckett in consideration of Beckett conveying the farm to Stone, instead of having the Stone conveyance first made to himself and then conveying to Beckett, with the express agreement that the two thousand dollars, at which the equity of redemption in the Stone lots was valued, should be paid to Stone by McClung, and that Stone should hold as security therefor the title to the said farm."

The negotiations which resulted in the exchange of the Camden lots for the Beckett farm were conducted entirely by McClung. The parties met at the office of Martin V. Bergen February 3d, for the purpose of the delivery of the deeds by the parties, respectively. The persons present on that occasion were Beckett, Stone, McClung, and Mr. Bergen, who had been the counsel and adviser of Stone for many years. Beckett had the ³⁹³ deed from him to Stone for the farm executed and acknowledged on the 25th of January, 1893. The deed from Stone to Beckett was prepared in Bergen's office. Mr. Bergen testified

that "after Beckett brought his deed there and he delivered that deed to Stone and McClung, both were there, and Stone had his deed there, and both lay on the table, and I chucked one to one and one to the other, and then I drew an agreement."

He also testified that he did not examine the deed—only looked to see if it was acknowledged. The agreement referred to is the agreement between Stone and McClung:

"Agreement entered into this 3d day of February, 1893, between Edward B. Stone, of the city of Camden, N. J., of the first part, and Thomas K. McClung, of the second part. (1) It is agreed that the said party of the first part, for and in consideration of the sum of two thousand dollars, is to convey to the said party of the second part the property conveyed to the said party of the first part by George S. Beckett, by deed dated January 25th, 1892, situated in Logan township, Gloucester county, New Jersey, containing about 438.08 acres. (2) The said agreement is to be carried out within sixty days from the date hereof. (3) The property is to be conveyed subject to the encumbrance thereon, over and above said \$2,000. (4) The conveyance or transfer of said property is to be made to said party of the second part or to such person as he may designate, and for such consideration as he may name.

"In witness whereof the said parties have hereunto set their hands and seal, the 3d day of February, 1893.

"EDWARD B. STONE,

"THOMAS K. McCLUNG.

"Signed and sealed in the presence of

"MARTIN V. BERGEN."

The deed was left with Bergen to be recorded, and was recorded the same day. In virtue of the title conveyed by the deed, possession of the farm was taken immediately, and was held until the foreclosure sale. The property has meanwhile been under the control of McClung exclusively, but his possession and control have been with the acquiescence and consent of Stone, and under the title Stone obtained under the deed. The vice-chancellor, in his opinion, says that, "so far as Stone was concerned, he was simply an instrument used by McClung to procure the passage of the title to the farm to himself ultimately." It is not necessary to consider whether McClung practiced any fraud or deception to induce Stone to consent to the arrangement made between them. The problem for judicial de-

cision is how ³⁹⁴ far the arrangement between them can be permitted to affect the rights of Beckett under the contract Stone made with him. This problem must be solved in conformity with legal principles. Beckett took no part in the negotiation of the arrangement between Stone and McClung. He simply agreed to make the deed to Stone, which was eminently proper, inasmuch as the transaction was an exchange for property of which Stone was the owner. Stone testified that he had no acquaintance with Beckett; that before the meeting at Bergen's office to exchange deeds, he had never seen him but once; that Beckett and McClung at that time came to his office, and that he had no conversation with him. That interview manifestly took place after all the negotiations had been concluded, and all that occurred at the time is testified to by Stone, as follows: "Mr. McClung introduced me to Mr. Beckett, and Mr. McClung says, 'Ed, Mr. Beckett will take those properties'; and he said, 'Will you have the deeds made in this fashion?' He says, 'You bring me that deed, and I will have the deeds drawn.' All right; I brought him down the deeds, and they left, and Mr. Beckett asked me how much there was against the property, and I told him. He asked me about the tax, if that is paid, and I told him they were, and that is about all that was said as far as I can recall."

Nothing was done at that interview tending in the slightest degree to influence Stone to make the indiscreet arrangement he made with McClung. Nor is there any proof that Beckett had knowledge of the personal transactions between McClung and Stone. The only evidence touching that subject is the fact that Beckett was present at Bergen's office when the agreement between McClung and Stone was prepared and read, and it does not appear that he gave such attention to the paper, which did not concern him, as to become informed of its contents. All that Bergen testified to was, that "Beckett was there while I fixed the matter up, and they signed the agreement, and they all went out together. That is all I know about it." Nor was there anything in the paper that would excite suspicion of wrong. The agreement was simply for an option to McClung to purchase the property within a limited time for the sum of two thousand dollars, subject to the encumbrances. On this evidence the vice-chancellor ³⁹⁵ concludes that it would be highly inequitable to enforce against Stone the claim for a deficiency. In this view as a basis of judicial decision I cannot concur. It was compe-

tent for Stone to take the place of McClung as the contracting party to oblige the latter, and, so far as Beckett was concerned, Stone voluntarily became the contracting party by accepting the deed to him as grantee containing a covenant that, as part of the consideration of the conveyance, he would assume and pay the mortgage on both tracts. The legal effect of such a covenant is not changed by the fact that the remedy upon it is sought in a court of equity. The covenant has the same efficacy in a court of equity as in a court of law, unless it be set aside or avoided on some one of the grounds on which a court of equity may annul or reform a deed—fraud or mistake.

There is no proof to sustain an allegation of fraud. It is conceded that the mortgage debt upon both tracts was comprised in the consideration for the conveyance. Stone testified that McClung told him that he was paying twenty-one thousand nine hundred dollars for the property. To make up that sum the whole mortgage debt was required to be included. The covenant to assume and pay the entire mortgage debt is full and specific, more so than is usual, and is contained in that part of the deed in which such covenants are usually placed. Beckett gave the deed into the hands of Mr. Bergen, who was an experienced lawyer, and had been the counsel and adviser of Stone for many years. Both McClung and Stone knew of the mortgage on the farm and the amount of it, and that the mortgage debt was part of the consideration of the conveyance. If either Bergen or Stone or McClung had exercised ordinary care, the presence of the covenant in the deed would have been discovered.

Nor is there such proof in the case as would justify the reformation of the deed on the ground of mistake. Courts of equity may grant relief on the ground of mistake, by rescinding the entire contract or reforming it, but such relief will not be granted in case of a deed, unless upon proof that is entirely satisfactory and convincing. In granting relief on the ground of mistake, there is a distinction between the rescission and the reformation ³⁹⁶ of a written instrument. A court of equity may rescind a contract for a mistake which is unilateral—that is, a mistake on the part of one of the parties only. In such a case, the whole contract is set aside, and the parties restored to their original position. But, in the case of the reformation of a contract or deed by altering or expunging some of the terms contained in it on the ground of mistake, the part improperly introduced into it will be altered or expunged, and the instrument

will stand as reformed. To warrant reformation there must be a mutual mistake—that is, a mistake shared in by both parties: *Paget v. Marshall*, L. R. 28 Ch. Div. 255; 2 *Pomeroy's Equity Jurisprudence*, sec. 870. Consequently, no relief can be granted for a mistake which is unilateral after the position of the parties has been changed so that the former state of things cannot be restored: *Pollock on Contracts*, 541. The deed was delivered and accepted, and possession taken and held under it until the entire estate was divested by a sale in the foreclosure suit. The defendant, in his answer, admits that he became aware of this covenant shortly after process was served upon him in the foreclosure proceeding. No efforts were made to rescind the conveyance by restoring the title to Beckett, and, at this time, restoration of Beckett to his original position has become impossible, and relief by the way of rescission could not be granted even if the proof of unilateral mistake were entirely satisfactory and convincing.

Under the circumstances, the only relief that can be considered is by way of reformation, by expunging the contract of assumption on the ground that it was inserted in the deed by the mistake of the parties mutually. The vice-chancellor disposes of this aspect of the case on the authority of *Bull v. Titsworth*, 29 N. J. Eq. 73. The other cases cited in the opinion under this head are not relevant to this precise subject. In *Bull v. Titsworth*, 29 N. J. Eq. 73, the chancellor found as a fact that the assumption of the mortgage was not part of the agreement made on the purchase of the property, and that the defendant, when he accepted the deed, was not aware that it contained the clause. The assumption clause was not in that part of the deed in which such an agreement was usually written—at the end of the description ²⁹⁷ of the premises—but was inserted among the covenants by the grantor, and at the end of the description of the property the statement was that the property was conveyed subject to the mortgage. It also appears by the chancellor's opinion that when defendant discovered the covenant, he sought to rescind the contract on that account, and offered to surrender the deed to the grantor on receiving back a railroad bond of one thousand dollars, which he had given as the consideration for it; and, when the grantor stated that he was unable to return the bond to him, he offered to surrender the deed on the receipt of fifty dollars, which offer the grantor declined. The defendant had acted promptly, and had done all that was necessary to effect a

rescission and restore to the grantor the title he had conveyed. The chancellor's opinion does not sustain the reporter's head-note. The case is not authority for the position that a deed will be reformed for a unilateral mistake where there has been no rescission of the entire transaction.

The doctrine that a contract or deed will not be reformed for mistake, in the absence of fraud or imposition, unless the mistake was mutual, that is, reciprocal and common to both parties, where each alike was under the same misconception as to the terms of the written instrument, is the settled doctrine of courts of equity. This doctrine is accurately stated by Mr. Kerr in this language: "There can be no rectification if the mistake be not mutual or common to all parties to the instrument, or if one of the parties knew of the mistake at the time he executed the deed. Where one party only has been under a mistake, while the other, without fraud, knew what the character of the deed was, and intended that it should be, the court cannot interfere, for otherwise it would be forcing on the latter a contract he never entered into, or depriving him of a benefit he had bona fide acquired by an executed deed. Rectification can only be had where both parties have executed an instrument under a common mistake and have done what neither of them intended. A mistake on one side may be a ground for rescinding but not for correcting or rectifying an agreement": Kerr on Fraud, 2d ed., 498.

The doctrine is stated by Chief Justice Spencer in this language: "It is not enough in cases of this kind to show the sense and intention of one of the parties to the contract; it must ³⁰⁸ be shown, incontrovertibly, that the sense and intention of the other party concurred in it: in other words, it must be proved that they both understood the contract, as it is alleged it ought to have been, and as in fact it was, but for the mistake. It would be the height of injustice to alter a contract on the ground of mistake, where the mistake arises from misconception by one of the parties in consequence of his imperfect explanation of his intentions. To make a contract, it is requisite that the minds of the contracting parties agree on the act to be done; if one party agrees to a contract under particular modifications, and the other party agrees to it under different modifications, it is evident there is no contract between them. If it be clearly shown that the intention of one of the parties is mistaken and misrepresented by the written contract, that cannot avail un-

less it further be shown that the other party agreed to it in the same way, and that the intention of both of them was, by mistake, misrepresented by the written contract": *Lyman v. United Ins. Co.*, 17 Johns. 377.

Equally explicit is the language of Chief Justice Ames, in *Diman v. Providence etc. R. R. Co.*, 5 R. I. 130, 135, where he said: "If the court were to reform the writing to make it accord with the intent of one party only to the agreement, who avers and proves that he signed it as it was written by mistake, when it accurately expressed the agreement as understood by the other party, the writing, when so altered, would be just as far from expressing the agreement as it was before, and the court would be engaged in the singular office of doing right to one party at the cost of a precisely equal wrong to the other."

The cases to the same effect are numerous. Many of them will be found in the following citations: 2 *Leading Cases in Equity*, 4th ed., 979-981; *Worlam v. Hearn*, 15 *Am. & Eng. Ency. of Law*, 629, tit. "Mistake," *Am. note*; 1 *Sugden on Vendors and Purchasers*, 14th ed., 243, and note; *Fowler v. Fowler*, 4 *De Gex & J.* 250, 264, and note; *Paulison v. Van Iderstine*, 28 *N. J. Eq.* 306, 310; *Morris v. Penrose*, 38 *N. J. Eq.* 629, 630; *Henderson v. Stokes*, 42 *N. J. Eq.* 586, 589.

The negotiations for the exchange of the two properties were had between McClung and Beckett, and were oral. No agreement in writing preceded the making of the deed. Beckett died before the commencement of this litigation, and the only evidence that the agreement made verbally was different in any respect from that set out in the deed is the testimony of McClung. Barker, who drew the deed, and is an intelligent and disinterested witness, testified that the deed was prepared in conformity with Beckett's instructions. Barker and Livermore both testify that McClung saw the deed while it was in Barker's office, and was made aware that the assumption clause was in it. Barker's testimony is that McClung came to his office and said that the deed would not do; that the purchaser objected to that clause, and wanted another deed prepared; that he (Barker) told McClung that Mr. Beckett could not make a deed without that in it. Livermore, who is the private secretary of the mortgagee, testified that he met McClung at Barker's office on another occasion before the deed was delivered, and that he and McClung read the deed over and read the assumption clause, and that McClung asked him whether that would compel Stone to pay the

mortgage. McClung's testimony is in conflict with the testimony of Barker and Livermore in several matters most material in this controversy. To justify the reformation of a deed executed, delivered, accepted, and acted upon, on the ground that it did not correctly express the agreement made by the parties, the proof must be clear and convincing, and upon testimony that is unexceptionable, both with regard to the agreement actually made by the parties and the mutuality of the mistake through which a different agreement was put in the deed. In *Rowley v. Flannelly*, 30 N. J. Eq. 612, 614, Vice-Chancellor Van Fleet says: "When the evidence, in demonstration of mistake, is doubtful or equivocal, or strongly contradicted, so that it is impossible for the mind to reach a strong conviction as to the truth, the court will not change what is written. . . . Until a mistake has been established by such force of proof as leaves no rational doubt of the fact, no change in the writing sought to be reformed is entitled to be called a correction."

The rule of evidence, with respect to the character and degree ⁴⁰⁰ of proof exacted, in order to substitute another contract in the place of that contained in a written instrument, as stated by Vice-Chancellor Van Fleet, has frequently been declared and adopted: 1 Story's Equity Jurisprudence, sec. 157; *Cummins v. Bulgin*, 37 N. J. Eq. 476; *Henderson v. Stokes*, 42 N. J. Eq. 586, 588; *Hupsch v. Resch*, 40 N. J. Eq. 657, 662. A considerable number of cases to the same effect are cited in 15 American and English Encyclopedia of Law, 650. The testimony produced by the defendant in this case falls far short of the standard of proof required to expunge from the deed the covenant in question.

In *Vreeland v. Van Blarcom*, 35 N. J. Eq. 530, 531, cited in the opinion below, the defendant for many years had been mentally an imbecile. One Geroe had charge of his affairs as agent and quasi guardian. As such he negotiated an exchange of properties, and caused to be inserted in the deed to the defendant an agreement to assume a mortgage which Geroe himself held. This agreement was placed in the deed without the knowledge or authority of the defendant and without its being required by the grantor. This court vacated the agreement to assume, on the ground that Geroe could not insert such a stipulation in the deed for his personal benefit without the authority of his principal. That decision would be controlling as between McClung and Stone. The facts in the case disclose its inapplicability to

this controversy as between the parties to this suit. McClung was not owner of the mortgage now in question, nor was he in this transaction the agent of the mortgagee. He derived no benefit to himself personally by the assumption of the payment of the mortgage by Stone.

The decree should be reversed, and a decree entered in conformity with the prayer of the bill.

The defense was made by answer only. It should have been made by way of a cross-bill: *Miller v. Gregory*, 16 N. J. Eq. 274; *French v. Griffen*, 18 N. J. Eq. 279; *Graham v. Berryman*, 19 N. J. Eq. 29; *Rosenkrans v. Snover*, 19 N. J. Eq. 420; 97 Am. Dec. 668; *O'Brien v. Hulfish*, 22 N. J. Eq. 471, 475; *Allen v. Roll*, 25 N. J. Eq. 164, 165. And all persons who were interested should have been made parties to the cross-bill. When the object of a cross-bill ⁴⁰¹ is affirmative relief, such as would be obtained by the reformation of a deed, in aid of a defense to the suit, persons not parties to the original bill, who are necessary parties to the relief sought, may be made parties to the cross-bill: *Brandon Mfg. Co. v. Prime*, 14 Blatchf. 372; 5 Ency. of Pl. & Pr. 650. In *Randolph v. Wilson*, 38 N. J. Eq. 28, Chancellor Runyon said that the defense that an assumption clause was inserted in a deed by mistake should regularly be set up by cross-bill, but that the court had entertained it when set up by answer without a cross-bill when the matter could be satisfactorily tried without a cross-bill. In this case, the defense should have been set up by way of a cross-bill, and the representatives of Beckett should have been made parties to it. That two litigations resulted in two decisions of the chancery court, the one directly opposite to the other, upon the same facts and depending upon a liability identically the same, indicates that those rules of practice by which a court of equity seeks to dispose of the entire litigation in one suit whenever it is practicable to do so should have been conformed to in this case. No objection was made to the mode in which the defense was set up in this suit, and reference to it has been only to exclude an inference that it is approved by this court.

DEEDS—AGREEMENT BY GRANTEE TO ASSUME MORTGAGE DEBT.—A grantee who covenants with his grantor to pay off the mortgage on the premises becomes, in equity, the principal debtor with respect to the mortgage debt, and the grantor becomes his surety. The mortgagee may have in foreclosure suit a decree for deficiency against such grantee: *Klapworth v. Dressler*, 13 N. J. Eq. 62;

78 Am. Dec. 69, and extended note. See, also, the note to *Gifford v. Corrigan*, 15 Am. St. Rep. 514.

EQUITY—REFORMATION OF INSTRUMENT FOR MISTAKE. A written instrument which by mistake fails to express the agreement of the parties may be reformed: *Nelninger v. State*, 50 Ohio St. 394; 40 Am. St. Rep. 674, and note; *Eastman v. Provident etc. Relief Assn.*, 65 Conn. 176; 23 Am. St. Rep. 29, and note; note to *Hecht v. Batcheller*, 9 Am. St. Rep. 712.

MISTAKE—REFORMATION OF INSTRUMENTS—PROOF.—Evidence sufficient to reform a deed on the ground of mistake must be clear, precise, and indubitable, and of such weight and directness as to establish the facts alleged beyond a reasonable doubt: *Boyertown Nat. Bank. v. Hartman*, 147 Pa. St. 558; 30 Am. St. Rep. 759, and note. One who seeks to have a deed reformed on the ground of mistake must establish his case by clear, satisfactory, and convincing proof. A mere preponderance of evidence is not sufficient: *Crookston Imp. Co. v. Marshall*, 57 Minn. 333; 47 Am. St. Rep. 612, and note.

RESCISSION OF CONTRACTS IN EQUITY FOR MISTAKES OF FACT is discussed in the extended note to *Miles v. Stevens*, 45 Am. Dec. 631, and *Hough v. Hunt*, 15 Am. Dec. 572. And see, also, the late case of *Du Bois Borough v. Du Bois Waterworks Co.*, 176 Pa. St. 430; 53 Am. St. Rep. 678, and note.

FULPER v. FULPER.

[54 NEW JERSEY EQUITY, 431.]

HUSBAND AND WIFE—COTENANCY.—A conveyance to husband and wife as "tenants in common" creates a tenancy in common between them, and not an estate by the entireties.

HUSBAND AND WIFE—COTENANCY.—Whether a husband and wife take as cotenants or as tenants by the entirety is to be gathered from the instrument which passes the estate to them, and, if it appears from such instrument that it is the intention for them to take as cotenants, that intention must prevail.

G. H. Large, for the appellant.

H. A. Fluck, for the respondents.

431 GUMMERE, J. The complainant in this case filed his bill for the partition of certain lands in the county of Hunterdon, which were conveyed on May 9, 1834, to his parents, Asher and Jane Fulper, "as tenants in common." Both grantees are now dead, Asher Fulper having survived his wife, who died intestate. The husband, however, left a will, by which he devised the whole of his real estate to five of his children, disinheriting the remaining one, the complainant, who, the will declared, "shall take nothing under this will."

The complainant bases his right to a partition of the lands in question upon the fact that he is one of the heirs at law of his

mother, and, as such, the owner of an undivided interest therein. His ownership is challenged by his brothers and sisters, the ground of their contention being that, notwithstanding the fact that the lands were conveyed to their parents as tenants in common, they, by force of law, held them as tenants of the entirety, ⁴³² and that, therefore, upon the death of their mother, the whole estate became vested in their father, by right of survivorship, as tenant in fee simple.

The learned advisory master who heard the case adopted the view advanced by the defendants, and held that the complainant had no interest in the lands which he sought to have partitioned, following the decision of the supreme court of Pennsylvania in *Stuckey v. Keefe*, 26 Pa. St. 397, which holds that, in consequence of the theoretic unity and entirety of the ownership of the husband and wife with respect to their interest in lands, they cannot hold by moieties, and that where land is conveyed to them in common, they take an entirety of estate without regard to the intent appearing in the conveyance. The decision in *Stuckey v. Keefe*, 26 Pa. St. 397, rests upon the ground that there are certain incidents to a tenancy in common which cannot exist in an estate held by husband and wife. Those incidents are said to be that tenants in common may sell their respective shares, that they are compellable to make partition, that they are liable to reciprocal actions of waste and account, that if one turns the other out of possession an action of ejectment will lie; and it is said that, where lands are held by a husband and wife jointly, he cannot sell his moiety free from her dower, nor can she sell hers at all without his consent, and that no action of partition, or account, or waste, or ejectment can be maintained by one against the other.

The fact that a husband cannot sell his moiety of lands held jointly with his wife free from her dower, and that she cannot sell hers at all without his consent, does not seem to afford a substantial reason for concluding that they cannot, therefore, hold lands as tenants in common. The same fact is equally true of lands held by either the husband or wife in severalty, and yet it has never been suggested that this fact would operate to prevent lands from being so held by a married person.

Nor does it seem to me that the fact of the inability of the husband or wife to maintain an action of partition or of waste, or of ejectment, or of account, against the other (admitting that such inability exists), justifies the conclusion that they cannot

⁴³³ hold as tenants in common. The reason why, at common law, an action could not be maintained by the wife against the husband for an accounting of the rents and profits of an estate held by him and her, or for the joint possession thereof, was not because of anything characteristic of the estate so held, but because the husband, by the *jus mariti*, was entitled to the exclusive possession of his wife's land during her life, and to the rents and profits thereof, whether held by her jointly with him or in severalty: *Hiles v. Fisher*, 144 N. Y. 306; 43 Am. St. Rep. 762. So far as the husband is concerned, while it is true that he could not maintain an action at law against his wife for an accounting of the rents and profits of their joint estate, or for the joint possession thereof, or for waste committed, I see no reason why he could not have proceeded against her by a bill in equity, which has always been resorted to for the enforcement of rights and the redress of wrongs as between husband and wife. So, too, it seems to me that a court of equity would, at the instance of the wife, restrain waste of the joint estate by the husband, whether they held as tenants of the entirety or as tenants in common. Nor can I concede that an action of partition of the joint estate cannot be maintained by the husband against the wife, or vice versa, unless, of course, there is a survivorship. Equity will decree a partition between husband and wife, if they hold as tenants in common, to the same extent which it would if they were strangers. It is reasoning in a circle to say that a partition of land cannot be made between husband and wife because their estate is by entireties, and that the proof that their estate is by entireties is the fact that there can be no partition between them.

It is a mistake to suppose that there is anything in the theoretic unity of husband and wife which prevents them from being able to hold moieties of the same estate. It has always been held that if a man and woman become possessed of an estate as joint tenants, or as tenants in common, and afterward marry, they still retain their moieties after marriage, and continue to hold as joint tenants or tenants in common: *Coke on Littleton*, 187 b; 1 *Preston on Estates*, 434; 3 *Washburn on Real Property*, 425, and cases cited. There being nothing in the marriage relation which prevents ⁴³⁴ those who were tenants in common before marriage from remaining such after marriage, it would seem to follow necessarily that there is nothing in that relationship which would prevent a husband and wife from taking such

an estate after marriage, provided it clearly appeared, from the deed or devise under which they took, that such was the intention.

This was the view taken by Chancellor Green in *McDermott v. French*, 15 N. J. Eq. 78. In that case a bill was filed for a partition of land, brought by a grantee of a husband against the wife. The bill alleged that the husband and wife were seised in fee of the land, as tenants in common, by virtue of a conveyance made to them, and that the husband had conveyed to the complainant all his interest therein. There was a demurrer filed to the bill on behalf of the wife, upon the ground, among others, that by the conveyance to them she and her husband took an estate by entireties. Discussing this point the chancellor says: "The bill alleges that the husband and wife were seised as tenants in common by virtue of a conveyance made by them. Even, therefore, if it appears by the bill that the conveyance was made during coverture, that fact is not absolutely inconsistent with the creation of a tenancy in common. As there is a direct averment that the conveyance created a tenancy in common, it must be assumed that apt words were used in the deed for that purpose."

In the case of *Buttler v. Rosenblath*, 42 N. J. Eq. 651, which involved the effect of our married women's act upon estates by entireties, Mr. Justice Van Syckel states that a tenancy in common between husband and wife may be created by deed, provided there be in the conveyance an expression of an intention to do so.

The same view has been taken by the courts of other states, as well as by the United States supreme court. In the case of *Miner v. Brown*, 133 N. Y. 308, it is said that whether a husband and wife take as tenants in common or as tenants of the entirety, is to be gathered from the instrument which passes the estate to them, and that where it appears from the instrument that it was the intention that they should take as tenants in common, that intention must prevail, and it is said that such has been the rule from an early period in the history of the English law.

⁴³⁵ In *Knapp v. Windsor*, 6 Cush. 157, and *Brown v. Baraboo*, 90 Wis. 151, it is held that where lands descend to a husband and wife as heirs at law, they take and hold as tenants in common and not as tenants by entireties.

In the case of *Hunt v. Blackburn*, 128 U. S. 464, it is declared that, at common law, when lands are granted to husband and

wife as tenants in common, they will hold by moieties as other distinct and individual persons would do.

It seems clear, both on principle and authority, that the rule laid down in *McDermott v. French*, 15 N. J. Eq. 78, that a husband and wife may be made tenants in common by express words contained in the grant, is the correct one; but even if it were otherwise, we ought to adhere to the rule as stated in the opinion in that case. Since its promulgation in 1862, it has been accepted by the bar of this state as a correct enunciation of the law on this subject, and has become a rule of property upon which many titles undoubtedly are founded. It should not now be altered unless by legislative enactment.

The decree of the court of chancery should be reversed.

HUSBAND AND WIFE—COTENANCY.—A husband and wife may hold property as tenants in common: *Robinson*, Appellant, 88 Me. 17; 51 Am. St. Rep. 367. If a statute invests married women with capacity to acquire and hold estates, a conveyance to a husband and wife vests title in them as tenants in common: *Donegan v. Donegan*, 103 Ala. 488; 49 Am. St. Rep. 53. If a husband and wife contribute equally from their separate estates moneys which they invest in a bond and mortgage taken in their joint names, to be held by them, their executors, administrators, or assigns, they become tenants in common thereof, and neither can take anything by right of survivorship on the death of the other: *Matter of Albrecht*, 136 N. Y. 91; 32 Am. St. Rep. 700. At common law, under a conveyance of realty to a husband and wife, they do not take either as joint tenants or tenants in common, unless by express words or words strongly implying such intention: *Baker v. Stewart*, 40 Kan. 442; 10 Am. St. Rep. 213. See, also, the notes to *Enyeart v. Kepler*, 10 Am. St. Rep. 99; *Harrison v. Ray*, 23 Am. St. Rep. 59, and the extended note to *Den v. Hardenbergh*, 18 Am. Dec. 380.

MILLS v. DAVISON.

[54 NEW JERSEY EQUITY, 659.]

TRUSTS.—THE RULE AGAINST PERPETUITIES does not apply to gifts for charitable uses.

TRUSTS.—GIFTS TO CHARITABLE USES, with a direction that no part thereof shall at any time be alienated, does not create a perpetuity in the sense forbidden by law, but only a perpetuity allowed by law and equity in cases of charitable trusts.

TRUSTS—CHARITABLE USES—PERPETUITIES.—When a charitable use is created by gift, the donor may impose conditions and limitations which shall prevent the diversion of the trust estate from the uses upon which it is given, either by the voluntary or involuntary act of the donee.

TRUSTS—CHARITABLE USES.—Every conveyance to a charitable use is a conveyance to hold upon the trust declared, and the execution of the trust is the condition upon which the estate is

taken and held, to be given effect to, not by forfeiture of the title, but by those methods by means of which a court of equity compels the performance of such trusts.

TRUSTS—CHARITABLE USE.—It is sufficient to create a charitable use if it appears from the construction of the instrument that the property was intended to be held subject only to the execution of certain charitable trusts or the performance of certain conditions in favor of charity.

TRUSTS—CHARITABLE USE.—A deed of gift to a certain religious corporation with habendum to the grantees and their successors forever, with express condition and limitation that no building shall be kept, maintained, or erected on the premises except for the purpose of public worship and teaching in accordance with the usages, rites, and ceremonies of a certain religious sect, and with an express interdict that neither the grantee nor its successors shall at any time sell, mortgage, or in any way convey the premises, or any part thereof, donates the whole estate exclusively to the use named in the grant.

TRUSTS—CHARITABLE USES—INTENT.—The object for which the donee of a charity was incorporated is always an important element in the construction of the instrument by which the charity is created.

TRUSTS—CHARITABLE USES—RIGHT TO MORTGAGE PROPERTY.—If a deed of gift to a religious corporation for a charitable use contains the consent of the grantor that the grantee may mortgage the property to raise money to complete a church edifice, the effect of such consent is not to destroy the entire trust, but to validate the mortgage, and, upon sale under foreclosure, the surplus belongs to the grantee, to be held upon the original trust.

TRUSTS—CHARITABLE USES—INJUNCTION.—The donor, as founder of a charity, has a standing in court to restrain the diversion of the property donated from the charitable uses for which it was given.

TRUSTS—RESULTING.—If a deed of gift to a charitable use conveys away the entire estate in the premises, a resulting trust does not arise in favor of the grantor by reason of an abuse of the trust.

A. Mills, pro se, for the appellant.

C. A. Marsh, for the respondents.

⁶⁶⁰ DEPUE, J. The rector, wardens, and vestrymen of Grace Church, in Westfield, were incorporated as a religious society by a certificate filed November 20, 1862, pursuant to the act to incorporate religious societies: Revision, sec. 27, p. 962. During the years 1874 and 1875, the corporation erected a church building on a lot of land in Westfield, owned by Alfred Mills and Catherine, his wife. The building was erected and used for the purpose of public worship and teaching, in accordance with the usages, rites, and ceremonies of the Protestant Episcopal Church in the United States of America. The cost of erecting and furnishing ⁶⁶¹ the building was about six

thousand five hundred dollars. Of this sum, Mr. Mills and his wife gave two thousand nine hundred dollars. To raise the money necessary to complete the building, after other voluntary contributions were applied, the sum of two thousand dollars was borrowed of the Mutual Benefit Life Insurance Company. To enable the society to raise this money on mortgage, Mr. and Mrs. Mills made conveyance to the society by a deed made and executed on the 14th of June, 1875. On the same day, the society, in its corporate name, made and executed a mortgage on the lot so conveyed to it to the insurance company for the said sum of two thousand dollars. The mortgage is now being foreclosed. On the 30th of April, 1894, William Davison recovered a judgment against the society, in its corporate name, for the sum of fifteen hundred and fifty-four dollars and seven cents. This debt was not in any way connected with the building of the church edifice. Mrs. Mills died before the filing of the bill in this case, and her title to the premises, whatever it is, became vested in her husband, Alfred Mills, and her son, Edward, who were made parties to the foreclosure suit. Davison, as a judgment creditor, was made a party by his petition.

This controversy is over the surplus money that may remain after paying the mortgage debt. Davison, by his answer, claims that such surplus should be applied to the payment of his judgment. Alfred Mills has answered, and in his answer denies that the Davison judgment is a lien on the mortgaged premises, and, by way of a cross-bill, claims that the surplus of the proceeds of the sale of the mortgaged premises should be paid to him and his son. The church society has also answered, consenting to a sale of the mortgaged premises, and submitting to the determination of the court the question of the application of the surplus of the money realized from the sale after payment of the mortgage debt, interest, and costs.

On the motion of Davison, the chancellor made an order that the answer of Mills, by way of a cross-bill, be struck out and the cross-bill be dismissed. From this order Mills appealed.

The question that lies at the foundation of this controversy is, whether the deed of conveyance made by Mr. and Mrs. Mills to the church society was a conveyance to a charitable use. The ⁶⁶² situation before the deed was made—the object for which the society was incorporated, the erection of a church edifice for religious purposes by voluntary contributions on a lot constitut-

ing a suitable curtilage for a building devoted to such uses, and the need of the money borrowed on the mortgage to complete and furnish the building—has already been mentioned.

The deed is to the religious society and to their successors, with the words "but not to their assigns" added. It was made for a nominal consideration, and was, therefore, a deed of gift. The word "successors," in the granting part, created a fee, and the words added excluding assigns from the succession are unimportant, except when taken in connection with the habendum, as indicating the intent of the grantors. The habendum is in these words: "To have and to hold unto the said party of the second part and their successors forever, with this express condition and limitation: that neither the said party of the second part nor their successors shall at any time sell, mortgage, or in any way convey the said land and premises or any part thereof, and that no building shall be kept, maintained, or erected thereon, except for the purpose of public worship and teaching in accordance with the usages, rites, and ceremonies of the Protestant Episcopal Church in the United States of America, and also except the proper outbuildings appurtenant thereto."

The rule against perpetuities, as applied to private trusts, does not apply to gifts to charitable uses: *Grey on Perpetuities*, sec. 590; 1 *Lewin on Trusts*, 2011; *Perry on Trusts*, sec. 384; *Perin v. Carey*, 24 How. 465, 495, 507; *Jones v. Habersham*, 107 U. S. 174, 184, 185. In *Perin v. Carey*, 24 How. 465-507, Mr. Justice Wayne, delivering the opinion of the court, said: "Such gifts, from the purposes to which they were to be applied and the ownership to which they are subjected, have had the protection of courts of equity to prevent any alienation of them on the part of the person or body intrusted with the offices of giving them effect; and in all such cases land has been decreed by courts of equity to be practically inalienable, or that a perpetuity of them exists in corporations when they are charitable gifts." And in that case it was held that a devise of real estate to a charitable use, with a direction that no part thereof should at any time be alienated, did not ⁶⁶³ create a perpetuity in the sense forbidden by law, but only a perpetuity allowed by law and equity in the cases of charitable trusts. In *Jones v. Habersham*, 107 U. S. 174, a devise of land to a society for the relief of distressed widows and the schooling and maintaining of poor children, "but on the express condition that said society shall not sell or alienate said lot, but shall use and appropriate the rents

and profits of the same for the support of the school and charities of said institution, without said lot being at any time liable for the debts or contracts of said society," was held to be a good charitable devise. The distinction is between the purchase of lands by a corporation created for charitable purposes and a donation or gift of lands to such a corporation for uses that are charitable. In *Magie v. German Evangelical Church*, 13 N. J. Eq. 77, an incorporated religious society purchased lands for a consideration and procured from the vendor a deed of conveyance in fee, with an habendum to hold for the specific uses for which the society was incorporated, with a restriction against alienation or encumbering. Chancellor Green applied to this conveyance the rule of the common law, that alienation is an inseparable incident of an estate in fee simple and could not be restrained by any provision or condition whatever, and that, therefore, a mortgage by the society was valid. But this decision was expressly placed upon the ground that the trust was not created by devise or gift; that the land was purchased for a valuable consideration, and a church was erected thereon by the funds of a corporation, and the trust was inserted in the deed by the society at its instance and for its benefit and protection, and that a trust so created will not protect the property against the payment of debts. But he adds: "Where property is given to a corporation in trust for a charitable use, the trust is the creature of the donor. He may impose upon it such character, condition, and qualifications as he may see fit. The property being a gift, no wrong is thereby done to the creditors of the corporation, and a court of equity may well protect and enforce all the conditions of the gift." This case was affirmed in this court without an opinion, adopting, presumably, the ⁶⁶⁴ opinion of the chancellor in the court of chancery: *German Evangelical Church v. Magie*, 15 N. J. Eq. 500.

When the charitable use is created by gift, the donor may impose conditions and limitations which shall prevent the diversion of the trust estate from the uses upon which the estate was granted either by the voluntary or involuntary act of the donee. Indeed, the inalienability of the trust estate to other purposes than the uses for which it was donated results from the fact that the trust is created. The question is wholly one of construction. The dominating rule in the construction of deeds and other written instruments is to so construe them as to give effect to the intention of the parties as far as is permitted by the rules of law.

The prefatory words in the habendum in the deed in question are "upon this express condition and limitation." In the court of chancery, the word "condition" in this sentence was construed as a condition designed for the benefit of the grantors to defeat the estate granted. Such a construction, it seems to me, is contrary to the intent of the grantors in making the gift. A church edifice, designed for religious worship in accordance with the usages of the Protestant Episcopal Church, had been erected upon the lot conveyed; the grantors had contributed liberally toward the erection of the building, and, as will be seen presently, consented to a mortgage to raise money to complete it. I think it is obvious that the conditions and limitations inserted in the deed were designed and intended to secure and maintain the property donated for the benefit of the religious society, and not for the advantage of the grantors personally. The word "condition" is a term of flexible meaning. In leases it is often construed as a covenant. "Express words of condition shall be taken for a limitation if the nature of the case requires it": 2 Comyns' Digest, 360, tit. "Condition," E; 1 Abr. Cas. Eq. 105, note a. Words of express condition are not inapt as introductory to a declaration of trust. Every conveyance to a charitable use is a conveyance to hold upon the trust declared, and the execution of the trust is the condition upon which the estate is taken and held, to be given effect to not by the forfeiture of the title, but by those methods by means of which a court of equity compels ⁶⁶⁵ the performance of such trusts. In *Jones v. Habersham*, 107 U. S. 174, the charitable uses were declared in the form and under the introductory words of an "express condition." In a devise of lands to W., "upon this express condition" that he pay certain legacies, it was held by the queen's bench and exchequer chamber that the words "upon this express condition" did not create a condition for breach of which the heir might enter, but created a trust which the devisee taking the legal estate would in equity be bound to perform: *Wright v. Wilkin*, 2 Best & S. 232. Other precedents for the use of words of condition as a declaration of trust and not as a condition on the nonperformance of which a forfeiture will result, will be found in the following citations: *Attorney General v. Wax Chandlers' Co.*, L. R. 6 Eng. & Ir. App. 1; *Merchant Tailors' Co. v. Attorney General*, L. R. 6 Ch. App. 512; *Goodman v. Mayor of Saltash*, L. R. 7 App. Cas. 633, 640, 642; *Richardson*, in re *Royal Life Boat Co.*, 56 L. J. Eq. 784; In re *Conningston's Will*, 2 L. T.,

N. S., 535; 1 Lewin on Trusts, 140. In *Attorney General v. Wax Chandlers' Co.*, L. R. 6 Eng. & Ir. App. 1, Lord Cairnes said: "If I give an estate to A upon condition that he shall apply the rents for the benefit of B, that is a gift in trust to all intents and purposes." In *Goodman v. Mayor*, L. R. 7 App. Cas. 633, Lord Selborne, speaking of a grant from the crown, said: "If an actual grant so qualified were produced, it would be immaterial whether the word used in it were 'trust,' 'intent,' 'purpose,' 'proviso,' or 'condition,' or whether the trust or duty imposed were cognizable in equity or also at law. In such a grant, there would be all the elements necessary to constitute what, in modern jurisprudence, is called a charitable trust." "A trust may be raised by a gift upon condition of doing a certain thing, even when followed by a gift over if the condition be broken. . . . The tendency in early times was to treat such a limitation as a conditional gift, and the tendency in modern times is to treat it as a trust": Tyssen on Charitable Bequests, 508. "It is sufficient if it appears from the construction of the instruments that the property was intended to be held subject only to the execution of certain charitable trusts or the performance of certain conditions in favor of charity": Tudor on Charitable Trusts, 3d ed. 50. The other word, "limitation," in its most ⁶⁶⁶ technical sense, when used in the habendum, is an appropriate term under which to declare the nature and extent of the estate granted and the uses for which the grant is made.

In the deed now in hand, the grant is to a religious society incorporated as a Protestant Episcopal church, and the habendum is to the grantees and their successors forever, with a limitation that no building shall be kept, maintained, or erected on the premises except for the purpose of public worship and teaching in accordance with the usages, rites, and ceremonies of the Protestant Episcopal Church, and the proper outbuildings appurtenant thereto, with an express interdict that neither the grantee nor its successors shall at any time sell, mortgage, or in any way convey the said land and premises or any part thereof; thus excluding all beneficial ownership or use of the property otherwise than for public worship and teaching in accordance with the rites and ceremonies of the Protestant Episcopal Church. The object for which the donee of a charity was incorporated is always an important element in the construction of the instrument by which a charity is created: Tudor on Charitable Trusts, 52; *Attorney General v. Dean etc. of Windsor*, 8

H. L. Cas. 369, 405, 406; *Miller v. Gable*, 2 Denio, 492; *People v. Steele*, 2 Barb. 398, 405. The grant is of the entire estate in fee, to hold to the religious society and their successors forever; excluding, nevertheless, all beneficial ownership or use of the property, except for the religious purposes for which the grantee was incorporated. The language of the habendum plainly indicates a conveyance for use exclusively for public worship and teaching in conformity with the rites and ceremonies of the Protestant Episcopal Church.

Annexed to the habendum is a consent by the grantors to the mortgage by the grantees to raise the money which was required to complete the church edifice. This is the mortgage now under foreclosure. The consent is set out at large in the chancellor's opinion. The mortgage debt is much less than the value of the property.

Power to mortgage is frequently inserted in deeds of trust. Such a power, if executed, does not destroy the entire trust. The trust remains encumbered only by the mortgage. The consent in ⁶⁶⁷ this case will have the effect to validate the mortgage as a lien upon the premises conveyed. The purchaser at a foreclosure sale will take the premises by a title free from the trust; but the surplus money arising from such sale will belong to the society, to be held upon the original trust.

The defendant Mills, as the founder of the charity, has a standing to appear in court to restrain the diversion of the property donated from the charitable uses for which it was given. The specific prayer of the cross-bill is, that the surplus money arising from the sale in the foreclosure proceedings, after paying the mortgage debt, interest, and costs, may be paid to him. This relief cannot be granted. The deed of the grantors having conveyed away the entire estate in the premises, a resulting trust will not arise in favor of the grantors by reason of an abuse of the trust: *Sanderson v. White*, 18 Pick. 328; 29 Am. Dec. 591; 2 *Perry on Trusts*, sec. 744. But the facts stated in this opinion are all set out in the cross-bill, exhibiting the purposes for which the deed was made; and there is also a prayer for other or further relief. The bill, as framed, is sufficient to bring within the cognizance of a court of equity the construction of the deed and relief by way of preventing a diversion of the property conveyed to purposes at variance with the charitable uses to which it was devoted.

The order striking out the cross-bill should be reversed and the record be remitted, etc.

CHARITIES—PERPETUITIES.—The rule against perpetuities has no application in case of a trust for charitable purposes: *Ould v. Washington Hospital*, 1 McAr. 541; 29 Am. Rep. 605. A present gift to a charity is never a perpetuity, though intended to be inalienable: *Philadelphia v. Girard*, 45 Pa. St. 9; 84 Am. Dec. 470. See, also, the extended note to *Barnum v. Barnum*, 90 Am. Dec. 105.

CHARITABLE USE—SUFFICIENCY OF CREATION.—A gift cannot be sustained as a charity unless made upon a trust (either express or implied from the name and purposes of a charitable society to which it is made) that it shall be devoted to uses which the law recognizes as charitable: *Owens v. Missionary Soc.*, 14 N. Y. 380; 67 Am. Dec. 160, and note. See, also, the cases discussing the sufficiency of the instrument creating charitable uses in the notes to *Eutaw Place etc. Church v. Shively*, 1 Am. St. Rep. 415, *Methodist Church v. Remington*, 26 Am. Dec. 68, *Going v. Emery*, 26 Am. Dec. 653, *Rhymer's Appeal*, 39 Am. Rep. 738, and *Dashiell v. Attorney General*, 9 Am. Dec. 586.

MIDDLETON v. MIDDLETON.

[54 NEW JERSEY EQUITY, 692.]

CONSTITUTIONAL LAW—CLASS DISCRIMINATION.—A class of persons which can be ascertained only by inquiry into the private opinions of another than the person operated upon by the discrimination is not such as principles of constitutional construction can approve.

CONSTITUTIONAL LAW—CLASS DISCRIMINATION IN DIVORCE.—A statute which imposes upon one person a kind of divorce which for the same offense it cannot apply to another, because the consort of the former holds certain opinions which the consort of the latter does not, does not classify in conformity with constitutional requirements, and is void. The fact that the person who suffers from such discrimination is an offender does not change the character of such legislation.

CONSTITUTIONAL LAW—DIVORCE.—A statute providing for a limited divorce for adultery or desertion, with special consequences as to property rights only when the applicant alleges and proves conscientious scruples against absolute divorce, is unconstitutional and void.

J. J. Crandall, for the appellant.

S. K. Robbins, for the respondent.

694 **BARKALOW, J.** The principal and governing question in this case is the constitutionality of the act of March 4, 1891, which provides that "for desertion, adultery, or extreme cruelty in either of the parties, the court of chancery may decree a divorce from bed and board forever thereafter, or, in the case of extreme cruelty for a limited time, as shall seem just and reasonable; but in every such case, except for extreme cruelty, the party applying shall prove that he or she has conscientious scruples

against applying for a divorce from the bond of matrimony; when such proof has been made, the court, in case it shall deem it just to do so, may also decree that the guilty party shall forfeit all right to dower, curtesy, and administration of or participation in the property or estate of the party in whose favor the decree is entered." The wisdom of this enactment is not a question for the court. The legality of it is all that we are to determine.

In this state, both parties in the case of a divorce from the ⁶⁹⁵ bond of matrimony may marry again; in the case of a limited divorce neither can.

The parties to a marriage contract, whoever they may be and whatever their opinions or beliefs, have, in all cases, until the passage of the law under consideration, incurred the same obligations and acquired the same rights.

The legislature may prescribe those rights and obligations, but it must do so within the limits fixed by the constitution of this state and of the United States; and those limits are to be ascertained by reference to the language of those instruments and to the spirit indicated by their expressions.

It cannot be denied that the legislature has power to pass an act giving to all petitioners for divorce the right to apply for an absolute or a limited divorce as each may elect; for such an act would operate equally upon all persons, and would impose no special consequence and confer no exclusive privilege upon any.

The act of 1891 is, however, not of this character, in that it does confer upon certain petitioners rights and impose upon certain offenders consequences not shared by all and which are determined, not by the character of the offense, but by the opinions of the injured party.

While it is not declared that the constitution of this state, in terms, prohibits such legislation, it seems clear that this law is contrary to the whole spirit of that instrument.

It is therein provided that "no person shall be denied the enjoyment of any civil right merely on account of his religious principles," and surely the spirit of that provision cannot permit the religious or moral scruples of another person to deny to an offender, however culpable, the right to remarry after his offense, by reserving for him a form of divorce not applicable to other wrongdoers of the same kind, and one, too, which carries with it a special possibility in relation to property.

The constitution of the United States forbids any state to "deny to any person within its jurisdiction the equal protection

of the laws," and it certainly seems to be a true construction of that prohibition to hold that the laws which are operative should be laws which impress themselves equally upon all without regard to the individual opinions of any.

⁶⁹⁶ Accepted authorities, in treating of constitutional limitations, have laid it down that "a statute would not be constitutional which would select individuals from a class and subject them to peculiar rules or impose upon them special obligations or burdens from which others in the same class are exempt": Cooley's Constitutional Limitations, 5th ed., 391, and the case of *Ho Ah Kow v. Nunan*, 5 Saw. 552, 562, sustains this doctrine.

The law under consideration selects individuals from a class of married offenders and subjects them to "peculiar rules" and imposes upon them "special burdens." It singles out those whose consorts happen to hold certain scruples, subjects them to a peculiar rule of accountability, and imposes upon them consequences from which all other equal offenders are free.

Where a different result is provided for dereliction on the part of one person from that which is attached to the same dereliction on the part of another, there is a discrimination applied to that offender which is contrary to the spirit of the constitution of this state and of the United States.

Such discrimination can only, if at all, escape from that position of repugnance, by being made to apply to a class so large, so consciously entered into, and so certainly defined that the classification is either originally patent or deliberately accepted by the members of it.

A class which is only to be ascertained by inquiry into the private opinions of another than the person operated upon by the discrimination does not seem to be such as the principles of constitutional construction can approve.

A law which imposes upon one person a kind of divorce which for the same offense it cannot apply to another, because the consort of the former holds certain opinions which the consort of the latter does not, is a law which does not classify in conformity with the requirements just enumerated; and the fact that the person who suffers from such discrimination is an offender does not change the character of such legislation nor justify an infraction of constitutional principles.

⁶⁹⁷ The classifications which have been sustained by the courts of this state, in the interpretation of the laws concerning

taxes, have been defined by political or municipal lines of boundary or population, and not by the existence of opinions or beliefs.

The law of this state which permits an affirmation instead of an oath acts only upon the person himself who holds the scruple provided for, and is matter of indifference to all others, since the conscience of the one who affirms is bound.

The Sunday laws constitute no precedent contradictory to the views here expressed, for they operate upon all alike.

No law other than this under consideration appears upon our statute book which allows an individual to be judicially dealt with in conformity to the private opinions of another individual.

Upon all of these considerations, we are of opinion that the act in question is unconstitutional.

The decree below should be reversed so far as it decrees forfeiture of curtesy and of right to administration of or participation in the property of the respondent, as authorized by the act of 1891; and should be affirmed so far as it allows a limited divorce for extreme cruelty under the general laws concerning divorce: Revision, sec. 5, p. 315.

STATUTES — CONSTITUTIONALITY — DISCRIMINATION. — Every law shall have a uniform operation upon all citizens, persons, or things of any class upon which it purports to take effect, and it shall not grant to any person or class of persons privileges which upon the same terms shall not equally belong to all persons: Extended note to State v. Ellet, 21 Am. St. Rep. 781. See, also, on this subject the notes to the following cases: Foster v. Police Commrs., 41 Am. St. Rep. 200, State v. Sheriff, 31 Am. St. Rep. 653, and State v. Hinman, 23 Am. St. Rep. 25.

MYERS v. HOLBORN.

[58 NEW JERSEY LAW, 193.]

PHYSICIANS AND SURGEONS—LIABILITY FOR UNSKILLFUL TREATMENT.—A physician who sends another physician to attend a patient whom the former has promised to attend, is not liable for the unskillful or negligent acts of the latter.

NEGLIGENCE—AGENCY.—A party employing a person who follows a distinct and independent occupation of his own is not responsible for the negligent or improper acts of the latter.

DAMAGES—INJURY CAUSING DEATH.—In New Jersey, no action lies for an injury caused by the death of a human being, with the exception of that provided by statute permitting a recovery by the personal representative of the decedent, for the benefit of the widow and next of kin, of the pecuniary loss resulting to them from such death.

Collins & Corbin, for the plaintiff in error.

W. H. Speer, Jr., for the defendant in error.

194 GUMMERE, J. This writ of error brings up for review a judgment of the Hudson circuit court, rendered in favor of Holborn, the plaintiff below, and against Myers, the defendant below. The principal facts which were proved at the trial of the cause are as follows: The defendant, a practicing physician of the city of Bayonne, promised the plaintiff, who resided in that city, to attend his wife professionally during her confinement. A short time before that event took place, he left the city for a three days' vacation, having first visited the wife of the plaintiff and made an examination of her condition, from which he concluded, as he informed her, that his services would not be needed for a few days. Before his return, however, she was confined. The plaintiff, when his wife's travail came on, telephoned to the house of the defendant for him to come at once, and, in response to this message, one Doctor P. arrived, stating that Doctor Myers was out of town, and that he represented him, and proceeded to take charge of the case, and to deliver the plaintiff's wife of her child without any objection being made. It was not suggested that his treatment of the wife was unskillful, but evidence was offered to show that, after the birth of the child, he improperly severed the umbilical cord so close to its body that it was impossible afterward to tie it, and that the child consequently died, in a short time, of umbilical hemorrhage. The shock caused by her child's death under these circumstances, it was testified, so affected the mother as to seriously injure her

health, and render her an invalid for many months, thereby depriving the plaintiff of her services and companionship, and making it necessary for him to incur expenses which he would not otherwise have been called upon to meet; and this suit was brought to recover compensation for such loss of services and companionship, and for such expenses, on the theory that Doctor P. was the agent and representative in this matter of the defendant, and that, therefore, he was legally liable for these results of Doctor P's unskillfulness. The trial judge adopted ¹⁹⁵ this theory, advanced on behalf of the plaintiff, in his charge to the jury, and so instructed them.

In this, it seems to me, there was an error. Doctor P. and the defendant were, each of them, practicing physicians of this state, having no business connection with one another, except that Doctor P. was attending the patients of the latter while he was temporarily absent; even if it be admitted, therefore, that Doctor P. was employed by the defendant to attend upon the wife of the plaintiff, that fact did not render the defendant liable for his neglect or want of skill in the performance of this service, for an examination of the authorities will show that a party employing a person who follows a distinct and independent occupation of his own, is not responsible for the negligent or improper acts of the other: *Laugher v. Pointer*, 5 Barn. & C. 547; *Milligan v. Wedge*, 4 Perry & D. 714; *De Forrest v. Wright*, 2 Mich. 368; *Wood on Master and Servant*, sec. 311.

But even if I had reached the conclusion that Doctor P. was the agent of the defendant in his attendance upon the wife of the plaintiff, I should nevertheless consider that there could be no recovery in this case for the losses sustained by the plaintiff. He does not complain that his wife was unskillfully treated by Doctor P., and that he thereby lost her services and companionship, and incurred expenses on that account to which he would not otherwise have been put. His claim is, that such unskillfulness caused the death of his child, and that the shock of its death caused the sickness of the mother, with the consequent deprivation of her services and society and the increase of his expenses.

The gravamen of the action, it will be perceived, is the death of the child; and the injury sustained by the father, for which damages are sought to be recovered, is the result of that death. Since the decision of the supreme court, in the case of *Grosso v. Delaware etc. R. R. Co.*, 50 N. J. L. 317, it has been considered as settled law in this state that no action will lie for an in-

jury caused by the death of a human being, with the exception of that provided ¹⁹⁶ by the act of March 3, 1848 (Revision 294), which permits a recovery by the personal representatives of the decedent, for the benefit of the widow and next of kin, of the pecuniary loss resulting to them from such death. The decision in that case was rendered after a careful and exhaustive consideration, and the views expressed by Magie, J., in delivering the opinion of the court, must be accepted as a correct exposition of the law on that subject.

The judgment of the circuit court should be reversed.

PHYSICIANS AND SURGEONS — LIABILITY OF RAILROAD FOR NEGLIGENCE OF.—A railroad company employing a physician or surgeon of ordinary competency and skill to care for employes injured in its service is not liable for his carelessness, negligence, or malpractice in the performance of his professional duties toward an injured employe placed in his charge by the company: *Quinn v. Railroad*, 94 Tenn. 713; 45 Am. St. Rep. 767, and note; *Pittsburgh etc. R. R. Co. v. Sullivan*, 141 Ind. 83; 50 Am. St. Rep. 313.

ACTIONS FOR NEGLIGENCE CAUSING THE DEATH of a person are purely statutory, and can only be maintained in the name of the person in whom the right of action is vested by the statutes of the state where the injuries resulting in death are inflicted: *Nesher v. West Jersey R. R. Co.*, 126 Pa. St. 206; 12 Am. St. Rep. 863, and note with the cases collected. See, also, the extended note to *Edgar v. Castello*, 37 Am. Rep. 716-719.

DAMAGES FOR NEGLIGENCE CAUSING DEATH.—The measure of damages for the loss of human life resulting from negligence is the present value of the net income ascertained by deducting the cost of living and expenditures from the gross income: *Pickett v. Wilmington etc. R. R. Co.*, 117 N. C. 616; 53 Am. St. Rep. 611, and note. The measure of relief in an action to recover for death caused by negligence is a sum equal to the net pecuniary benefit which plaintiff might reasonably have expected to receive from the deceased: *Pierce v. Conners*, 20 Colo. 178; 46 Am. St. Rep. 279, and note. This subject is discussed at length in the extended note to *Louisville etc. Ry. Co. v. Goodykoontz*, 12 Am. St. Rep. 375.

HOBOKEN PRINTING AND PUBLISHING CO. v. KAHN.

[58 NEW JERSEY LAW, 359.]

LIBEL—EVIDENCE TO MITIGATE DAMAGES.—In an action for libel, the defendant may prove, in mitigation of damages, that he did not originate the calumnious statement.

W. S. Stuhr, for the plaintiff in error.

Collins & Corbin, for the defendant in error.

359 BEASLEY, C. J. The ground of the action was a libel published by the plaintiff in error. There is but a single exception relied on for the reversal of the judgment, and that is the offer of the publishing company that was the defendant in the suit to prove that neither it nor its agent had originated the calumnious statement, but that it had been received from other persons in the way of common gossip. This offer of proof was overruled by the trial judge, and in such action we think there was error.

In the books there is much contrariety of judicial opinion expressed, but in this state it is deemed that the rule of practice in the respect in question has long since been at rest. In my own experience, extending over a period of fifty years, it has never, to my knowledge, been called in question. The **360** admissibility of such testimony was sanctioned by the supreme court in a case that was fully considered and which had been argued by members of the bar whose learning and ability have never been surpassed by any of their successors. The decision referred to is that of *Cook v. Barkley*, of the date of 1807, and which is reported in 2 N. J. L. 169; 2 Am. Dec. 343. Nearly fifty years afterward, Chief Justice Green refers to this decision in terms that plainly show that, in his opinion, it had entirely established the rule of evidence in this particular. In his opinion in the case of *Sayre v. Sayre*, 25 N. J. L. 235, he thus communicates his views, viz: "Evidence touching the plaintiff's character, in mitigation of damages, may be offered to show that the defendant merely repeated rumors that were in circulation, and that the slander was not wantonly originated by him, with the view of showing the animus with which the words were spoken, in order to diminish the extent or to qualify the character of the defendant's motive, and thereby to diminish the damages. With this view the evidence was offered, and held by

this court to be admissible in *Cook v. Barkley*, 2 N. J. L. 169, 2 Am. Dec. 343, and with the same view it has frequently been admitted in the English courts."

Under these circumstances, this court does not think that the subject is open to debate, and, consequently, the judgment must be reversed and a venire de novo awarded.

GARRISON, J., dissenting. If *Cook v. Barkley*, 2 N. J. L. 169, 2 Am. Dec. 343, be assumed to stand for the proposition that the defendant in a libel suit may, in mitigation of damages show that, in making the false defamatory statement, he was engaged in the circulation of a current rumor, and, if it be admitted that this court would feel bound to adopt this exposition of the law of libel where the publication was not stated to be as of rumor, the ancient decision would still be devoid of any possible application to the case in hand. No question of the existence of rumors, or of their repetition, is in any aspect before this court, nor was any such matter asked of any witness in the court below; nor was any ruling made or charge given that in the remotest degree tended to raise, or even to suggest, any question concerning the currency of rumors or the admissibility or effect of testimony with respect thereto.

On the contrary, the case was this: The defendant was the proprietor and publisher of a newspaper whose editorial agent, McCawley, accepted the story about the plaintiff from Collins, a local reporter. Collins had gotten the story from one Woods. At the trial, the defendant was permitted to put McCawley on the stand to testify to what Collins told him; then Collins was allowed to tell what he said to McCawley, and that his informant was one Woods. Woods was then sworn, and asked to give the conversation between Collins and himself about plaintiff. This was objected to, and the ruling of the court sustaining the objection to this line of proof constitutes the sole bill of exceptions upon which the reversal of this judgment can rest.

It will be perceived that no question of common rumor arose, or was at all involved, but that the contention of the defendant was that if Woods, in the course of a conversation with Collins, communicated to him the falsehood against the plaintiff, that circumstance would be relevant testimony in mitigation of the amount of damages the plaintiff should recover. I think it is safe to say that no theory can be suggested upon which this proof could be relevant evidence, and that no authority for its admission for any purpose by any court can anywhere be found.

The course pursued by the trial court was, in my opinion, entirely free from legal error, and the resulting judgment free from any reversible imperfections.

I am instructed by Justices Van Syckel and Magle, and by Judges Talman and Smith, to say that they concur in the views expressed in this memorandum.

Whether in Actions of Slander and Libel the Defendant may Prove, in Mitigation of Damages, that He did not Originate the Defamatory Charge.

Although, as is correctly stated in the principal case, there is much contrariety of opinion, the majority of the cases hold that, in actions for libel or slander, the defendant may show in mitigation of damages that he merely repeated, and did not originate, the calumnious charge. Proof that defendant repeated, but did not originate, the alleged libel or slander does not amount to justification, but, may be considered in mitigation of damages: *Hinkle v. Davenport*, 38 Iowa, 355; *Cook v. Barkley*, 1 N. J. L. 169; 2 Am. Dec. 343.

The defendant in slander may show, in mitigation of damages, that before the words were spoken by him, statements which another had made in reference to the same offense had been communicated to him: *Galloway v. Courtney*, 10 Rich. 414; *Leifter v. Smith*, 2 Root, 24; *Kennedey v. Gregory*, 1 Binn. 84. Evidence in a libel case that the charge was taken from the journals of Congress, thus showing that the publishers were not the authors of the charge, is admissible in mitigation of damages: *Romayne v. Duane*, 3 Wash. C. C. 246. In such case, the defendant may, in mitigation of damages, prove that, prior to publishing the alleged libel, he had seen the same matter published in other newspapers: *Hewitt v. Pioneer Press Co.*, 23 Minn. 178; 23 Am. Rep. 680. The fact that the defamatory matter was copied from another newspaper in the honest belief that it was true is not a justification, but it may be given in mitigation of damages: *Upton v. Hume*, 24 Or. 420; 41 Am. Rep. 683; *McDonald v. Woodruff*, 2 Dill. 244; *Edwards v. Kansas City Times*, 32 Fed. Rep. 813. The publication in a newspaper of rumors is not justified by the fact that they exist, but their existence may be given in mitigation: *Skinner v. Powers*, 1 Wend. 451. Declarations of a husband, pending an action for the slander of his wife, that he believed that the defendant had not originated the slander, but had only repeated it, are admissible in mitigation of damages: *Evans v. Smith*, 5 T. B. Mon. 363; 17 Am. Dec. 74. In an action for saying that a certain person said certain things, and that it is reported everywhere, evidence that such person did use the actionable words is admissible in mitigation as showing defendant's motive: *Williams v. Greenwade*, 3 Dana, 432. If the words are spoken or published as current report or as expressing regret, such fact may be given in evidence to mitigate damages: *Young v. Shinons*, Wright, 124. The defendant may prove under the general issue, in mitigation of damages, that at the time of the publication it was generally reported and suspected that the plaintiff was guilty of the particular offense imputed to him by the article

published: *Hancock v. Stephens*, 11 *Humph.* 507. A general rumor of the truth of the alleged libel prior to its publication is matter in mitigation, and may be given in evidence under a plea of justification: *Heilman v. Shanklin*, 60 *Ind.* 425; *Barr v. Hack*, 46 *Iowa*, 308. All who repeat a libel or slander are responsible therefor, and general reports previously in circulation to the same effect are no justification, although they are admissible in mitigation of damages as extenuating malice: *Calloway v. Middleton*, 2 *A. K. Marsh.* 372; 12 *Am. Dec.* 409. Defendant in slander may prove in mitigation of damages that when the slanderous words were spoken by him there was a general report previously circulated or current to the same effect as the words spoken: *Farr v. Rasco*, 9 *Mich.* 353; 80 *Am. Dec.* 88; *Moyer v. Pine*, 4 *Mich.* 409; *Wetherbee v. Marsh*, 20 *N. H.* 561; 51 *Am. Dec.* 244; *Case v. Marks*, 20 *Conn.* 248; *Haskins v. Lumsden*, 10 *Wis.* 359; *Bowen v. Hall*, 20 *Vt.* 232; *Nelson v. Evans*, 1 *Dev.* 9. Thus, in slander, charging the defendant with having accused the plaintiff of adultery, it is competent for the defendant, in mitigation of damages, to prove that plaintiff before the speaking of the words, was commonly reputed to be unchaste and licentious: *Bridgman v. Hopkins*, 34 *Vt.* 532; *Case v. Marks*, 20 *Conn.* 248.

On the other hand, a respectable number of authorities maintain that, in libel or slander, the fact that others had previously spoken the same words or published a like article, or that a similar report was prior or current, cannot be given in evidence either in justification or mitigation of damages: *Anthony v. Stephens*, 1 *Mo.* 254; 13 *Am. Dec.* 497; *Beardsley v. Bridgman*, 17 *Iowa*, 290; *Wolcott v. Hall*, 6 *Mass.* 514; 4 *Am. Dec.* 173; *Alderman v. French*, 1 *Pick.* 1; 11 *Am. Dec.* 114; *Scott v. McKinnish*, 15 *Ala.* 662; *Pease v. Shippen*, 80 *Pa. St.* 513; 21 *Am. Rep.* 116; *Iuman v. Foster*, 8 *Wend.* 602; *Treat v. Browning*, 4 *Conn.* 408; 10 *Am. Dec.* 156. In an action of slander for repeating defamatory words, evidence that rumors charging the plaintiff with the same offense previously prevailed in the vicinity is not admissible in mitigation of damages: *Peterson v. Morgan*, 116 *Mass.* 350. Evidence in an action for slander of prior reports charging the plaintiff with the same crime imputed to him by the defendant, without any offer to explain their extent or effect upon plaintiff's character, is inadmissible in mitigation of damages under a plea of justification: *Sanders v. Johnson*, 6 *Blackf.* 50; 36 *Am. Dec.* 564. In an action of slander in charging the plaintiff with stealing, evidence that there was a report current in the neighborhood that he had been guilty of stealing is not admissible in mitigation of damages under the general issue: *Young v. Bennett*, 4 *Scam.* 43; *Bradley v. Gibson*, 9 *Ala.* 406.

When slanderous words do not, on their face, purport to be spoken upon the authority of another, but are spoken as of the defendant's own knowledge, evidence is not admissible to show, in mitigation of damages, that they originated with another: *Marker v. Dunn*, 68 *Iowa*, 720; *Elliott v. Boyles*, 31 *Pa. St.* 65. Evidence in mitigation

of damages to show that defendant merely repeated a slander which he or she had heard can be available only when it is shown that the slanderous report had been brought to defendant before the words charged were uttered by her or him: *Willover v. Hill*, 72 N. Y. 36. It has been held that the publication of a similar article in another newspaper cannot be shown in mitigation of damages in an action for libel: *Sheahan v. Collins*, 20 Ill. 325; 71 Am. Dec. 271. Evidence in mitigation of damages that it was the general opinion and common talk of the community that the plaintiff was guilty of the things charged in the published article, is not admissible, unless it had come to the knowledge of, and was relied upon and believed by, the defendant in making the publication: *Larrabee v. Minnesota Tribune Co.*, 36 Minn. 141; *Quinby v. Minnesota Tribune Co.*, 38 Minn. 528; 8 Am. St. Rep. 693. Public report of a fact stated in a libel cannot be given in evidence in mitigation of damages, when the libel expressly disavows all reliance on report, and professes to go on the ocular observation of the author: *Root v. King*, 8 Cow. 613. Nor is the defendant entitled to prove for the purpose of showing that he has no malice, that there were reports in circulation similar to those contained in the newspaper, without showing that he knew of and relied upon such reports: *Lothrop v. Adams*, 133 Mass. 471; 43 Am. Rep. 525. In an action for libel in imputing adultery to plaintiff with a negro woman, evidence that before and at the time of publishing the alleged libel, the plaintiff was generally reputed and believed to be the father of a colored child belonging to such negro woman, is inadmissible in mitigation of damages under the general issue: *Strader v. Snyder*, 67 Ill. 404. In an action for libel, the defendant may show under the general issue, in mitigation of damages, certain forged letters, purporting to have been written by reputable citizens to him, charging plaintiff in substance as in the libelous article, whereby defendant was imposed upon and induced to publish the article: *Storey v. Early*, 86 Ill. 461.

In Connecticut, the middle ground seems to be taken that while evidence of reports in circulation that plaintiff had been guilty of the crime charged is admissible as proof of his character, yet it may not be considered by the court in mitigation of damages: *Treat v. Browning*, 4 Conn. 408; 10 Am. Dec. 156; *Case v. Marks*, 20 Conn. 251. This is creating a distinction, which, conceding that it may be understood by the court, must certainly be difficult for the jury to apply. If the evidence of previous defamatory reports is receivable as proof of the character of the plaintiff, it must be for the purpose of showing that a person possessing a character such as the rumors attribute to him either has not been libeled at all, or, if libeled, has not been seriously damaged. The ultimate result of the reception of the evidence for this purpose must probably be that the rumors will be treated either as in mitigation of damages or as constituting a complete justification.

HOPE v. LINDEN PARK BLOOD HORSE ASSOCIATION.

[58 NEW JERSEY LAW, 627.]

CONTRACTS—VALIDITY—PUBLIC POLICY.—An agreement which controls or restricts, or tends or is calculated to control or restrict, the free exercise of a discretion for the public good vested in one acting in a public official capacity, is illegal and so reprobated by the courts that no redress can be given to a party who sues for himself in respect of it.

CONTRACTS—VALIDITY—PUBLIC POLICY.—In an action in which either party to a contract contrary to public policy seeks redress from the other for his own benefit, the court must refuse to interfere and leave him in the position in which he has placed himself.

CONTRACTS—VALIDITY—PUBLIC POLICY—EVIDENCE. In an action by either party to a contract against public policy to recover from the other for his own benefit, such other may show the illegality of the contract.

CONTRACTS—VALIDITY—PUBLIC POLICY—EVIDENCE. If one party to a contract contrary to public policy makes out a prima facie case for a recovery under it, without showing its illegality, the person sued, who is a party to the contract, may show its illegality and defeat such recovery.

F. M. Voorhees and F. Bergin, for the plaintiff in error.

A. L. McDermott, for the defendant in error.

628 THE CHANCELLOR. The judgment reviewed is in an action upon contract brought by the Linden Park Blood Horse Association to recover from James W. Hope the sum of five thousand dollars paid by it to him in August, 1893, as hereinafter stated, in which the defendant pleaded the general issue.

The case was tried before the judge at circuit without a jury. Errors are assigned upon refusals of the judge to nonsuit and to admit and consider the defense that the money sued for was paid to Mr. Hope in pursuance of a corrupt and illegal agreement.

The plaintiff below proved that it applied to the township committee of the township of Linden, in Union county, to license it to maintain and use a racecourse in that township, under chapter 16 of the laws of 1893 (Pamphlet Laws, p. 28), entitled "An act concerning the maintaining of racecourses in this state, and to provide for the licensing and regulating of the same"; that thereafter it was resolved by the township committee, Mr. Hope being a member thereof and voting in favor of the resolution, that the defendant in error be licensed as it requested, for a period of five years, upon conditions stated, and that it pay to the inhabitants of the township of Linden, for the exercise of the

privileges granted by the license, the sum of five thousand dollars annually during the second, third, fourth, and fifth years of that term, and that, during the first year, it pay five thousand dollars to aid in the construction of a sewer projected in the township; the sewer referred to was to be the work of a private corporation called the Roselle Sewerage Company; that upon the adoption of the resolution, an agent of the defendant in error, who was present at the meeting, prepared his check for five thousand dollars, payable to his own order, and indorsed it to Mr. Hope, to whom it was also delivered; and that in March, 1894, the five thousand dollars was yet in Mr. Hope's hands, and was demanded of him by the defendant in error.

Upon this proof, the court refused to nonsuit, and then the defendant below proceeded under objection, the decision of ⁶²⁹ which was reserved, to prove that after the resolutions of license were adopted, in the midst of confusion, someone remarked that there was something yet to be done, and that the reply was that five thousand dollars was to be paid, and that thereupon the agent of the defendant in error produced a blank check, and discussion arose as to whom it should be drawn; that the treasurer of the township was named and the treasurer of the sewer company was also mentioned, and that it was finally arranged that the check should be given to Mr. Hope, and be left with him to see that it got to the proper parties; also that it was suggested, by the agent of the defendant in error, that in making the check payable to Hope, the word "manager" should be added after Hope's name, but, upon objection, that word was omitted from the check; and also that Mr. Hope was the manager of the Roselle Sewerage Company and a subscriber for its capital stock; and that the corporation was organized to conduct its business for the profit and advantage of its stockholders.

In deciding the case, the judge held that the evidence upon the part of the plaintiff did not show either that there was any illegality in the transaction, or that the transaction was tainted with criminality or in contravention of public policy; that the payment appeared to be a voluntary payment to the defendant, who, therefore, stood as the agent of the defendant in error, charged with the duty of expending the money under its direction, from whom the money might, in legal right, be withdrawn at any time. Hence, he concluded that, at the close of the case of the plaintiff below, a right to recover had been proven.

As to the proofs by the defendant below, Hope, the judge

said: "The defense is substantially this: That a stockholder in a private corporation gave his vote as a public officer in discharge of a public duty in consideration that the plaintiff would pay five thousand dollars into the treasury of the private sewer company which the defendant was engaged in promoting. This is a corrupt agreement, which is as clearly denounced by the law as though the money had been paid to the defendant for ⁶³⁰ his exclusive benefit, and it cannot be set up in defense to this action. If the plaintiff, in order to make out his case, had been compelled to show these facts, the law would not have permitted him to recover back the money paid for such a corrupt purpose. The defendant is no more favored by the law. He cannot introduce such a state of facts into the case on his own behalf and set up his own corrupt action as a legal defense to this suit. The defense set up by this testimony is incompetent and inadmissible, and is overruled." The court then proceeded to give judgment for the recovery of the five thousand dollars, with interest and costs.

The proposition laid down by the trial judge, that the transaction which influenced or induced Hope to give his official vote for the license of the defendant in error was corrupt and unlawful, is not disputed. It is too well established to admit of question that an agreement which controls or restricts, or tends or is calculated to control or restrict, the free exercise of a discretion for the public good, vested in one acting in a public official capacity, is illegal and so reprobated by the courts that no redress will be given to a party who sues for himself in respect of it.

The question now mooted is, whether the courts will permit a party to such an agreement to show its corrupt and illegal character in defense of an action against him to recover money paid to him in pursuance of its terms?

The trial judge thought that if one party to such an agreement should make out a prima facie case for the recovery back of money paid under it, without exhibiting the illegality, it would not be competent for the person sued, who had been party to the agreement, to show the illegality and defeat such recovery.

The rule is, that in an action in which either party to such a contract seeks redress from the other, for his own benefit, he will be left by the courts in the position in which he has placed himself: *Church v. Muir*, 33 N. J. L. 320; *Price v. Polluck*, 37 N. J. L. 44; *Shallcross v. Deats*, 43 N. J. L. 177, 182.

⁶³¹ That rule is the application of the maxim *ex turpi causa non oritur actio*. The maxim has its foundation in the public policy of discouraging illegal and corrupt agreements, by holding them to be void and refusing all judicial aid between the parties to them.

In *Den v. Shotwell*, 23 N. J. L. 465, 474, Chief Justice Green used this language: "But in dealing with illegal contracts, courts do not and cannot look to the interest of those who are parties to the illegal transaction. The law regards the welfare of society as paramount, and, in enforcing the law, courts cannot impair its efficiency or cripple its operation by considerations affecting the interest of those who are *particeps criminis*."

In *Holman v. Johnson*, 1 Cowp. 343, Lord Mansfield said: "The objection that a contract is immoral or illegal as between the plaintiff or defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice between him and the plaintiff, by accident, if I may say so. The principle of public policy is this—*ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or a transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground that the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff, so if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*."

In *Marlatt v. Warwick*, 19 N. J. Eq. 454, Mr. Justice Depue said: "The objection is rather that of the public, speaking through the courts, than of the defendant as a party to the contract. The law disallows all proceedings in respect of illegal contracts, not from any consideration of the relative ⁶³² position and rights of the parties, but upon grounds of public policy."

It appears to me to follow from this view of the foundation of the rule with respect to illegal and corrupt contracts, that the policy which constrains the courts to deny all relief to the par-

ties, demands that when either of those parties shall offer to show that the cause of action springs from an illegal or corrupt agreement, the courts shall admit and consider the legal proofs offered to that end. It certainly does not further the salutary effect of the rule, that neither party will be aided by the courts, or satisfy as to its impartiality, to exclude proof of some of the facts essential to show the entire transaction and thus exhibit its illegality, merely because they are offered by a particeps criminis against whom a prima facie case is made by one equally corrupt, who has gained an advantage by presenting to the court garbled and partial proofs, which suppress part of the truth and impose a mutilated state of facts upon the court, in place of the real transaction.

It was said by Chancellor Kent (2 Kent's Commentaries, 467) that "the courts of justice will allow the objection that the consideration of the contract was immoral or illegal, and be made even by the guilty party to the contract; for the allowance is not for the sake of the party who raises the objection, but is grounded on general principles of policy."

In 2 Starkie on Evidence, 86, it is said: "Where the illegal consideration is set forth upon the record, the objection may be taken either by demurrer or in arrest of judgment. But where it does not appear on the record, the defendant may show that the claim is, in reality, founded upon an illegal and noxious agreement."

In *Smith v. Applegate*, 23 N. J. L. 352, which was a suit upon a promissory note, under a plea of the general issue the defendants were permitted to show the illegality of the transaction of which the giving of the note was a part.

So, in *Nellis v. Clark*, 20 Wend. 24, in a suit upon a note, it was held that the defendant might produce proof of like character. And a similar right in the defendant was recognized ⁶³³ in *Harrison v. Hatcher*, 44 Ga. 638, *Inhabitants of Worcester v. Eaton*, 11 Mass. 368, and *Smith v. Hubbs*, 10 Me. 71, 78.

A single word may be added concerning the contention by the defendant in error that Mr. Hope is, under all the evidence offered, to be regarded as its agent, to whom it paid the five thousand dollars for the purpose of conveying it to those who would build the sewer, from whom it might recall its money at any time prior to his payment thereof over, according to his instruction. We think that the facts do not warrant this position, but that, on the contrary, they clearly show that the payment to

Hope was regarded as the final disposition of the money so far as the defendant in error was concerned. Hope was recognized as the manager of the sewer company, and to him, as such, the money was paid in execution of the illegal agreement. It is unnecessary to consider what legal effect the fact contended for, if established, would have.

The judgment will be reversed.

CONTRACTS AGAINST PUBLIC POLICY—INTERFERENCE WITH PUBLIC OFFICERS.—Promises to officers to induce them to perform the duty required of them by law, are void: *Mitchell v. Vance*, 5 T. B. Mon. 528; 17 Am. Dec. 96. A contract is void where the object is to be effected by procuring the consent of the agent of the government to violate his official duties: *Howell v. Fountain*, 3 Ga. 176; 46 Am. Dec. 415. A promise made in consideration of the governor being prevailed upon to appoint the promisor to office is void as being against public policy: *Faurie v. Morin*, 4 Mart. 39; 6 Am. Dec. 701. A note given in consideration that the payee will give the maker his interest in the ensuing election for sheriff is void: *Swayze v. Hull*, 8 N. J. L. 54; 14 Am. Dec. 399. A contract whereby the parties agree to pay a delegate in Congress for services rendered by him in securing the payment of a claim where legislation is by Congress required therefor is void as against public policy: *Weed v. Black*, 2 McAr. 268; 29 Am. Rep. 618. Contracts are against public policy and void whenever their subject matter tends to obstruct or prevent the administration of the law, to interfere with or control executive, legislative, or other official action: *Brooks v. Cooper*, 50 N. J. Eq. 761; 35 Am. St. Rep. 793, and note. Contracts which have for their subject matter any undue interference with the creation or enforcement of laws are against public policy and void: *Spalding v. Ewing*, 149 Pa. St. 375; 34 Am. St. Rep. 608, and note. The validity of contracts to influence the actions of public officers is further discussed in the extended note to *Parsons v. Trask*, 66 Am. Dec. 510, 511.

CONTRACTS AGAINST PUBLIC POLICY—ENFORCEMENT.—A contract opposed to the public policy and laws of this state will not be enforced by its courts: *Rose v. Kimberly*, 89 Wis. 544; 46 Am. St. Rep. 855, and note.

CONSOLIDATED TRACTION COMPANY v. SCOTT.

[58 NEW JERSEY LAW, 682.]

NEGLIGENCE—WHEN QUESTION OF FACT.—In cases of negligence, whether the facts are disputed or undisputed, if different minds might honestly draw different conclusions from them, the case should properly be left to the jury, and, in order to withdraw it from the jury, the facts should not only be undisputed, but the inferences in respect to negligence, which arise from these facts should be indisputable.

STREET RAILWAYS—NEGLIGENCE—INJURY TO CHILD. In an action by a child less than eight years old against an electric street railway company, to recover for injuries caused by being run over by defendant's car, the question whether plaintiff was *sui juris* is a question for the jury.

NEGLIGENCE—DEGREE OF CARE REQUIRED OF CHILD.—When a child has reached the age of discretion and is considered *sui juris* as a matter of law, the degree of care and caution required of him is no greater nor higher than such as is usually exercised by persons of similar age, judgment, and experience; and whether that degree of care and caution has been exercised by the child in a given case, is usually, if not always, a question of fact for the jury.

INSTRUCTIONS.—In order to entitle one to have the jury instructed as requested, the request must not only be correct in point of law, but also applicable to the evidence.

STREET RAILWAYS—NEGLIGENCE AT CROSSINGS.—An electric street railway is required to so regulate the movements of its cars at the intersection of public streets when receiving or discharging passengers from a standing car as not to unnecessarily expose pedestrians to danger from collision with a passing car on an adjacent track.

STREET RAILWAYS—NEGLIGENCE—QUESTION FOR JURY.—The negligence of a motorman on an electric street-car and of a child less than eight years old struck by the car when moving a little distance behind another similar car standing on an adjacent track are questions for the jury, when the evidence is conflicting and the motorman admits that he did not have his car under control, and the evidence shows that no bell was sounded or warning given, and that the child did not look before going upon the track.

STREET RAILWAYS.—DUTY TO LOOK AND LISTEN required before crossing the track of a steam railway does not apply with equal force to one in crossing the tracks of a street railway.

NEGLIGENCE—SUDDEN DANGER.—A person placed by the negligence of another in a place of sudden danger, and who, under the influence of great terror does an act which may contribute to his injury or death, cannot be charged with contributory negligence, so as to bar a recovery by him.

STREET RAILWAYS — NEGLIGENCE — DAMAGES—CONTINUANCE OF LIFE.—If a child less than eight years of age is killed through the negligence of a street railroad company, the jury, in estimating damages are not limited by the period of the minority of the deceased, but may extend their estimate through such period as they may determine to be a reasonable expectation of the continuance of the life of such deceased.

W. Dixon, for the plaintiff in error.

A. L. McDermott, for the defendant in error.

⁶⁸³ HENDRICKSON, J. Virginia A. Scott, the defendant in error, brought suit in the supreme court against the Consolidated Traction Company, the plaintiff in error, in tort, for damages resulting from the death of her son, William Scott, a boy aged seven years and eight months, caused by being run over by a ⁶⁸⁴ trolley-car of the defendant below, in the city of Bayonne, on the ninth day of October, 1894. The suit was brought by the mother as administratrix of the son, for the benefit of the next of kin under the statute. The trial took place before Mr. Justice Lippincott and a jury, in the Hudson circuit, and resulted in a verdict for the plaintiff below.

The matters for review brought into this court are alleged errors of the trial judge upon exceptions taken below upon his refusing, at the close of the plaintiff's case, to call the plaintiff and order a nonsuit; and also upon his refusal, at the close of the evidence on both sides, to direct a verdict for the defendant below; and also upon exceptions taken to the judge's refusal to charge as requested and to portions of the charge as delivered.

The facts of the case as developed by the evidence of the plaintiff below, briefly stated, were that plaintiff's son William, in company with his brother Horace, aged nine years, were returning home from a store, to which they had been sent, and, in so doing, were passing along the north side of Centre street, in said city, in a westerly direction, and were about to cross Avenue C, along which the defendant was engaged in running an electric street railway with double tracks, running from Jersey City to Bergen Point. The general course of the railway was from north to south.

As the boys neared the northerly crossing of Centre street over Avenue C, a closed car, on its way to Jersey City, approached on the northbound track and stopped two or three feet north of the crossing for the purpose of receiving and discharging passengers. While the car was so standing there, receiving passengers, the boys, with one other pedestrian, Mr. McFale, had reached the crossing in the rear of the standing car. Mr. McFale and the larger boy stopped, but the smaller boy, who was one or two feet back of them, walked onto the southbound track, where he was struck by a car from Jersey City and killed. Just before the car struck him he was seen to make a sort of spring

as if to get out of the way, but it was too late. The standing car obstructed the vision of those behind ⁶⁸⁵ it from seeing an approaching car on the southbound track. The southbound car was traveling at the rate of six miles per hour, and had passed the rear of the standing car seven or eight feet before it struck the boy. The motorman at once reversed the car, which continued its motion to the south side of Centre street some thirty or forty feet before it was brought to a standstill. The witnesses heard no sound of bell or gong from the approaching car, and there was no evidence that the boy knew a car was approaching when he started to pass over from behind the standing car. The boy was familiar with the passing of cars to and fro on Avenue C, and had often passed over this crossing. While these may not be all of the facts shown, I think they are sufficient upon which to fairly consider the legality of the judge's rulings at the trial. Upon the facts proved, the defendant moved that the plaintiff be nonsuited, on the ground that no negligence had been shown on the part of the defendant, and that contributory negligence had been proved on the part of the plaintiff's intestate. This motion the judge refused, and his refusal is now assigned for error.

It is insisted in support of this assignment of error that the plaintiff below failed to establish any facts from which the jury would be justified in finding negligence on the part of the defendant.

But this insistment is scarcely in accord with the well-settled rule regulating the action of the trial judge upon such a motion. It is not for him to say whether there are any facts proven in a given case from which the jury would be justified in finding negligence on the part of the defendant, but rather whether any facts have been established by evidence from which negligence might be reasonably inferred by a jury.

As stated by Mr. Justice Magie, in delivering the opinion of this court in *Newark Passenger Ry. Co. v. Block*, 55 N. J. L. 605: "In performing this function, the trial judge must take care not to trench on the peculiar province of the jury to determine questions of fact, and must bear in mind ⁶⁸⁶ that the question is, not whether he would infer negligence from the established facts, but whether negligence can be reasonably and legitimately inferred therefrom by the jury." In applying this general rule to the examination of the facts, it must be remembered that "negligence is not a fact which is the subject of direct proof, but an inference from facts put in evidence." "Now

negligence," says Dr. Wharton, "may be disputed when the facts are undisputed, and the question in such case, where the dispute is real and serious, is eminently one for the jury, under the direction of the court": Wharton on Negligence, 3420.

"Whether the facts are disputed or undisputed, if different minds might honestly draw different conclusions from them, the case should properly be left to the jury, and that, in order to withdraw such a case from the jury, the facts should not only be undisputed, but the inferences, in respect of the defendant's failure of duty, which arises from these facts, should be indisputable": 2 Thompson on Trials, 1208. This same doctrine has been repeatedly laid down by this court: *Bonnell v. Delaware etc. R. R. Co.*, 39 N. J. L. 189; *Bahr v. Lombard*, 53 N. J. L. 233; *Baldwin v. Shannon*, 43 N. J. L. 596; *Delaware etc. R. R. Co. v. Shelton*, 55 N. J. L. 342; *Pennsylvania R. R. Co. v. Matthews*, 36 N. J. L. 531.

Can it be said, as a matter of law, that upon the facts stated there was no duty laid upon the defendant at this public crossing to so regulate the action of its cars, as to rate of speed, the giving of signals or otherwise, that pedestrians should be protected from unnecessary exposure to danger from collision with its passing cars. The counsel for the plaintiff in error, in his argument, admitted that the company might owe such a duty to a passenger who alighted from the northbound car and had passed behind it in making his exit, by reason of its contractual relations with the passenger.

Indeed, it has been held that in an action for injuries to plaintiff's intestate while crossing defendant's car-track, negligence and contributory negligence are questions for the jury,⁶⁸⁷ where it appears that the intestate, on alighting from one of the defendant's cars, passed behind it and attempted to cross the other track when he was struck by an approaching car, which was running at its ordinary speed, and there is no evidence that any signal or warning of its approach was given: *Dobert v. Troy City Ry. Co.*, 91 Hun, 28; 36 N. Y. Supp. 105.

In another case, an instruction that the care required of a street-car company to persons upon its tracks is not that high degree of care which it is required to exercise toward passengers was held to be incorrect when applied to a company running electric-cars on city streets: *Dallas Rapid Transit Ry. Co. v. Dunlap*, 7 Tex. Civ. App. 471.

It is well settled that at crossings street-cars and pedestrians

have equal rights to the use of the streets, and it has been held in that connection that what is proper care and precaution on the part of those in charge of cars to prevent accident is a question of fact in each case: *Schulman v. Houston etc. Ry. Co.*, 36 N. Y. Supp. 439; 15 Misc. Rep. 30.

That such a duty toward pedestrians who are thus passing along the crossing of a public street traversed by a street-car company becomes chargeable to the latter is emphasized by the fact that such crossings are necessarily and legally frequented by not only the adults but by the children of a town, attended or unattended by older people, and that such duty becomes more or less exacting according to the circumstances of each case.

The facts in the present case, to say the least, fairly raised a question for the jury, whether the defendant was in the exercise of due and reasonable caution, when it permitted its south-bound car to pass the standing car at that public crossing and at such a rate of speed under the circumstances. In forming a judgment upon that question, there were subsidiary questions, equally calling for consideration and judgment, such as, Was it the duty of the motorman, in the exercise of due and proper care, as he approached the standing car which would obstruct his view of passengers or pedestrians who might be waiting to pass, to sound his bell or gong as a warning?; ⁶⁸⁸ and did he so sound his bell or gong? and should he have had his car under control at this crossing? and did he have it under such control when approaching the standing car? These facts and the inferences to be fairly drawn from them, under the principle before alluded to, it seems to me, clearly, were matters for the jury exclusively, and that the trial judge was right in so submitting them and refusing to nonsuit.

The next ground of contention why the motion to nonsuit should prevail was because of alleged contributory negligence on the part of the plaintiff's intestate. But, like the preceding ground, in order to give it the effect of requiring the court to arrest the trial and take the matter from the jury, the fault of the intestate must appear to be so clearly established by the evidence that there can be reasonably only one opinion on the subject.

The chief justice, in *Pennsylvania R. R. Co. v. Matthews*, 36 N. J. L. 531, after saying, in substance, upon a motion of this character, that the evidence on the subject was open to fair debate and left the mind in a state of some doubt on the ques-

tion of exercising that degree of care which the plaintiff's legal duty exacted, added: "This being the case, the judge would not have been justified in taking this question from the jury. Such a course is proper only when the absence of caution is apparent, and is, in reason, indisputable." The evidence in this cause, at the close of the plaintiff's case, showed that the boy was making his way across the street to go to his home, and was walking from back of the defendant's standing car at an ordinary walk, and that after having taken a step or two beyond it was struck by the approaching car. He was in the center of the southbound track at the time. Mr. McFale, a disinterested witness, says it was but a few seconds from the time the boy passed him on his left until he was struck by the car; that it was done very quickly; it was done like a flash; he could not say whether the boy looked up to see if the car was coming, though it was the witness' impression that he did not; witness, however, saw the boy make a spring or dash forward at the last moment before he was ⁶⁸⁹ struck, and was impressed that he had just caught a glimpse of the car.

It would seem that, under such circumstances, with a car approaching at the rate of speed this was, apparently without the sounding of bell or gong, creeping up, as it were, to the side of the standing car which obstructed the view, even if the deceased had been an adult, the question of contributory negligence on his part would have been one for a jury.

But that is not the case here, and it is not necessary to decide that question now. There is another element to be considered, as affecting juridical action upon the question of contributory negligence in this case, and one that, I think, clearly makes it a question for the jury alone, and that is the fact that the plaintiff's intestate was a boy of tender years. He was described as a bright boy, but he was so young that naturally his powers of reason and judgment could be but partially developed.

He had not passed far beyond the age of seven years, the period below which children have, in many cases, been held to be non sui juris as a matter of law, and hence not chargeable with contributory negligence under any circumstances.

Where there is a question whether the child is of sufficient age and discretion to be capable of some care for his own safety, the question of his capacity and its degree is for the jury: 2 Thompson on Negligence, 1182.

In an action, by a child eight years old, against an electric street railway company, for injuries caused by being run over

by defendant's car, the question whether plaintiff was *sui juris* was held to be a question for the jury: *Stone v. Dry Dock etc. Ry. Co.*, 115 N. Y. 104; followed, *Bennett v. Brooklyn Heights Ry. Co.*, 1 App. Div. (N. Y.) 205; 37 N. Y. Supp. 447.

And when a child has reached the age of discretion, and is considered *sui juris* as a matter of law, the degree of care and caution required of him will be no higher than such as is usually exercised by persons of similar age, judgment, and experience. And whether that degree of care and caution has been exercised by the child in a given case is usually, if not ⁶⁹⁰ always, a question of fact for the jury: 4 Am. & Eng. Ency. of Law, 46, and cases cited.

The counsel for defendant below, in the argument here, called the attention of the court to the fact that the question of contributory negligence of infants is usually one for a jury, but not always, citing *Thompson v. Buffalo Ry. Co.*, 145 N. Y. 196, *Nagle v. Allegheny Valley R. R. Co.*, 88 Pa. St. 35, 32 Am. Rep. 413, *Dietrich v. Baltimore etc. Ry. Co.*, 58 Md. 347, where the court, as a matter of law, found the plaintiff's intestates to have been guilty of contributory negligence and withdrew the cases from the jury. It is noticeable, however, that in those cases the intestates were all of the age of fourteen years, and the facts showed that they had acted in entire disregard of the care and caution that might be reasonably expected from persons of their age and experience.

The case in hand does not seem, by its circumstances, to arrange itself under the category of the cases named. The boy was much younger, and he was following the accustomed pathway for pedestrians at the intersection of public streets, and he approached defendant's westerly track from behind another car of defendant that obstructed his view of the approaching car, and his gait was an ordinary walk. Taking these facts in connection with the other circumstances stated, the trial judge could not certainly have done less than he did, which was to refuse to nonsuit and submit the question of contributory negligence to the jury.

The next assignment of error is based on an exception to the trial judge's refusal, after the defendant rested and the evidence was closed, to direct a verdict for the defendant on the same grounds that the motion to nonsuit was based, and on the ground that this was an unavoidable and inevitable accident. The rule for the guidance of the trial judge upon this motion is practical-

ly the same as governs in the case of the motion to nonsuit, and has been already stated.

The defendant's testimony raised a conflict as to some of the facts, the motorman having testified that the boy came running ⁶⁹¹ on the track diagonally toward the approaching car and was struck before it had reached a line opposite the rear of the standing car, and that, to the best of his opinion, he had rung the gong before reaching Centre street. He admitted that he did not have his car under control as he approached the standing car, because, as he stated, the latter had stopped so quickly and unexpectedly to him. Another of defendant's witnesses said the boy was on a smart walk, not a run, when he passed the rear of the standing car toward the track, and that the car came to a standstill one or two feet before reaching the rear of the standing car. Another testified it had passed several feet beyond the standing car before it was stopped.

This conflict of testimony, and the admission of the motorman that he did not have his car under control, made it more clearly the duty of the judge to submit the questions of negligence, on both sides, to the consideration of the jury, so that the first two assignments of error must be overruled.

The next assignment of error is upon an exception to the trial judge's refusal to charge the following request of defendant, to wit: "It was not the duty of the moving car to stop before passing the standing car." Upon the subject matter of this request the judge charged as follows: "Now, upon this question as to the right of one car to pass another standing car on or near a crossing taking in or discharging passengers, in my view of this case, it is not a question of law for the court to determine, whatever it might be considered to be in a case of a passenger alighting from a car and then going behind the car on his way to his destination, and another car suddenly coming upon him in the opposite direction, but the question here is as between the company and one attempting to pass across the street at a place where persons usually cross, where persons are in the habit of crossing, and a car is standing there, and the person crossing from the side of the street on which the car is standing in the rear of that car and is met by a car passing in another direction, and I take it that the question here is for the jury to say under all the circumstances ⁶⁹² whether it was negligence upon the part of the motorman to run past that standing car or not."

Exception was also taken to this part of the judge's charge and

error assigned thereon, so that both of these assignments may be considered together.

It was insisted upon the argument by counsel of the defendant company that the court should have charged this request, on the ground that defendant owed to the plaintiff's intestate no other duty than that imposed upon any other vehicle in the street that might have caused such an accident, and that if the only negligent act alleged was that the teamster driving such vehicle had passed a standing vehicle without first stopping, the court would not permit the case to go to the jury.

If the request is to be taken as raising the general question, apart from the particular circumstances, that it is not necessarily the duty of a moving car upon a street railway to stop before passing a standing car on the adjacent track, the judge would have probably answered the question in the affirmative.

But the request could not have been rightly considered in that narrow aspect, for it is well settled that, in order to entitle a party to have the jury instructed as requested, the request must not only be correct in point of law but applicable to the evidence. And the judge had a right to consider, as he evidently did, this request as intended to apply to the circumstances of the case as proven; and, so regarding it, the question was this: Could the judge say, as a matter of law, that it was not the duty of the defendant, under all the circumstances, to have so regulated the movements of its cars that its moving cars should stop before passing the standing car that was engaged in taking on or discharging passengers at this street crossing? Much that I have already said in reference to the court's refusal to nonsuit and to direct a verdict has application here and I need not repeat it. Suffice it to say that, in the light of the authorities cited and of common experience, I think there is at least room for honest differences of opinion on the subject, and that negligence might be reasonably inferred. If so, no matter what the court might think, the question, as before stated, is one for the jury.

693 The language of the trial judge, above cited, in submitting this question to the jury is not open to judicial criticism. The rules that should govern the jury in determining this question were carefully laid down with due regard to the rights of the defendant. I find no error under these two assignments.

Another assignment of error is based on the exception to the refusal of the judge to charge that "if plaintiff's intestate entered upon the southbound track without first looking for an

approaching car, the plaintiff cannot recover." While not charging this request in terms, the judge charged that if the boy himself was guilty of negligence or the want of reasonable care, which contributed in any degree to that result, there could be no recovery; and, further, that "the rule is, that in crossing a street in which these cars are running, the pedestrian must exercise reasonable care to avoid injury to himself. He has no right to shut his eyes and walk across; he must use his senses, his eyes, his ears, and he must do that which reasonable, ordinary care requires of him, and it is a question for the jury to determine whether this boy was negligent there." He further charged that, "being a boy of tender years, he is held only to that degree of reasonable care and caution which his age and capacity permit him to use and exercise." Further on, the judge charged that if the boy "saw a car coming he was bound to use his eyes, to look, to see that there was danger there and he could not go in front of it; and if he did, and accident and injury resulted to him, although the motorman may have been negligent, the defendant is held not liable in this accident."

It may be said, with reference to this request to charge, that the proposition that one, to be in the exercise of due care, must look and listen before crossing a steam railway, is well established, but this duty does not apply with equal force to one in crossing the tracks of a street railway: *Newark Passenger Ry. Co. v. Block*, 55 N. J. L. 605; *Lynam v. Union Ry. Co.*, 114 Mass. 83; *Shea v. St. Paul City Ry. Co.*, 50 Minn. 395; *Moebus v. Herrmann*, 108 N. Y. 354; 2 Am. St. Rep. 440.

⁶⁹⁴ In the case of *Shea v. St. Paul City Ry. Co.*, 50 Minn. 395, it was held that the failure to look up and down a street railroad upon a public street, before attempting to cross, is not, as a matter of law, negligence as in case of crossing the ordinary steam railroad. And, in *Moebus v. Herrmann*, 108 N. Y. 354; 2 Am. St. Rep. 440, the New York court of appeals held the same doctrine. It is a matter of common knowledge that the double tracks of street railways lie close to each other, and that, after emerging from behind the standing car, the plaintiff's intestate could have had but a step or two to take to reach the opposite track in front of the approaching car. And even if the boy had looked as soon as he passed this standing car, it is a question whether he could have saved himself from the impending danger. It may be that, without looking, the approaching car was within the range of the boy's vision, and that the spring he made in front of the car was

under a sense of sudden terror that increased the hazard of his death. But it must be remembered that a person placed by the negligence of another in a position of sudden danger, and, under the influence of great terror, does an act which may contribute to his injury or death, such contributory negligence is not imputable to him and will not bar a recovery: Wharton on Negligence, 304.

I think, in view of the authorities named, and considering the extreme youth of the plaintiff's intestate, that the trial judge could not have properly charged this request and thus held that, under the circumstances of this case, a failure of the plaintiff's intestate to look for an approaching car before entering upon the south-bound track would be negligence, per se, that should bar a recovery. And I think the judge's charge upon the subject of that request as to the amount of care and watchfulness required of the plaintiff's intestate, under such circumstances, was fully up to the standard exacted by the law.

The only other assignments of error were those with reference to the jury's right in estimating damages to consider any pecuniary benefit which might arise by the earnings of deceased after he would have reached his majority. The judge held ⁶⁹⁵ that the jury was not limited by the period of the minority of the deceased, but that, under the rules as laid down by him, they might extend their estimate through such period as they might determine would be a reasonable expectation of the continuance of his life. The assignments on this point were not insisted upon at the argument, and I need only say that I find no error in that part of the record.

The judgment below should be affirmed.

NEGLIGENCE—WHEN A QUESTION FOR THE JURY.—If fair-minded men might reasonably draw different conclusions from the facts which the evidence tends to prove, the question of negligence is one for the jury: *Ryder v. Kinsey*, 62 Minn. 85; 54 Am. St. Rep. 623, and note; *Davis v. Pacific Power Co.*, 107 Cal. 563; 48 Am. St. Rep. 156.

NEGLIGENCE — CAPACITY OF CHILD, WHEN QUESTION FOR JURY.—The question whether or not the mind of a boy ten years of age is sufficiently mature to make him responsible for his contributory negligence is a question for the jury: *Avey v. Galveston etc. Ry. Co.*, 81 Tex. 243; 26 Am. St. Rep. 809, and note. To the same effect see *Lorence v. Ellensburg*, 13 Wash. 341; 52 Am. St. Rep. 42. See, especially, the extended note to *Westbrook v. Mobile etc. R. R. Co.*, 14 Am. St. Rep. 591, where it is laid down as the law that the question as to whether a child of tender years is *sui generis* should be submitted to the jury.

NEGLIGENCE—WHETHER CHILD GUILTY OF CONTRIBUTORY NEGLIGENCE, WHEN QUESTION FOR JURY.—A child more than seven years of age is bound to exercise such care as children of his age, capacity, and intelligence are capable of exercising, and whether he did so or not is a question for the jury: *Pekin v. McMahon*, 154 Ill. 141; 45 Am. St. Rep. 114; *Burger v. Missouri Pac. Ry. Co.*, 112 Mo. 238; 34 Am. St. Rep. 379, and note. Negligence cannot, as a matter of law, be imputed to a child of eight years of age; it is a question for the jury: *Lorence v. Ellensburg*, 13 Wash. 341; 52 Am. St. Rep. 42, and note.

NEGLIGENCE—DUTY OF PERSON IN PERIL.—When a person is placed in peril through the negligence of another, he need only make an effort to protect himself, and, if he makes a mistake and errs in judgment in seeking safety, he cannot be said to be guilty of negligence: *Blackwell v. Lynchburg etc. R. R. Co.*, 111 N. C. 151; 32 Am. St. Rep. 786. Contributory negligence is not always chargeable upon the failure to exercise the greatest prudence or the best of judgment in cases where a person is required to act suddenly or in an emergency: *Valin v. Milwaukee etc. R. R. Co.*, 82 Wis. 1; 33 Am. St. Rep. 17, and note with the cases collected.

STREET RAILWAYS—NEGLIGENCE AT CROSSINGS—DUTY TO LOOK AND LISTEN.—A person about to cross the tracks of a street railway operated by steam, cable, or electricity is bound to "look and listen." A failure to observe this rule is negligence: *Omslaer v. Pittsburg etc. Traction Co.*, 168 Pa. St. 519; 47 Am. St. Rep. 901, and note.

DAMAGES FOR CAUSING DEATH OF MINOR CHILD.—At common law, a parent may recover damages from a wrongdoer for depriving him of the services of his child, and, when the act causes death, he may recover for the services of the child from the time of the injury to its death, together with any incidental damages he may have suffered, such as expenses: *Jackson v. Pittsburgh etc. Ry. Co.*, 140 Ind. 241; 49 Am. St. Rep. 192. In an action to recover for the death of a minor child, evidence of the nature of the child's services from the time of its death until it became of age is admissible, though the recovery is not necessarily limited in value to such services: *Pierce v. Conners*, 20 Colo. 178; 46 Am. St. Rep. 279, and note. In an action by a parent for the death of a minor child, the main element of damage is the probable value of the services of the deceased until he would have attained his majority, considering the cost of his support and maintenance during the early and helpless part of his life: *Morgan v. Southern Pac. Co.*, 95 Cal. 510; 29 Am. St. Rep. 143.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

MATTER OF BRONSON.

[150 NEW YORK, 1.]

INHERITANCE TAX—BONDS AND STOCK OF CORPORATIONS.—A statute imposing an inheritance tax upon a transfer by will or by the intestate laws of property within the state, when the decedent was not a resident thereof at the time of his death, does not apply to bonds and other indebtedness not within this state at his death due to him from a corporation organized and existing in this state, but does include stock in such corporation held by him, whether the certificates of such stock are within the state at that time or not.

BONDS AND OTHER CHOSES IN ACTION FOLLOW THE PERSON of their owner, and cannot be regarded as situated in the state of which the debtor is a resident, when they and their holder are both within another state.

CORPORATIONS, SHARES OF, WHERE DEEMED TO BE. The interest which a shareholder in a corporation has is property which may be deemed as existing within the state of which the corporation is a resident, and, therefore, shares of stock held by a non-resident stockholder of the corporation, though the certificates thereof are at the place of his domicile at the time of his death, are property within the state, and as such subject to the inheritance tax imposed on all property within the state transferred by will or the intestate laws, where the decedent was a nonresident at the time of his death.

Emmett R. Olcott, for the appellant.

Howard Mansfield, for the respondents.

³ GRAY, J. The decedent was domiciled in the state of Connecticut, where he died in 1893; leaving, by his will, his ⁴ residuary estate to his two sons, also residents of that state. A part of the residuary estate consisted in shares of the capital stock and in the bonds of corporations incorporated under the laws of

this state, and which were in the testator's possession at his domicile. They had been handed over to the residuary legatees, prior to the institution by the comptroller of the city of New York of this proceeding to appraise them for the purposes of taxation under the transfer tax act: Laws 1892, c. 399. It was held by the appellate division of the supreme court, reversing the decree of the surrogate's court in the county of New York, that the executors were not liable to pay a transfer tax upon the basis of the stocks and bonds in question. The claim of the comptroller is, that both by the terms of that act and by force of the statutory construction law of the state, and upon the theory that these bonds and shares represent interests in corporations incorporated under the laws of this state, they were, although not physically within the state, properly assessed for the purposes of such taxation.

The act under which this tax was sought to be collected was passed in 1892 (Sess. Laws, c. 399), and is known as "The Transfer Tax Act." By section 1 a tax is imposed upon the transfer of any real or personal property of the value of five hundred dollars or over, in the following cases, viz., when the transfer is by will or by the intestate laws of this state from a resident decedent; or, when the transfer is by will or intestate law, of property within the state and the decedent was a nonresident at the time of his death. The important words to be noticed in this section, which imposes the tax, are, in the case of a nonresident decedent, "property within the state." Their importance is evident; inasmuch as the attempt of the state to collect a tax, where the decedent was not subject to its jurisdiction, is limited to that which possesses the legal attributes and characteristics of property here. In that connection, reference may be made to section 22 of the act, which defines the word "property," as used in the act, as meaning all property, ⁵ or interest therein, "over which this state has any jurisdiction for the purposes of taxation." In the endeavor to ascertain the intention of the legislature, with respect to what should be assessable for the purposes of taxation as property under this act, we need go no further than the act itself; which, in imposing the tax, undertakes, in addition, to give a definition to property, the transfer of which by will, or by the intestate laws of the state, creates the liability to taxation. It seems unimportant to consider that section of the statutory construction law, which gives a definition to the term "personal property" (Laws 1892, sec. 4, c. 677), if, indeed, applicable. The

act contains within itself a complete system for the taxation of transfers of property, in cases of testacy and of intestacy, and also controlling definitions for such words used in its sections as, in the judgment of the legislature, might seem to require definition. The section of the statutory construction act, in terms, is only applicable, as I think, to a statute where its general object, or the context of the language construed, or other provisions of law, do not indicate that a different meaning is intended.

Whatever may be argued in support of the right to subject the bonds of domestic corporations to appraisement for taxation purposes under this act, when physically within the state, upon some theory that they are something more than the evidences of a debt and constitute a peculiar and appreciable species of property, within the recognition of the law as well as of the business community, such argument is certainly unavailing in this case, where the bonds themselves were at their owner's foreign domicile. They did not represent "property within the state" in any conceivable sense. What property they represented consisted in the debt of their maker and that species of property, unquestionably, must be considered to be, as a chose in action, the holder's and owner's, and to be inseparable from his personality. The supreme court of the United States held in the *Foreign Held Bonds* case, 15 Wall. 300, where the state of Pennsylvania⁶ assumed to tax the interest payable upon bonds issued by a Pennsylvania corporation, secured by a mortgage upon its property and held by a nonresident, that the tax was invalid. It will be profitable to quote some of the language of the opinion in that case, the soundness of which has never been questioned: "But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. The principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities and no forms of expression could add anything to its obvious truth, which is recog-

nized upon its simple statement." It seems difficult to furnish an argument in support of the view that the debt owing to a creditor is the property, which follows him everywhere, and not the written or printed obligation expressing the indebtedness, that is not resumed in the foregoing opinion. In our consideration of the question, we should not lose sight of the fact that the state, through the transfer tax act, is exerting its taxing power only over that as to which it had jurisdiction for the purposes of taxation; and we should not be confused, in that consideration, by statutes or decisions which bear upon the exercise of that power over residents within its territorial limits.

The inheritance tax act, or, as it is known to-day, the Transfer tax act, imposes a tax upon the right of succession: In *re Swift*, 137 N. Y. 77; In *re Merriam*, 141 N. Y. 479; In *re Hoffman*, 143 N. Y. 329.

It was said of it by Judge Andrews, in *In re Enston*, 113 N. Y. 181: "It is not a general but a special tax, reaching ⁷ only to special cases and affecting only a special class of persons"; and, as he also observed, in substance, there must be a clear warrant in the law for the imposition of the tax. In *In re Swift*, 137 N. Y. 77, it was decided that the personal property of a resident decedent, wheresoever situate, within or without the state, is subject to the tax. The act of 1885 was under discussion, and the general theory of the inheritance tax law was considered, and it was held to be a fundamental requirement that there should be jurisdiction over the subject taxed, or an actual dominion over the subject of taxation at the time the tax is imposed. In *In re Phipps*, 77 Hun, 325, which was affirmed here upon the opinion of the general term (143 N. Y. 641), the question was, whether the right to an unpaid legacy left to a nonresident decedent in the will of a resident decedent was property within this state and, as such, assessable for purposes of taxation under the act of 1887. It was held that it was not such property, upon the principle that the residence of the debtor does not fix the situs of the debt, but the domicile of the creditor. It was there observed that "a mere chose in action, a right to recover a sum of money, has never, as yet, been given the attribute of tangibility." By the act of 1887, chapter 713, the legislature had amended the inheritance tax law, as it existed under the act of 1885, so as to impose a succession tax with respect to the property of nonresident decedents, which should be within this state. In *In re James*, 144 N. Y. 6, we had occasion to consider the operation of that

act. An Englishman, who died abroad, left property deposited within this state, consisting in stocks and bonds of corporations of this and of other states. The question was considered whether, in view of these words in the act, "which property shall be within this state," it was its intendment to reach, for purposes of taxation, any personal property that was not within the state, either in fact or because of the domicile here of its owner. We thought not, and that it would be highly improper to impute to the legislature an intention to tax that over which there was no jurisdiction. ⁸ It is obvious that the state has no jurisdiction over a right of succession which accrues under the laws of the foreign state. That is something in which this state has no interest, and with which it is not concerned. The legal title to these bonds, or the debts they represent, vested in the personal representatives of the decedent by force of foreign laws. The decedent was a creditor, to whom the obligors in the various bonds were indebted, the extent and terms of whose obligation were evidenced by those bonds. The legal situs of the indebtedness was at the creditor's domicile and, as the actual situs of the bonds themselves was also there, upon no theory can it be held that the provisions of the transfer tax act could reach them in its operation. The logical result of the proposition which has been established, that the tax is upon the right of succession to property, is, in my opinion, to confine the operation of this law, where non-residents' estates are concerned, to cases of property having a tangible and visible existence, and being the actual subject of the ownership.

But, with reference to the shares of capital stock owned by the decedent, I think we are compelled to differ with the appellate division. The attitude of a holder of shares of capital stock is quite other than that of a holder of bonds toward the corporation which issued them. While the bondholders are simply creditors, whose concern with the corporation is limited to the fulfillment of its particular obligation, the shareholders are persons who are interested in the operation of the corporate property and franchises, and their shares actually represent undivided interests in the corporate enterprise. The corporation has the legal title to all the properties acquired and appurtenant; but it holds them for the pecuniary benefit of those persons who hold the capital stock. They appoint the persons to manage its affairs; they have the right to share in surplus earnings, and, after dissolution, they have the right to have the assets reduced to

money and to have them ratably distributed. Each share represents a distinct interest in the whole of the corporate property. As said ⁹ in *Jermain v. Lake Shore etc. Ry. Co.*, 91 N. Y. 492, it "represents the interest which the shareholder has in the capital and net earnings of the corporation"; or, as Parke, B., put it, in *Bradley v. Holdsworth*, 3 Mees. & W. 424, it is "a right to have a share of the net produce of all the property of the company." Corporate shares must be regarded as property within the broad meaning of that term. Certificates of stock, in the hands of their holder, represent the number of shares which the corporation acknowledges that he is entitled to. In legal contemplation, the property of the shareholder is either where the corporation exists, or at his domicile, accordingly as it is considered to consist in his contractual rights, or in his proprietary interest in the corporation. In the case of bonds, they represent but a property in the debt, and that follows the creditor's person. Hence, it cannot be said, if the property represented by a share of stock has its legal situs either where the corporation exists, or at the holder's domicile, as we have said in *In re Enston*, 113 N. Y. 181, and *In re James*, 144 N. Y. 12, that the state is without jurisdiction over it for taxation purposes. As personalty, the legal situs does follow the person of the owner; but the property is in his right to share in the net produce, and, eventually, in the net residuum of the corporate assets, resulting from liquidation. That right as a chose in action must necessarily follow the shareholder's person; but that does not exclude the idea that the property, as to which the right relates and which is, in effect, a distinct interest in the corporate property, is not within the jurisdiction of the state for the purpose of assessment upon its transfer through the operation of any law, or of the act of its owner. The attempt to tax a debt of the corporation to a nonresident of the state, as being property within the state, is one thing, and the imposition of a tax upon the transfer of any interest in, or right to, the corporate property itself is another thing. The corporation is the creation of state laws, and those who become its members, as shareholders ¹⁰ are subject to the operation of those laws, with respect to any limitation upon their property rights and with respect to the right to assess their property interests for purposes of taxation.

It results from these views that the order appealed from must be reversed, to the extent that it reversed the order of the surrogate affirming an assessment upon the estate of the decedent based

upon an appraisal of the shares of stock of domestic corporations, and the determination of the surrogate in that respect is affirmed. In other respects the order appealed from is affirmed, and the matter is remitted to the surrogate's court, to be proceeded with in conformity with our opinion.

Under the circumstances, no costs are awarded to either party.

MR. JUSTICE VANN also wrote an opinion in which he considered at great length the question whether shares of stock in corporations existing in the state were subject to the inheritance tax, and upon that subject reached the same conclusion as that announced in the opinion of the majority of the court. He dissented, however, from the conclusion of the majority that bonds of which the decedent was owner at the time of his death were not subject to the inheritance tax, and regarded such bonds, for the purposes of that tax, as standing substantially upon the same ground as the shares in the stock of the corporation. He said: "An investment in corporate bonds being practically a loan of capital to the corporation, differs from an investment in stocks, which represent capital employed by its owners in the business of the corporation. In the latter case, there is an interest in the corporation itself, as well as directly in its property, while in the former there is the relation of debtor and creditor. Where bonds are registered, however, as it was asserted on the argument by the appellant and not denied by the respondent, that these bonds were, the transfer can only be effected at an office designated by the corporation: Cook on Stocks and Stockholders, sec.15. It would be necessary, upon this assumption, for the person entitled to succession to these bonds to come into the state of New York, directly or indirectly, to complete his title. The transaction, by virtue of the contract itself, would become localized, for the transfer would require a corporate act in this state done under the sanction of our laws, and possibly by virtue of an appeal to our courts. As an examination of the record, however, does not disclose the fact that the bonds were registered, we must proceed upon the basis that they were not. The bald question is therefore presented whether money lent by a nonresident to a resident corporation, or a bond given as evidence of the debt thus created, is subject to a transfer tax. While such a bond can be transferred without the state, it cannot be collected against the will of the corporation without coming into this state. Even if collected through the federal courts, it must be within this state. The fact that the property of the corporation found in another state may be attached there does not change the general rule that the bond represents money lent in this state, and that the holder thereof must come here to get it. If secured by a mortgage, the recording act of this state controls. If not paid when the corporation is dissolved, the statutes of this state apply. The power of the corporation to borrow or pay depends on our laws, and hence there is an obvious distinction between corporate and private debts. While an

individual can contract a debt without the aid of legislation, a corporation cannot borrow nor give a valid bond except under the authority of some statute, general or special. The state makes the bonds property and preserves them as property. Their value rests on the action of the state government, both in their creation and in the protection subsequently afforded. A debt which owes its existence to our laws, and which could not have been contracted under the laws of any other state, has a local existence for the purpose of taxation. A bond is personal property not only created, but protected, by the state, and protection and taxation are reciprocal. As the protection is the same whether the bond is owned by a resident or nonresident, why should the accident of residence affect the power to provide the means of protection? The exercise of the power does not impair the obligation of contracts, because every contract is made in view of possible taxation, and the parties are bound to anticipate that there may be legislation to that end. Tax laws and police laws may lawfully be applied to prior contracts. The place where the contract is made and to be performed, and where the corporate borrower resides and must always reside, is the place where the legislature may reasonably declare the debt of its own creature to exist as property so as to be taxed. While at common law it follows the person of the owner, it may be given a fixed habitation by statute. This does not result in any discrimination between resident and nonresident bondholders, for succession to the bonds of either is taxed in the same way. I think that whatever the state government can reach and lay its hands on, as, beyond question, it can on a debt through the process of attachment, has a practical existence here, and is subject to the control of our legislature for the purpose of taxation. While I concur in the result reached by the court that the stocks in question are taxable, I am constrained to dissent from its conclusion that the bonds are not taxable."

INHERITANCE TAX.—BONDS AND STOCK OF CORPORATIONS, whether foreign or domestic, actually within the state at the death of a nonresident decedent, are subject to the inheritance tax: *Matter of Whiting*, 150 N. Y. 27; post, p. 640, and note.

CORPORATIONS—SITUS OF STOCK.—The situs of a corporation itself determines the situs of the stock without regard to the locality of the stock certificates: *Young v. South Tredegar Iron Co.*, 85 Tenn. 189; 4 Am. St. Rep. 752.

MATTER OF WHITING.

[150 NEW YORK, 27.]

INHERITANCE TAX—PROPERTY, WHEN WITHIN THE STATE WITHIN THE MEANING OF THE STATUTE.—Bonds and certificates of stock whether of foreign or domestic corporations, actually within the state at the death of a nonresident decedent, are subject to the inheritance tax.

INHERITANCE TAX.—BONDS ISSUED BY THE UNITED STATES are not subject to the inheritance or transfer tax act.

George L. Rives, for the appellant.

Emmett R. Olcott, Jabish Holmes, Jr., and Edgar J. Levey, for the respondent.

²⁹ VANN, J. Augustus Whiting, a resident of Newport, Rhode Island, died there on the 23d of July, 1894, leaving a will by which he gave his entire estate in trust for his infant daughter. At the time of his death he had money on deposit in a bank in this state, and owned certain bonds and certificates of stock that were found in a box rented by him in a safe deposit vault in this state. The stocks and bonds were issued partly by domestic and partly by foreign corporations; and there were also bonds of the United States to the amount of fifty-two thousand five hundred and forty-five dollars. All except the stock of foreign corporations were included in the appraisalment, which was sustained by the surrogate and by the appellate division. The theory upon which the supreme court, by a divided vote, proceeded to judgment was, that the written instruments were physically within the state and constituted property here subject to taxation. They were regarded as tangible and apparently as in the nature of chattels. I think this is a sound conclusion, warranted by the Romaine case, which was decided before the act "to tax gifts, legacies, and collateral inheritances" was expanded into the present statute "in relation to the taxable transfers of property": In re Romaine, 127 N. Y. 80; Laws 1887, c. 713; Laws 1892, c. 399.

I think, moreover, that the written instruments issued by domestic corporations, including their bonds and the interests represented by them, are subject to a succession tax, independent³⁰ of the fact of their physical presence in this state, as I have already attempted to show in an opinion filed in Matter of Bronson, 150 N. Y. 1, ante, p. 632, argued and decided at the same time as the case in hand.

This involves the conclusion that the legislature intended to tax the investment itself when practicable, otherwise the evidence of the investment, in the form of a certificate, when that is habitually kept in this state. The law clearly distinguishes "written instruments themselves" from "the rights or interests to which they relate" (Laws 1892, c. 677, secs. 1, 4, 32), and makes either taxable. The main use of certificates is for convenience of transfer, and they are treated by business men as property for all practical purposes. They are sold in the market, transferred as collateral security to loans, and are used in various ways as property. They pass by delivery from hand to hand, are the subject of larceny, and are taxable generally when in possession of an agent in this state. They are the only evidence of transfer required by the corporations issuing them in order to make the actual transfer on the books. There is obvious propriety in subjecting the instrument of transfer to a transfer tax when it is left in this state for safekeeping. It is subject to the jurisdiction of our laws, and hence is within the intent of the transfer tax act. When the design of the legislature is to tax the transfer of everything that it has power to tax, there is no inconsistency in taxing in one form if another is not available. Indeed, perfect consistency is not always practicable in a scheme of taxation that is intended to let nothing escape that can be owned or transferred. Thus the legislature intended, as I think, to repeal the maxim *mobilia personam sequuntur*, so far as it was an obstacle, and to leave it unchanged, so far as it was an aid, to the imposition of a transfer tax upon all property in any respect subject to the laws of this state. I think this intention plainly appears from the history of legislation upon the subject, the decisions of the courts, some of them in effect repealed, and from the sweeping language of the statute, which subjects everything that can be owned in this state to a ³¹ succession tax, except so far as expressly exempted. The legislature possessed and exercised the power to employ the maxim when necessary, and to disregard it when necessary to attain that object. That dominant purpose is the key to the construction of the act, and it should not be thwarted by the conservatism of the courts, even if, in order to embrace all kinds of property, it is necessary to make it so pliable in application as to conform to all methods of doing business and all ways of holding property. '

A majority of my associates, however, are of the opinion that the United States bonds, although physically present in this

state, are not subject to a transfer tax. By their direction, I announce, as the conclusion of the court, that the certificates of stock in question, as well as all of the bonds, except those issued by the United States, were properly held by the courts below subject to taxation under the transfer tax act on account of their physical presence in this state; that although the state may have the power to impose a succession tax upon United States bonds, it has not yet done so; that the phrase "property over which this state has any jurisdiction for the purposes of taxation" refers to the jurisdiction actually exercised through contemporary statutes, rather than to the entire jurisdiction actually possessed by the state; that hence the order appealed from should be so modified as to exempt from taxation the bonds owned by the decedent that were issued by the United States, and, as thus modified, affirmed, without costs in this court to either party.

INHERITANCE TAX.—STOCK OF A FOREIGN CORPORATION held by an executor as such, and as part of the estate, is, in fact, a part thereof, and the right of succession thereto is subject to such tax: *Matter of Merriman*, 141 N. Y. 479; *Strode v. Commonwealth*, 52 Pa. St. 181, cited in the extended note to *State v. Hamlin*, 41 Am. St. Rep. 583. The interest of a nonresident at the time of his death in the estate of his deceased brother within the state, consisting of bank and other stocks, bonds, and cash is property within the state, subject to a collateral inheritance tax: *State v. Dalrymple*, 70 Md. 294; cited in note to *State v. Hamlin*, 41 Am. St. Rep. 583; but the estate of a decedent, composed of United States bonds or securities, no matter where deposited, is subject to such tax in the state of his domicile at the time of his death: *Orcutt's Appeal*, 97 Pa. St. 179; cited in extended note to *State v. Hamlin*, 41 Am. St. Rep. 583.

MATTER OF HOUDAYER.

[150 NEW YORK, 37.]

INHERITANCE TAX.—MONEYS ON DEPOSIT WITHIN THE STATE in one of its banks, though belonging to a nonresident, are, upon his death, subject to the inheritance or transfer tax act. Nor are such moneys any the less subject to the tax because they are on deposit with a trust company, commingled with other moneys which the depositor held in trust for a third person.

Emmett R. Olcott, for the appellant.

J. Culbert Palmer, for the respondent.

³⁸ VANN, J. On the 21st of May, 1895, John F. Houdayer died intestate at Trenton, New Jersey, where he had resided for a number of years. In 1876, he opened an account with the

Farmers' Loan and Trust Company, of the city of New York, as trustee under the will of Edward Husson, deceased, ³⁹ in which he made deposits, from time to time, of moneys belonging to the trust estate, as well as moneys belonging to himself. This continued as an open running account until his death, when the balance on hand was the sum of seventy-three thousand seven hundred and fifteen dollars, of which two thousand dollars belonged to him as trustee, and the remainder to himself as an individual. The appraiser deducted three thousand five hundred dollars for the payment of debts and expenses, and included sixty-eight thousand two hundred and fifteen dollars in the appraisal, which was affirmed by the surrogate, but reversed by the supreme court. The theory upon which that learned court decided the case appears in the following extract from its opinion: "It is well settled that the legal relation which existed between the decedent, as such trustee, and the Farmers' Loan and Trust Company, was that of debtor and creditor. The deposits became the property of the trust company, and thereupon the company became indebted to the depositor for the amount so deposited. Here, however, even this relation existed only between the decedent in his representative capacity, as trustee under the will of Edward Husson, and the company. Individually, he occupied no contract relation toward the company. His individual deposits simply went to swell the trust account. Ordinarily, it would have required an accounting in equity to separate the individual from the trust deposits, and to appropriate the general bank balance in accordance with just principles. Here this separation was amicably arranged between the decedent's estate and the trust estate, but this was merely a friendly substitute for an accounting. Precisely what the decedent had individually within this state was the right to an accounting in equity with regard to a debt due from the company to himself as Husson's trustee. We do not think that the debt was property within this state, within the meaning of the taxable transfer act. Much less was the right to an accounting with respect to such debt."

In my judgment, this is sound reasoning upon an unsound basis, because it places form before substance. It enables a large sum of money, invested and left in this state and enjoying the protection of its laws, to escape taxation because the ⁴⁰ decedent had voluntarily commingled his own funds with those of an estate he represented, and for the further reason that his rights as against the trust company were intangible. But what were

his rights, or those of his successors, as against the state of New York, in view of the command of its legislature that all property, or interest in property, within the state, susceptible of ownership, should be subject to a transfer tax upon the death of its owner whether he was a resident or nonresident. What was the real thing, the essence of the transaction, that gives rise to this controversy? The decedent brought his money into this state, deposited it in a bank here, and left it here until it should suit his convenience to come back and get it. While the commingling of funds may complicate administration, it does not change the facts as thus stated. If he had deposited in specie, to be returned in specie, there can be no doubt that the money would be property in this state subject to taxation. But, instead, he did as business men generally do, deposited his money in the usual way, knowing that, not the same, but the equivalent, would be returned to him upon demand. While the relation of debtor and creditor technically existed, practically he had his money in the bank, and could come and get it when he wanted it. It was an investment in this state subject to attachment by creditors. If not voluntarily repaid, he could compel payment through the courts of this state. The depositary was a resident corporation, and the receiving and retaining of the money were corporate acts in this state. Its repayment would be a corporate act in this state. Every right springing from the deposit was created by the laws of this state. Every act out of which those rights arose was done in this state. In order to enforce those rights, it was necessary for him to come into this state. Conceding that the deposit was a debt; conceding that it was intangible, still it was property in this state for all practical purposes, and in every reasonable sense, within the meaning of the transfer tax act: *In re Romaine*, 127 N. Y. 80, 89.

While distribution of the fund belongs to the state where ⁴¹ the decedent was domiciled, as such distribution cannot be made until his administrator has come into this state to get the fund, possibly, after resorting to the courts for aid in reducing it to possession, the fund has a situs here, because it is subject to our laws. A reasonable test in all cases, as it seems to me, is this: Where the right, whatever it may be, has a money value and can be owned and transferred, but cannot be enforced or converted into money against the will of the person owing the right without coming into this state, it is property within this state for the purposes of a succession tax. Thus the right in question is prop-

erty, because it is capable of being owned and transferred. It is within this state, because the owner must come here to get it. It is subject to taxation, because it is under the control of our laws. It has a money value, because it is virtually money, or can be converted into money upon demand. It is subject to a transfer tax, because the passing, by gift or inheritance, of "all property, or interest therein, whether within or without this state, over which this state has any jurisdiction for the purposes of taxation," comes within the expressed intention of the legislature.

I regard further discussion as unnecessary, as I have fully expressed my views as to the scope of the statute in *Matter of Bronson*, 150 N. Y. 1; ante, p. 632.

While a majority of my associates concur in the result reached by me, they do not all concur in the reasons given therefor. They are of the opinion that a deposit of money in a bank, although technically a debt, is still money for all practical purposes, and as such is taxable under the transfer tax act.

The order of the supreme court should, therefore, be reversed, and the order of the surrogate affirmed, with costs.

GRAY, J., dissenting. When the deceased made deposits with the trust company, they became the property of the depositor, and the relation which sprang up between them ⁴² was that of debtor and creditor. The right of the decedent as a depositor was a mere chose in action. More than that, as the account in the trust company was with the decedent as trustee of Husson's will, there was, of course, no clear liability to him individually. The sum owing to him could only be established as the result of an accounting, or by amicable arrangement in lieu thereof. Thus, all that the decedent owned in this state at the time of his decease, to put it in its strongest expression, was the right to an equitable accounting with respect to the debt due to him as Husson's trustee. To say that that constituted "property," within the meaning of the act, would be to carry the doctrine of the inheritance tax laws too far for support in law or in reason.

I think the order appealed from should be affirmed, with costs.

O'Brien, J., concurs with Vann, J.

Andrews, C. J., Bartnett, and Martin, JJ., concur in result of opinion of Vann, J.

Haight, J., concurs with Gray, J.

Ordered accordingly.

TAXATION—SITUS OF MONEY ON DEPOSIT IN BANK.—The money of a nonresident deposited in a savings bank in this state is subject to taxation here: Matter of Romaine, 127 N. Y. 89. See, also, the extended note to State v. Hamlin, 41 Am. St. Rep. 583.

CHEEVER v. PITTSBURGH ETC. RAILROAD COMPANY

[150 NEW YORK, 59.]

NEGOTIABLE INSTRUMENTS, EVIDENCE OF DIVERSION OF TO AN IMPROPER PURPOSE.—If a note is made and issued in due form by a corporation and signed by its president and secretary, the fact that it is indorsed by the payee to a firm of which such president is a member, and is in the possession of the president, who transfers it as collateral security for a loan made to his firm, does not charge the transferee with notice that the note has, by such president, been fraudulently diverted from the purpose for which it was authorized to be issued, when it is not shown that such transferee knew anything about the origin or diversion of the paper.

NEGOTIABLE INSTRUMENTS—DUTY OF PURCHASER.—One to whom negotiable paper is presented for discount or sale before due is not bound, at his peril, to be alert for circumstances which may possibly excite suspicion, and does not owe to the party who puts the paper afloat the duty of inquiring in order to avert suspicion of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by speculative views as to his diligence or negligence.

NEGOTIABLE PAPER.—ONE TO WHOM NEGOTIABLE PAPER IS PRESENTED FOR DISCOUNT has the right to assume that the relations to the paper of every party whose name appears upon it is precisely what they appear to be, and though the note is made by a corporation to a third person, by whom it is indorsed, and is presented for collection by the president of the corporation, the purchaser is justified in assuming that the note came into the hands of such president as his private property in the regular course of business.

Austen G. Fox, for the appellant.

Frank Sullivan Smith, for the respondent.

⁶² O'BRIEN, J. The complaint in this action contained four separate causes of action, each upon a promissory note of the defendant. The last two causes of action were not defended, and upon these the plaintiff recovered, but was defeated upon the two notes embraced in the first and second causes of action. The defense to these two notes was, that they were made by the defendant's president, one M. S. Frost, and by him wrongfully diverted from the uses and purposes for which they were intended to his own personal or private benefit, or the benefit of a firm of which he was a member, and that the plaintiff is not a bona fide holder, but chargeable with notice of these facts.

⁶³ The following are copies of the two notes in controversy, with the indorsements thereon when put in circulation by the defendant's president:

"\$5,000. Greenville, Pa., Feb'y 24th, 1888.

"Four months after date the Pittsburgh, Shenango and Lake Erie Railroad Company promises to pay to the order of John T. Bruen five thousand dollars, at the American Exchange National Bank, New York City.

"Value received.

"THE PITTSBURGH, SHENANGO & LAKE ERIE RAILROAD COMPANY.

"Attest:

By M. S. FROST,

"E. S. Templeton,

President."

"Secretary.

Indorsed:

"Pay to the order of M. S. Frost & Son,

"JOHN T. BRUEN,

"M. S. FROST & SON."

"\$5,000.00 Greenville, Pa., Feb'y 24th, 1888.

"Three months after date the Pittsburgh, Shenango and Lake Erie Railroad Company promises to pay to the order of John T. Bruen five thousand dollars, at the American Exchange National Bank, New York City.

"Value received.

"THE PITTSBURGH, SHENANGO & LAKE ERIE RAILROAD COMPANY.

"Attest:

By M. S. FROST,

"E. S. Templeton,

President."

"Secretary.

Indorsed: "JOHN T. BRUEN,

"M. S. FROST & SON."

The body of these notes and every part of them except the signature of the president was in the handwriting of Templeton, the secretary. The president was authorized by the board of directors to issue the corporate notes to the extent of ten thousand dollars, for the purpose of purchasing flat cars. In March, 1888, before the notes became due, Frost went to Boston and there negotiated a cash loan of thirty thousand dollars from ⁶⁴ Francis A. Brooks for the benefit of M. S. Frost & Son, giving the firm note therefor and delivering to him the two notes in question, indorsed as they now appear, with other obligations, as

collateral security for the payment of this loan. Subsequent to the maturity of the notes, Brooks became the absolute owner by consent of the pledgor and the proceeds applied upon the debt, and still later he transferred them to a third party, and they have come to the hands of the plaintiff for value. It is not claimed that the plaintiff occupies any other or different position than Brooks would if he had brought the action upon the notes at maturity. Bruen, the payee of the notes, was the private secretary of Frost, the president, and the notes were made payable to him by Templeton, the secretary of defendant, who drew them in that form at the suggestion of the president. There is not and cannot be any dispute with respect to the authority of Frost to make the notes. They were made with sufficient authority, the fraud upon the defendant consisting in the wrongful use of them when made for a legitimate purpose by the president for his own private business.

Nor is there any dispute with respect to the fact appearing on the plaintiff's case, that Brooks paid value for the notes and made present advances in cash to Frost in the sum already stated. It is equally clear upon the record that Brooks had no actual knowledge of the facts surrounding the origin of the paper or of the diversion of it by the president. He received the notes and made the advances in Boston, whereas they were made, and the transactions stated with respect to them took place, in a distant state, where the office of the company was, and is indicated on the paper as the place where made.

The learned trial judge held, as matter of law, that the plaintiff could not recover upon the notes, for the reason that he was chargeable with knowledge of the facts and circumstances that rendered them invalid in the hands of Frost. The plaintiff is, doubtless, chargeable with such knowledge or notice as to the antecedent equities of the defendant as Brooks, his assignor, had, but with no others. If the notes ⁶⁵ were valid obligations in the hands of Brooks, the plaintiff may assert every right that he could have asserted. It needs no argument to show that if Brooks had knowledge or notice, or is in law chargeable with knowledge or notice, of the fraud by means of which the notes were diverted from the purpose for which they were authorized to be made, that the plaintiff cannot recover. But it is not claimed that he knew anything about the origin or diversion of the paper in fact. All that is claimed is, that when it was presented to him in Boston by Frost, whom he knew to be the president of

the railroad, there was enough upon the face of the paper to put him upon inquiry and, therefore, to charge him with knowledge of all the facts that such inquiry would have disclosed. He knew nothing, so far as appears, outside of the paper itself, except the fact that the party presenting it was defendants' president, and that he was proposing to pledge the notes for his own debt, or rather for the debt of his firm, which, for all the purposes of the question, may be assumed to be the same thing. The question in the case is, therefore, reduced to a very narrow inquiry, and that is, whether Brooks, standing in all other respects in the position and sustaining the character of a bona fide purchaser of negotiable paper, is deprived of that character and the benefits of that position by reason of anything appearing upon the face of the notes themselves.

The mind, at the threshold of the inquiry, encounters two principles that point in opposite directions and lead to different conclusions, as the one or the other is allowed to preponderate in the mental process of determining the legal rights of the parties. On the one hand is the principle which protects a bona fide holder of commercial paper from existing antecedent equities between the parties, and on the other the principle which protects a corporation from the unauthorized and fraudulent acts of its own officers. There is not much difficulty in stating the rule of law defining the duties and obligations of a party to whom negotiable paper is presented for discount or sale before due. He is not bound at his peril to be on the alert for circumstances which might possibly ⁶⁶ excite the suspicion of wary vigilance; he does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The holder's rights cannot be defeated without proof of actual notice of the defect in title or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted mala fide, his title, according to settled doctrine, will prevail: *Magee v. Badger*, 34 N. Y. 249; 90 Am. Dec. 691; *American etc. Nat. Bank v. New York Belting etc. Co.*, 148 N. Y. 705; *Knox v. Eden Musee etc. Co.*, 148 N. Y. 454; 51 Am. St. Rep. 700; *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 202; *Vosburgh v. Diefendorf*, 119 N. Y. 357; 16 Am. St. Rep. 836; *Jar-*

vis v. Manhattan Beach Co., 148 N. Y. 652; 51 Am. St. Rep. 727.

Applying these rules to the conceded facts of the case, it seems to me to be impossible to impute bad faith to Brooks in the transaction. He advanced a large sum of money on the faith of the paper, without any actual knowledge that the relations of the party with whom he dealt to the paper were different from what they appeared to be on the face of it. The question now is, not what the facts were, but what they appeared to be, and what he had the right, from the notes themselves, to assume. He had the right to assume that the relations to the paper of every party whose name appeared on it were precisely what they appeared to be: *Hoge v. Lansing*, 35 N. Y. 136. He had the right to believe that the notes had been issued by the defendant to Bruen for value in the regular course of business, and were by him transferred to Frost & Son in like manner. There was nothing to suggest to him that Frost was dealing with paper that belonged to the railroad for his own benefit. The appearances were that the defendant had put the notes in circulation by delivery to Bruen, and that they came to Frost's firm in the regular course of business for value and were then the property of ⁶⁷ the firm. It is quite true that all these appearances were deceptive, and that the actual facts were otherwise. But how was a banker or business man in Boston to know or suspect that Bruen was only the nominal payee and a mere instrument in the transaction to enable the president to divert the paper to his own use. The name of the party who presented it and had it in his possession appeared on the face of the paper to have signed it as president. The name of another officer of the corporation was upon it also, attesting its regularity, and everything was in his handwriting except the signature of the president and the indorsement of the payee. So far as Brooks was concerned, the paper showed that it had been issued to a stranger in the regular course of business, and, through his indorsement, had come to the hands of a mercantile firm of which the president of the corporation was a member. If this were the fact, there is no doubt as to his right to use it in the business of the firm. The holder of a note who has no actual knowledge or notice of a defect in the title, or other equities between the parties, when circumstances come to his knowledge sufficient to put him upon inquiry, is chargeable with knowledge of all the facts that such inquiry would have revealed. The difficulty in this case is to find the circumstance which can

be said to be sufficient to put Brooks upon the inquiry. There was absolutely nothing on the face of the paper except the signature, as president, of the party who was dealing with it, and that, we think, was not sufficient, in view of the fact that the appearances were that he was a purchaser from a third party.

The principle that applies in a case where an officer of a corporation makes the corporate obligation payable to himself, and then attempts to deal with it for his own benefit, does not aid in solving the question in this case. When paper of that character is presented by the officer or agent of the corporation, it bears upon its face sufficient notice of the incapacity of the officer or agent to issue it: *Hanover Bank v. American Dock etc. Co.*, 148 N. Y. 612; 51 Am. St. Rep. 721; *Bank of New York v. American Dock etc. Co.*, 143 N.Y. 559; *Wilson v. Metropolitan etc. Ry. Co.*, 120 N. Y. 68 145; 17 Am. St. Rep. 625; *Gerard v. McCormick*, 130 N. Y. 261. There are numerous cases that belong to that class cited by the learned counsel for the defendant on his brief. There is a manifest distinction between them and the case at bar. Here the officer was not dealing with the corporate notes payable to himself, but with notes that had been regularly issued, so far as appeared from their face, to a stranger, and by him transferred to a firm of which the officer was a member and for which he acted as agent in procuring the loan from Brooks and pledging them as security. The presence of Frost's name upon the paper, as one of the agents who issued it, was not naturally or reasonably calculated, under the circumstances, to arouse suspicion in the mind of Brooks, or to lead him to believe that the president was attempting to defraud the corporation in disposing of the notes. None of the cases cited by the learned counsel for the defendant sustain the proposition that such a circumstance is sufficient to put the purchaser of negotiable paper upon inquiry, or charge him with knowledge of the fact in case he fails to make it, and there are many cases that tend to support the contrary view: *American etc. Nat. Bank v. New York etc. Co.*, 148 N. Y. 698; *Miller v. Consolidation Bank*, 48 Pa. St. 514; 88 Am. Dec. 475; *Walker v. Kee*, 14 S. C. 142.

It is said that if the plaintiff's right to recover in this case is sanctioned by this court, an easy way will be opened for the perpetration of frauds upon corporations by officers intrusted with its negotiable obligations, and that the device of making the paper payable to the order of a nominal payee, interested or aiding in the fraud, will be a favorite one to accomplish the end.

We must leave all such cases to be dealt with upon the peculiar facts and circumstances as they arise. It is more reasonable and just to assume that corporations will be able to protect themselves by proper vigilance from the dishonesty of their own officers, than to impute to parties who have taken the paper for value, ignorant of its origin, constructive knowledge of the facts upon such circumstances as exist in this case.

We think that there was nothing on the face of the paper ⁶⁹ or in the facts shown to warrant the court in holding as matter of law, as it did, that the obligations were received by Brooks and the advances made on them mala fide. That is the effect of the ruling at the trial, and the conclusion was not supported by the facts.

It follows that the judgment must be reversed and a new trial granted, costs to abide the event.

JUDGE BARTLETT, in an elaborate dissenting opinion, reached a conclusion adverse to that of a majority of the court, and insisted that the circumstances of the case were sufficient to impose upon a purchaser the duty of inquiry, and therefore to charge him with notice that the paper presented for discount was being diverted from the purpose for which it was issued.

NEGOTIABLE INSTRUMENTS—DIVERSION FROM ORIGINAL PURPOSE.—One who indorses a note, to be used in a particular way, takes the risk of its being used in another way, or for another purpose, and is answerable thereon to any bona fide holder into whose hands it may come: *Sweetser v. French*, 2 Cush. 309; 48 Am. Dec. 666. To the same effect, see *Fearing v. Clark*, 16 Gray, 74; 77 Am. Dec. 394, and note. See, especially, the extended note to *Bedell v. Herring*, 11 Am. St. Rep. 314.

NEGOTIABLE INSTRUMENTS—DUTY OF BONA FIDE PURCHASERS.—A purchaser of commercial paper for full value before maturity is not bound at his peril to be upon the alert for circumstances which might possibly excite the suspicions of wary vigilance: *Magee v. Badger*, 34 N. Y. 247; 90 Am. Dec. 691; and extended note. Bona fide holders of negotiable notes taken for value before maturity can recover thereon, although they take them under circumstances which ought to excite the suspicions of prudent men: *Second Nat. Bank v. Morgan*, 165 Pa. St. 199; 44 Am. St. Rep. 652, and note; unless such circumstances further showed that he acted in bad faith or with want of honesty: *Kitchen v. Louderback*, 48 Ohio St. 177; 29 Am. St. Rep. 540, and note. This question is fully treated in the extended notes to *Bedell v. Herring*, 11 Am. St. Rep. 310, and *Sims v. Lyles*, 26 Am. Dec. 156.

PALMER v. PALMER.

[150 NEW YORK, 189.]

SEVERAL INSTRUMENTS OF THE SAME DATE, between the same parties and relating to the same subject, should be construed as parts of one contract.

A WAY OF NECESSITY IS CREATED when cotenants partition land by voluntary conveyance, by which a tract is set apart to one of them, not fronting upon any public highway, and which can be reached from a public highway only by crossing the lands of a third person or a tract set apart to another of such cotenants.

WAY OF NECESSITY, HOW TO BE DESIGNATED.—If a grantor conveys lands surrounded by other land of his, or by his lands and those of a third person, a right of way by necessity across the lands of the grantor arises in favor of the grantee and his successors in interest. This way may be designated by the grantor, having due regard to the rights of both parties, but if he declines or omits to exercise that right, the grantee may select for himself, and will be supported in his selection, unless chargeable with palpable abuse.

A RIGHT OF WAY BY NECESSITY OVER LANDS OF THE GRANTOR CONTINUES only so long as the necessity exists, and is not a perpetual right.

WAY OF NECESSITY, IMPLIED LOCATION OF.—If a grantor does not locate a way of necessity to which his grantee is entitled, but the latter continues to use a way as formerly existing, such way must be regarded as established and consented to by the parties; and the right to subsequently continue its use cannot be denied by the grantor or his successor in interest, unless the necessity for the use has ceased.

A PRIVATE WAY OPENED BY OWNERS OF LAND through which each passes for his own use does not become a public highway merely because the public are for many years permitted to travel over it.

WAY OF NECESSITY, EXTINGUISHMENT OF.—A right of way by necessity to cross lands of the grantor or his successors in interest to a public highway is not extinguished by the existence of a private way, by means of which, and by crossing other lands, the tract can be reached in favor of which the way of necessity exists, especially where it does not appear that any right exists to cross the land which is necessary to be crossed to reach the private way.

A TENANT IN COMMON CANNOT GRANT AN EASEMENT so as to confer a right which can be enforced against the other tenants.

A RIGHT OF WAY BY NECESSITY IS NOT EXTINGUISHED by the fact that the person in whose favor it exists has become a tenant in common with others of an adjoining tract of land, the use of which by him for the purpose of reaching the land owned by him in severalty would render unnecessary the way by necessity.

Isaac N. Mills, for the appellant.

William A. Woodworth, for the respondent.

¹⁴³ **MARTIN, J.** The purpose of this action was to establish the plaintiff's right to a way across the defendant's farm from

Weaver street to a private cemetery owned by her in the rear of the defendant's premises, and to enjoin him from interfering with the exercise of that right. There is very little conflict in the testimony.

The defendant's farm is situated on the east side of Weaver street, which is one of the public highways of the town of Mamaroneck in Westchester county. The defendant and the plaintiff are brother and sister, and were born upon the farm now owned by the defendant. It belonged to their father at the time of his death. It consists of about five acres of land, and is bounded on the southerly and westerly sides by Weaver street; on the easterly side by a lane known as Hickory Grove Factory lane and premises owned by one Ireland, and on the north by the Ireland premises and Weaver street.

The farm lying east of the defendant's premises was previously known as the Haight farm, and has been divided into two farms known as the Ireland and Large farms, the Ireland farm adjoining the defendant's premises upon the east, and the Large farm lying immediately east of that. Upon the opposite side of the lane and southeast of the Palmer farm is a farm formerly known as the Mott farm, and now known as the Birney place.

More than ninety years since, there existed in the southwest corner of the Haight or Ireland farm a private cemetery, which is known as the "Haight burial ground." It fronted on the lane, and was separated from the Palmer farm by a stone wall. As early as 1820 there existed upon the rear of ¹⁴⁴ the Palmer farm and adjoining the Haight cemetery, another private cemetery which belonged to the owner of the Palmer farm. It was about the same width from east to west as the Haight cemetery, but did not extend the whole length thereof. These cemeteries were separated by the continuation of a stone wall which was upon the division line between the two farms.

In 1868, John Palmer, who was then the owner of the Palmer farm and cemetery, and was the father of the plaintiff and defendant, conveyed the cemetery to his three sons, William D., Benjamin F., and John W. Palmer, with the right "to go to and from said ground through the lane known as the Hickory Grove Factory lane."

In 1872, John Palmer died intestate and left surviving, as his only heirs at law, his children, William D., Benjamin F., John W., Harriet M., and Susan A. Palmer. In February, 1874, the children named agreed upon a settlement of the estate of their

father, and in pursuance thereof William D., Benjamin F., Susan A. and Harriet M. Palmer conveyed to the defendant the five acres now owned by him and known as the Palmer farm. At the same time, and as a part of the same transaction, the defendant, John W., William D., and their wives, jointly with Benjamin F. Palmer, who was unmarried, conveyed to Susan A. and Harriet M. a small piece of land, which was in the rear, and a part of the Palmer farm, and which lay immediately north of the Palmer cemetery and west of the Haight cemetery, to be used as a private cemetery by the grantees named in that deed. In 1876, Susan A. Palmer deeded to the plaintiff her interest in that lot.

After the conveyances of February, 1874, neither the plaintiff nor her sister had any title or interest in any land adjoining the premises conveyed to them. Until that time communication with the Palmer cemetery had uniformly been by passing from Weaver street across the Palmer farm, and since then the plaintiff has used substantially the same way to pass from Weaver street to her lot. Her use of this way had been in no manner interfered with by the defendant or ¹⁴⁵ otherwise, until within five or six years before the trial of this action, when the defendant claimed that she had no right of way across his farm. She, however, claimed the right, and continued to exercise it.

In April, 1891, a daughter of the plaintiff died, whose remains she intended to have buried upon her lot, when the defendant forbade her taking the body of her daughter across his farm for burial, and thereupon this action was commenced.

Five or six years since, and after a controversy had arisen between the parties as to the plaintiff's right of way across the defendant's farm, the defendant moved a portion of the wall which separated his farm from the lane, thereby throwing into the lane a portion of the triangular part of the Palmer farm, which lay between the lane and the Palmer cemetery, thus opening a passage from the lane to that cemetery. The Palmer cemetery does not adjoin the lane, and the land between it and the lane is a part of the Palmer farm, and belongs to the defendant. Since this change no carriage or other vehicle can pass from the lane across the Palmer cemetery to the plaintiff's lot, and a person passing from the lane to that cemetery must pass over a portion of the defendant's farm.

In 1879, Benjamin F. Palmer died intestate, leaving as his only heirs at law William D. Palmer, the defendant, the plain-

tiff, and Susan A. Palmer, now Susan A. Dean, and thereby the plaintiff inherited from him, as a tenant in common, an undivided one-twelfth part or interest in the Palmer cemetery. Hickory Grove Factory lane existed as a private way as early as 1801. Where it entered Weaver street a fence and gate were maintained until about twenty years ago, when it had rotted down and has not been rebuilt. It communicates with the Large, Birney, and Ireland farms, and with the Haight cemetery, but never reached any public road except Weaver street, or any other premises. It was always separated from the Palmer farm by a stone wall, having no barway, gateway, or other opening, and there is no proof that it was ever accepted, worked, or used as a public highway.

¹⁴⁶ The question presented upon this appeal is, whether the plaintiff had a right of way across the premises of the defendant to reach her lot. The appellant's contention is, that under and by virtue of the conveyances, which were executed between the parties thereto upon the settlement of their father's estate, the plaintiff acquired a right of way by necessity over the remainder of the Palmer farm from Weaver street to her lot.

The deeds executed upon the same day, one conveying to the plaintiff and her sister the lot now owned by her (the plaintiff) and the other conveying the remainder of the farm to the defendant, having been executed in pursuance of an agreement by the heirs for the settlement of the estate, must be regarded as parts of a single transaction. The general rule is, that several instruments of the same date, between the same parties, and relating to the same subject may be construed as parts of one contract: *Hills v. Miller*, 3 Paige, 254; 24 Am. Dec. 218; *Mott v. Richtmyer*, 57 N. Y. 49, 64, and cases cited.

After the deeds between the parties to that transaction were executed and delivered, the plaintiff and her sister had no interest in any land bordering upon that conveyed to them, and it did not adjoin any street or highway. Nor did it in any way connect with or adjoin Hickory Grove Factory lane, but was situated more than ninety feet therefrom. Neither the plaintiff nor her sister had any right of way across the Palmer cemetery or that portion of the defendant's farm which lay between it and the lane.

Under these circumstances, it is obvious that the plaintiff and her sister acquired a right of way by necessity from her lot

through the gate or opening into the Palmer cemetery from the Palmer farm and over the remainder of the Palmer farm to Weaver street.

Where a person conveys to another a piece of land surrounded by lands of the grantor, the grantee and those claiming under him have a right of way by necessity through the lands of the grantor as an incident of the grant. This principle applies where the land conveyed is surrounded in part by the lands of the grantor and in part by the lands of a third ¹⁴⁷ person. The grantor, in such a case, has the right to designate the track or way, having due regard to the rights of both parties, but, if he declines or omits to exercise that right, the grantee may select for himself and will be supported in his selection, unless chargeable with palpable abuse. A right of way of necessity over the lands of a grantor, in favor of a grantee and those subsequently claiming under him, is not, however, a perpetual right of way, but continues only so long as the necessity exists: *New York Life Ins. etc. Co. v. Milnor*, 1 Barb. Ch. 353; *Holmes v. Seely*, 19 Wend. 507; *Simmons v. Sines*, 4 Abb. Ct. App. Dec. 246.

In this case, the grantor was not shown to have designated the track or way to be used by the plaintiff, but she has since continued to use the way as it formerly existed and was previously used by the family in passing over the farm to the cemetery. Thus she selected the old way, which must be regarded as established and consented to by the parties, as no objection seems to have been made for years after the selection or during the continuance of its use. That the plaintiff still possesses the right to use that way cannot be successfully disputed, unless the necessity for it has ceased, and, consequently, the plaintiff's right has become extinguished.

The respondent contends, and the learned general term held, that when the fence was removed between the lane and the portion of the defendant's farm which lies between the cemetery and lane, so as to permit direct access from it to the old Palmer cemetery, that change extinguished the plaintiff's right of way by necessity, and, hence, she was not entitled to the relief sought. In this conclusion we cannot concur. We do not regard the evidence as sufficient to justify a finding that the lane ever became or was a public highway. It was at most a private way which existed for the accommodation of the owners of the farms or premises to which it led. There is no evidence that it was ever dedicated to or accepted by the public. Such an acceptance

was necessary to constitute a dedication of the highway: *Child v. Chappell*, 9 N. Y. 246, 257; *People v. Underhill*, 144 N. Y. 316.

¹⁴⁸ In *Speir v. New Utrecht*, 121 N. Y. 420, 430, it was said: "A private way opened by the owners of the land through which it passes for their own uses does not become a public highway merely because the public are also permitted for many years to travel over it." In *Lewis v. New York etc. R. R. Co.*, 123 N. Y. 496, 502, *Speir v. New Utrecht*, 121 N. Y. 420, 430, was referred to, and the court said: "We have recently determined what facts constitute a public highway within the meaning of the statute relating to user. . . . We there held that it must have been traveled by the public for twenty years, and either kept in repair by or taken in charge of the public authorities." It was said in the case of *Niagara Falls etc. Bridge Co. v. Bachman*, 66 N. Y. 261, 269, that "to constitute a public highway by dedication, there must not only be an absolute dedication, a setting apart and a surrender to the public use of the land by the proprietors, but there must be an acceptance and a formal opening, by the proper authorities, or a user." The same doctrine is stated in *Holdane v. Trustees*, 21 N. Y. 474, and in *People v. Underhill*, 144 N. Y. 316, 324. In the latter case, *Peckham, J.*, referring to the case of *Speir v. New Utrecht*, 121 N. Y. 420, said: "It was there held that the mere fact that a portion of the public had traveled over the road for twenty years would not make it a highway; that the user must be like that of highways in general, and the road must not only be traveled upon, but it must be kept in repair, taken in charge and adopted by the public authorities."

It is manifest that, upon the facts as they exist in this case, the lane never became a public highway, either by user or by dedication, and, as there is no proof or claim that it was ever laid out as such, it follows that it was a mere private way for the accommodation of the owners of the premises to which it led. As the plaintiff's lot did not adjoin the lane, and as it was a private way only, she had no right to pass over it to reach her lot.

Moreover, there is nothing in the evidence to indicate that the defendant has in any way transferred to the plaintiff any ¹⁴⁹ right, upon which she can rely, to cross that portion of his premises which lies between the lane and the Palmer cemetery.

Again, the claim of the defendant, that the plaintiff, having become a tenant in common of the Palmer cemetery, thus obtained a right to cross over it to her lot, cannot be sustained. A

tenant in common, being unable to convey any title to a specific part of the common land as against his cotenants, cannot grant an easement so as to confer any right which can be enforced against the other owners. This rule applies to an easement or right of way of necessity, as well as one founded upon an express grant. If the lands over which the way is claimed belonged to others as cotenants with the grantor, they cannot be prejudiced by a presumed intent in which they did not participate: *Collins v. Prentice*, 15 Conn. 426. In *Crippen v. Morss*, 49 N. Y. 63, it was held that one tenant in common could not, by his sole act, create an easement in the premises held in common. It was also held that a tenant in common of property, who owned other premises in severalty, could not so use the property owned by him alone as to acquire an easement over the property held in common.

Therefore, as the necessity for the way over the defendant's premises still exists, and the way has been located and used by the plaintiff since 1874, it follows that the plaintiff's right to the use thereof is yet in existence, and that the courts below erred in holding that she had no such right of way across the defendant's farm.

This conclusion renders it unnecessary to examine the other questions presented for our consideration, as the judgment must be reversed and a new trial granted for the errors already pointed out.

All concur; Vann, J., in result.

Judgment reversed.

CONTRACTS — CONSTRUCTION.—Written instruments made at the same time and relating to the same transaction must be read and construed together: *Jennings v. Todd*, 118 Mo. 296; 40 Am. St. Rep. 373, and note. If two contracts are contemporaneously executed by the same parties and relate to the same subject matter, they must be construed together as constituting but one agreement: *Bradfeldt v. Cooke*, 27 Or. 194; 50 Am. St. Rep. 701, and note.

WAYS OF NECESSITY—PARTITION.—On the partition by judgment of a tract of land, if one of the parcels set aside to be held in severalty is so situated that a way of necessity would be implied in its favor had it been conveyed by all the tenants in common to one of their number, the same implication arises in favor of the person to whom it was set aside by such judgment and his successor in interest, whether the way was referred to in the judgment or not: *Blum v. Weston*, 102 Cal. 362; 41 Am. St. Rep. 188, and note.

PRIVATE WAYS — EXTINGUISHMENT — OTHER WAY.—One entitled to pass over certain lands to reach a parcel of his real property is not obliged to surrender such right on becoming the owner

of other realty over which he might pass to the first-mentioned land: *Zell v. Universalist Soc.*, 119 Pa. St. 390; 4 Am. St. Rep. 654. The fact that access to land may be had by passing over the lands of a third person will not defeat a grantee's claim to a way by necessity over the lands retained by his grantor, if there is no right to pass over the lands of such third person: *Whitehouse v. Cummings*, 83 Me. 91; 23 Am. St. Rep. 756, and note. A way having been created by necessity for its use cannot be extinguished, so long as the necessity continues to exist, and therefore continues though not claimed for many years, during which another right of way was used under a special agreement: *Blum v. Weston*, 102 Cal. 362; 41 Am. St. Rep. 188.

WAYS OF NECESSITY—PRESCRIPTION.—To establish a right of way by prescription there must be: 1. Continued and uninterrupted use or enjoyment; 2. Identity of the thing enjoyed; 3. A claim of right adverse to the owner of the soil: Extended note to *Welch v. Wilcox*, 100 Am. Dec. 116.

COTENANTS.—POWER OF ONE COTENANT TO GRANT EASEMENTS in the common property is discussed in the extended note to *Benedict v. Torrent*, 21 Am. St. Rep. 593-595.

HEDGES v. WEST SHORE RAILROAD COMPANY.

[150 NEW YORK, 150.]

LANDS ADJOINING AND BENEATH NAVIGABLE WATERS, RIGHTS OF OWNERS OF RESPECTIVELY.—A riparian owner has nothing but the natural easement of right of access over lands beneath navigable waters for the purpose of reaching the channel of such waters, and the sovereign or state owns the lands under the waters subject to such easement, and has the right to put them to any use consistent with the exercise of the easement on the part of the riparian proprietor. The latter cannot so exercise his right of passage to the channel as to destroy, or unreasonably interfere with, the right of the sovereign to put its own lands to such use as it may think proper. Each right or interest is always subject to the qualification that it cannot be exercised or enjoyed in such a way as to destroy the other.

NAVIGABLE WATERS, OBSTRUCTIONS OF WHICH RIPARIAN PROPRIETOR CANNOT COMPLAIN.—If, by the authority of the state, a railway is constructed in the waters of a navigable river, and openings are left, so that a riparian proprietor may have access to the channel, and the natural condition of things is left unchanged, and opportunity is afforded at all time for reasonable modes of access, the owner of lands upon the shore has no just ground for complaint.

A RIPARIAN OWNER HAS NO RIGHT TO CONSTRUCT AN ARTIFICIAL CHANNEL in front of his lands for the purpose of making his means of access more convenient or valuable to him, and therefore has no ground of complaint because of some use made by the owners of the land covered by water which makes his construction and maintenance of such canal impossible.

A RIPARIAN PROPRIETOR HAS NO RIGHT AS SUCH TO MAKE CHANGES IN THE BED OF A RIVER, as by cutting a

canal from his lands to the channel, to enable him to have access to such channel in a mode and to an extent not possible when the river was in its natural state.

NAVIGABLE WATERS, OBSTRUCTION IN.—A railway constructed in front of the lands of a riparian proprietor under authority of the state, so long as the sovereign or its grantees provide for a reasonable and suitable access to the stream under all circumstances and at all times, gives the riparian owner no ground for complaint.

Edward Winslow Paige, for the appellants.

Andrew Shiland, Jr., for the respondents.

152 O'BRIEN, J. This action, in its form and in the nature and measure of the relief awarded by the judgment, is substantially the same as the numerous cases, now so familiar to the court, prosecuted by the owners of property, abutting upon streets in the city of New York, against the elevated railroads. The principle upon which the judgment rests is far reaching in its operation and application, and demands most careful examination.

There is but little, if any, dispute with respect to the material facts, the controversy depended entirely upon the rule of law that should govern the rights of the parties. The plaintiffs are the owners of certain uplands on the westerly shore or bank of the Hudson river at or near Cornwall. They acquired the title to these lands by grant from the executor of one Ward October 25, 1886. Subsequently, and on September 7, 1887, they acquired by grant from the state certain lands under water adjacent to and in front of the uplands, which they filled up, and by construction of all the necessary **153** appliances have converted the whole property into a brickyard, where they have ever since been engaged in the business of manufacturing bricks for sale, and transporting their product to the market by railroad, and also by boats upon the river. All this took place with full knowledge on the part of the plaintiffs of the existence and operation of the railroad, it having been constructed and put into operation several years before the plaintiff purchased the land, the situation then being the same as when this action was commenced. The New York Central is the lessee of the West Shore Railroad Company, the latter having succeeded to all the rights and franchises of other corporations that had constructed and put into operation the railroad now operated by the Central company along the westerly shore of the river. The railroad was constructed and put into operation in the year 1883. The plaintiffs' property is situated at a point where a stream known as

Murderers' creek, flowing from the west, enters the Hudson, and at the junction of a branch of the railroad of the defendants which runs from a westerly point, and here intersects the main line, running north and south along the westerly shore of the Hudson. In the year 1881, the executors of Ward granted to the railroad corporation considerable land for the purpose of constructing the road upon the banks of the creek and near the river, for which the railroad paid between four and five thousand dollars. In the same year, the railroad company, exercising the right of eminent domain under the statute, condemned a strip of land under water, ninety-nine feet wide across the mouth of Murderers' creek. This proceeding was for the purpose of acquiring the title of the state to this strip, and, upon the confirmation of the report, the railroad company paid the award and proceeded to construct the road. At that point the railroad structure is a pile bridge across the mouth of the creek with openings of fourteen feet between the uprights and of a height, in the clear, of eight feet above high tide. The easterly line of the plaintiffs' grant from the state is a dock which has been constructed for ¹⁵⁴ the purpose of their business, and there intervenes between the dock and the railroad structure a space of one hundred feet wide which belongs to the state.

The only injury which it is claimed the plaintiffs have sustained is the obstruction which the railroad structure constitutes to their access from their uplands to the channel of the river. In the natural condition of things and at the time of the plaintiffs' grant, and at the time of the construction of the railroad, the waters of the river at this point were quite shallow, and navigable only with small boats, and it is found that at these times there was no place in the river between the plaintiffs' grant and the railroad structure, and within several hundred feet outside or easterly of it, where there was water enough to float the barges or vessels, when loaded, which the plaintiffs have now in use in their business. It appears that in 1887, after the plaintiffs had prepared the brickyard, they began at the westerly channel bank of the river to dig a canal ten feet deep and about thirty feet wide, and continued this canal westerly toward the railroad structure and the shore, about two thousand eight hundred feet to the easterly edge of the strip acquired by the defendants from the state, and upon which the railroad was constructed. Here the plaintiffs were obliged to stop, as the structure upon which the railroad is operated became an unques-

tionable obstruction to the further progress of the work, so that the plaintiffs have not been able to complete the canal up to the brickyard. This being the situation, the plaintiffs were obliged to build a causeway from their brickyard, easterly from their own land, across the space of one hundred feet belonging to the state, across and under the railroad structure to a dock outside, between the railroad and the channel, where the barges could land. Upon this causeway has been placed a cartrack, over which the bricks are conveyed in cars for the space of about three hundred feet to the vessels in the river.

There is some confusion and conflict in the findings with respect to the precise location of the strip of land under water which the defendants acquired from the state, and upon which ¹⁵⁵ the railroad structure is built, whether it is a part of Murderers' creek or of the river. The defendants claim that it is part of the creek, and, as they own the banks and bed of that stream, the locus in quo is in the strictest sense private property. The findings, however, sufficiently show that the pile bridge or structure complained of is over an inlet of the river, formed by the junction of the creek at that point, in waters where the tide ebbs and flows, and for all the purposes of this discussion it will be assumed that the structure is in the Hudson. We have, then, the case of a riparian proprietor who, with knowledge of the situation, devotes, or attempts to devote, his property to certain uses, inconsistent with the existence of the railroad, and a structure in a public river, some two hundred feet below high-water mark, and between the plaintiff's property and the navigable channel, constructed under the circumstances stated, constituting an obstruction to the plaintiffs' access from their property to the channel, in the manner and to the extent that they now claim and assert as a legal right. This is, practically, the physical situation upon which the plaintiffs' judgment rests.

It should be observed here that in the numerous cases in this court, where actions of this character have been sustained by property owners against the elevated railroads in New York, a fundamental fact was always assumed or found, namely, that the railroad structure in the street was, as to the abutting property owner, unlawful and a trespass upon his property rights: *Story v. New York etc. Ry. Co.*, 90 N. Y. 122; 43 Am. Rep. 146; *Lahr v. Metropolitan etc. Ry. Co.*, 104 N. Y. 287; *American Bank Note Co. v. New York etc. Ry. Co.*, 129 N. Y. 252; *Odell*

v. New York etc. Ry. Co., 130 N. Y. 690; McGean v. Metropolitan etc. Ry. Co., 133 N. Y. 9.

In this case, the learned trial judge has found, as conclusions of law, that the defendants have wrongfully and without lawful right, as against the plaintiffs, constructed and maintained said railroad structure, across the waters of said river, between the plaintiffs' said lands and premises, and the navigable waters of said river, and have wrongfully obstructed the plaintiffs' access from their property to the channel, and so have injured the plaintiffs in their property rights. This finding suggests ¹⁵⁶ the important principle involved in the case, and that is, whether the defendants have in fact or in law invaded any right of property which the plaintiffs acquired under the grants mentioned.

In order to get a clearer view of the question, it may be well to go back to the condition of things that existed before the railroad was built and inquire what the rights of the parties then were, and how these rights have been affected by subsequent events.

The ownership of the plaintiffs' upland was then in Ward, or his executor, under the will, and the title to the strip of land upon which the railroad structure now stands was in the state, subject to an easement in favor of the then owner of the plaintiffs' lands to pass over it upon the water to the navigable channel of the river and to enjoy such riparian rights as were incidental to the ownership of the shore and bank of the river: Rumsey v. New York etc. Ry. Co., 133 N. Y. 79; 28 Am. St. Rep. 600; Saunders v. New York etc. Ry. Co., 144 N. Y. 87; 43 Am. St. Rep. 729. There is no question in the case, of course, concerning easements of light and air, since it is not claimed that these rights have been at all affected by the acts of the defendants. The plaintiffs' case rests entirely upon the proposition that the defendants have invaded and obstructed the right of access to the navigable highway. In the original condition of things, the strip of land under water, where the defendants' railroad now is, was affected with two distinct rights and interests that were liable to conflict with each other, and this litigation is really the result of such conflict. It arises largely, we think, from a misconception, on the part of the riparian owners, with respect to the nature, character, and extent of their rights. The riparian owner had nothing but a natural easement or right of access over this strip of land as an incident of his ownership of the uplands. On the other hand, the sovereign owned the land, subject to such ease-

ment, and had the right to put the land to any use consistent with the exercise of the easement on the part of the riparian proprietor. The owner of the banks and shore could not so exercise his right of passage or access to the channel as to destroy, or unreasonably ¹⁵⁷ interfere with, the right of the sovereign to to put its own land to such use as it thought proper. Where two such rights or interests exist, with respect to the same portion of the earth's surface, each must be exercised and enjoyed in a reasonable way. Each right or interest in such a case is always subject to the qualification that it cannot be exercised or enjoyed in such a way as to destroy the other: *Atkins v. Bordman*, 2 Met. 457; 37 Am. Dec. 100; *Perley v. Chandler*, 6 Mass. 454; 4 Am. Dec. 159; *Gerrish v. Shattuck*, 132 Mass. 235.

The owner of the uplands cannot exercise his easement or right of access to the channel in such a way as to prevent other parties, to whom the sovereign has granted the bed of the river or some portion of it, from using their own property in a reasonable way. The rights of the parties in these respects are governed by the general rules of law applicable to easements and servitudes generally: *Washburn on Easements*, c. 1, sec. 1, c. 3, sec. 1, c. 2, sec. 5. The sovereign, that is to say the state, could have built a railroad upon the strip of land while it was the owner of it, and the then owner of the plaintiffs' uplands could not complain, providing he was given suitable and reasonable means of access to the channel. Instead of doing this, it has chartered a corporation for that purpose, and this corporation has acquired the title of the state to the piece of land, and has constructed the railroad, and is operating it as a public common carrier. The corporation constructed the road upon its own land, under legislative authority, and provided for passageway, over the water beneath the structure, spaces fourteen feet in width and eight feet in height at high tide. The easement of access to the river by the owner of the lands on the shore was respected. It could still be enjoyed and exercised in a reasonable way and in practically the same way that it had been enjoyed before or was capable of enjoyment in its natural state. Hence, the defendants or their predecessors in title invaded no property right of the riparian owner. The railroad company could have appropriated the easement upon making compensation, in the exercise of the right of eminent ¹⁵⁸ domain, or so constructed its works as to permit its future enjoyment and exercise in a reasonable and suitable manner. It elected to take the latter course, and, therefore, the

structure was placed where it now is under lawful authority. The rights of the state to the land had been acquired in pursuance of law, and the easement of the upland owner had not, in any legal sense, been disturbed.

If it was a lawful structure when placed in the river where it now is, it could not become unlawful in consequence of any changes that may have since taken place. Any other rule would make it impossible for a railroad to perfect its right to cross an inlet of a public river, since the right would then be subject to any and all changes that might take place in the use of the lands upon the shore or to the enlargement of the means of access by the upland owner as the development of his property might require.

We do not hold that he is to be limited to such means of access as exist or are in use at the time of the construction of the railroad. He may insist at all times upon the enjoyment of the right of access in a reasonable manner, but not in such a way as would be inconsistent with the rights of the owner of the land which is subject to that right.

In determining, in such cases, whether the property rights of the riparian owner have been invaded, we must bear in mind that these rights were not originally absolute, but qualified by other rights in the owner of the land in the bed of the stream, and that they cannot be enlarged at will or according to his convenience or necessity. So long as the natural condition of things is left practically unchanged, and opportunity afforded at all times for reasonable modes of access, the owner of the lands upon the shore has no just grounds of complaint: *Lyon v. Fishmongers' Co.*, L. R. 1 App. Cas. 662, 676; *Orr Ewing v. Colquhoun*, L. R. 2 App. Cas. 839, 861.

The plaintiffs in this action have no greater or more extensive right of access than their grantors had when the structure was placed by the railroad company where it now is. When they took title to the uplands, the railroad was where it now ¹⁵⁹ is, with lawful right in the defendants to maintain and operate it there. The fact that the plaintiffs purchased the lands on the shore and proposed to use them for a purpose for which they had never been used before did not enlarge or change their rights as riparian owners. The fact that it then became more convenient or profitable for them to have access to the channel through an artificial canal thirty feet wide and ten feet deep could not and did not make the structure in the river unlawful

which was lawful before. The plaintiffs had no right to an artificial mode of navigating the waters that was destructive of the right of the defendants to use their own lands for the purposes of a railroad. If the defendants had obstructed the plaintiffs' access by a solid embankment, a very different question would then be presented. It could then be said that they had used their land in such a way as to obstruct the plaintiffs in the exercise of their rights, just as it can now be urged that the latter are insisting upon such a use of their easement as to interfere with the rights of the owner of the land under water.

The right which the plaintiffs assert is not a natural or necessary incident of their ownership of the uplands, but much more. It is the right to construct and maintain a deep watercourse from their brickyard, three thousand feet to the main channel of the river, and not to the navigation of the waters in their natural state. They claim the right for that purpose, not only to cross the land of the defendants, but also the intervening land of the state, for the space of one hundred feet, and then across the bed of the river to the channel, through the lands of the state, some two thousand eight hundred feet more. This is substantially a claim on the part of the plaintiffs that, as an incident of their ownership of the shore, they can make such changes in the bed of the river and divert the waters of the channel as their convenience or necessities may require. The defendants' railroad structure is, doubtless, an obstruction to the exercise of such an extensive claim of right, and it is only in that sense that it has been found to be unlawful. If the plaintiffs' rights are as broad as claimed, it ¹⁶⁰ is obvious that the railroad structure cannot lawfully be maintained. The judgment, we think, rests upon an erroneous view of the nature and character of the plaintiffs' rights as riparian owners. It virtually treats them as owners of the bed of the river, as well as the uplands, and denies to the defendants the right to use their land without the consent of the owners on the shore, or without in some way extinguishing the easement of access. The principle for which the plaintiffs contend would, when carried to its logical results, be productive of very serious consequences to public interests and private rights based upon the ownership of the bed of the river and the soil under water, below high-water mark. If the plaintiffs' easement of access comprehends the right to dig and use an artificial canal, in order to approach their docks, then every other owner on the same side of the river, and the opposite side

as well, has the same right which, if exercised, might seriously impair the public right of navigation and the private right by the grantees of the state to a reasonable use of their property. It may be true that if the plaintiffs have invaded a public right only, that the state alone can actively interfere. But since they have shown no right to the mode of access claimed, as against the defendants' structure, save their ownership of the uplands, that, we think, is not sufficient to warrant the conclusion that it is unlawful. The plaintiffs have not been deprived of a reasonable mode of access, under all the circumstances, and hence their riparian rights have not been invaded in any legal sense. If they require more extensive facilities for landing, or for conducting their business, than their grant carried with it, they cannot acquire them by enjoining the defendants from operating their railroad. The defendants' rights were established when the title of the land was acquired from the state and a reasonable and suitable mode of access provided for the plaintiffs, and they cannot be impaired by the fact that the plaintiffs have devoted their property to uses that may, for the purpose of greater convenience, require other modes of access.

¹⁶¹ The right of access and of navigation which the law secures to the riparian owner as one of the incidents of his title to the uplands does not include any right arising from the use of the land under water or the bed of a tidal river, below high-water mark. In the present case, the plaintiffs' rights, as the owners of the bank, were enlarged by a subsequent grant from the state of lands under water, but their right to use the bed of the river is limited by the boundaries of this grant. It is true that they have assumed to use the bed of the river for the construction of a deep artificial channel to their property for private purposes, but this is not a right flowing from or incidental to their grant, but something quite independent of their riparian rights. Whether such use of the bed be lawful or unlawful, it is quite clear that it cannot be made the basis of an attack upon the defendants' structure. The defendants have shown that they have the title to that portion of the bed of the river where their structure stands, but the plaintiffs have shown no title whatever to the land where they have dug the canal. Under such circumstances, it is quite difficult to suggest or imagine any principle of law or justice that would warrant the plaintiffs in insisting that the defendants' railroad must be put out of the way in order to enable them to use the canal. Such

a claim cannot be justified except upon the broad ground that the plaintiffs have the right to make such changes in the natural bed of the river from time to time as they may consider necessary in order to land at their brickyard with large vessels; and, whenever the defendants' structure stands in the way of such changes, it becomes unlawful and can be removed. It is obvious that such a principle cannot be defended or upheld.

Nor can it be claimed that a structure such as this, placed in a public river under such circumstances, and by such authority, is per se unlawful as against the riparian owner without regard to the effect upon the right of access. So long as that right, in the natural condition of the river and the shores, is not interfered with or obstructed, or, at least, so long ¹⁶² as the sovereign or its grantees provide for a reasonable and suitable mode of access under all the circumstances and at all times, the riparian owner has no ground of complaint, because the sovereign has made reasonable use of its own property, or the right to such use has been acquired by an individual or a corporation.

It is not found or claimed that the defendants have obstructed or interfered with the plaintiffs' easement of access otherwise than so far as it prevents them from digging and maintaining an artificial waterway from their property to the channel of the river for the floating of large vessels. That is an enlargement of the right of access existing or capable of enjoyment in the natural state of the waters, and under the circumstances unreasonable, and, therefore, not a natural or necessary incident of the plaintiffs' grant.

The pile bridge or railroad structure of the defendants, built upon lands which they acquired from the state in pursuance of legislative authority, without obstructing or interfering with the plaintiffs' natural or reasonable easement over the waters to the navigable channel, is not an unlawful interference with any of the plaintiffs' property rights.

Upon the undisputed facts as they appear in the record, the plaintiffs were not entitled to enjoin the operation of the defendants' railroad, or to maintain any action against the defendants for an unlawful injury to their property. There are other questions in the case that have been discussed upon the briefs of counsel, but, in the view that we have taken with respect to what seems to be the fundamental principle involved, they need not be considered.

-

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

WATERS—NAVIGABLE—RIGHTS OF RIPARIAN OWNERS.—Riparian owners on a navigable stream hold only to the water's edge: *Cox v. Arnold*, 129 Mo. 337; 50 Am. St. Rep. 450, and note. See, also, the extended notes to *Allen v. Weber*, 27 Am. St. Rep. 56; *Miller v. Mendenhall*, 19 Am. St. Rep. 226, and *People v. Kirk*, 53 Am. St. Rep. 290, where the respective right of the landowners and the sovereign power to lands under navigable waters is thoroughly discussed.

WATERS—NAVIGABLE—OBSTRUCTIONS—RIGHTS OF LAND OWNERS.—A riparian owner, whose lands are bounded by a navigable stream, has a right to access to such river and to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see fit to impose for the protection of the rights of the public: *Rumsey v. New York etc. Ry. Co.*, 133 N. Y. 79; 23 Am. St. Rep. 600, and note.

KUJEK v. GOLDMAN.

[150 New York, 176.]

THAT AN ACTION IS NEW AND WITHOUT PRECEDENT is not conclusive against plaintiff's right of recovery, if he is shown to have suffered a wrong.

MARRIAGE, INDUCING BY FALSE REPRESENTATIONS, DAMAGES RECOVERABLE FOR.—One who is, by the deceit of another, induced to enter into a marriage contract with a third person may recover for the damages thereby sustained, as where a person who has had meretricious relations with a woman represents to another that she is virtuous, and thereby induces him to marry her.

EXEMPLARY DAMAGES MAY BE AWARDED against one who, knowing a woman to be unchaste and then pregnant by him, for the purpose of inducing a man to marry her, represents to him that she is a virtuous and respectable woman.

Wheeler H. Peckham, for the appellant.

August P. Wagener, for the respondent.

177 VANN, J. The verdict of the jury has established as the facts of this case, beyond our power to review, that the plaintiff married Katie Moritz in the belief that she was a virtuous girl, induced by the representations of the defendant to that effect, when, in fact, she was at the time pregnant by the defendant himself. The case was submitted to the jury upon the theory that if Goldman, knowing that Katie was unchaste, by false representations that she was virtuous, induced the plaintiff to

marry her, he was entitled to recover damages, ¹⁷⁸ and the jury found a verdict in his favor for two thousand dollars. While no precedent is cited for such an action, it does not follow that there is no remedy for the wrong, because every form of action when brought for the first time must have been without a precedent to support it. Courts sometimes of necessity abandon their search for precedents and yet sustain a recovery upon legal principles clearly applicable to the new state of facts, although there was no direct precedent for it, because there had never been an occasion to make one. In remote times, when actions were so carefully classified that a mistake in name was generally fatal to the case, a form of remedy was devised by the courts to cover new wrongs as they might occur so as to prevent a failure of justice. This was called an "action on the case," which was employed wheretherighttosue resulted from the peculiar circumstances of the case, and for which the other forms of action gave no remedy: 26 Am. & Eng. Ency. of Law, 694. For instance, the action for enticing away a man's wife, now well established, was at first earnestly resisted upon the ground that no such action had ever been brought. In an early case the court answered this position by saying: "The first general objection is, that there is no precedent of any such action as this, and that, therefore, it will not lie; and the objection is founded on Littleton, sec. 108 and Coke on Littleton, 81, b, and several other books. But this general rule is not applicable to the present case; it would be if there had been no special action on the case before. A special action on the case was introduced for this reason, that the law will never suffer an injury and a damage without a remedy, but there must be new facts in every special action on the case": Winsmore v. Greenbank, Willes, 577, 580. As was recently said by this court in an action then without precedent: "If the most that can be said is that the case is novel and is not brought plainly within the limits of some adjudged case, we think such fact not enough to call for a reversal of the judgment": Piper v. Hoard, 107 N. Y. 73, 76; 1 Am. St. Rep. 789.

The question, therefore, is not whether there is any precedent ¹⁷⁹ for the action, but whether the defendant inflicted such a wrong upon the plaintiff as resulted in lawful damages. The defendant, by deceit, induced the plaintiff to enter into a marriage contract whereby he assumed certain obligations and became entitled to certain rights. Among the obligations

assumed was the duty of supporting his wife in sickness and in health, and he discharged this obligation by expending money to fit up rooms for housekeeping, in keeping house with his wife and caring for her during confinement, when she bore a child not to him but to the defendant. Among the rights acquired was the right to his wife's services, companionship, and society. By the fraudulent conduct of the defendant, he was not only compelled to expend money to support a woman whom he would not otherwise have married, but was also deprived of her services while she was in childbed. He thus sustained actual damages to some extent, and, as the wrong involved not only malice but moral turpitude also, in accordance with the analogies of the law upon the subject, the jury had the right to make the damages exemplary. By thus applying well-settled principles upon which somewhat similar actions are founded, this action can be sustained, because there was a wrongful act in the fraud, that was followed by lawful damages in the loss of money and services. The fact that the corruption of the plaintiff's wife was before he married her does not affect the right of action, as the wrong done to him was not by her defilement, but by the representation of the defendant that she was pure, when he knew that she was impure, in order to bring about the marriage. It is difficult to see why a fraud, which, if practiced with reference to a contract relating to property merely, would support an action, should not be given the same effect when it involves a contract affecting not only property rights, but also the most sacred relation of life. Fraudulent representations with reference to the amount of property belonging to either party to a proposed marriage, made by a third person for the purpose of bringing about the marriage, are held to constitute an actionable wrong, and the ¹⁸⁰ usual remedy is to require the person guilty of the fraud to make his representations good: *Piper v. Hoard*, 107 N. Y. 73; 1 Am. St. Rep. 789; *Montefiori v. Montefiori*, 1 W. Black. 363; *Atherly on Marriage Settlements*, 484. In such cases, the injury is more tangible and the measure of damages more readily applied than in the case before us, but both rest upon the principle that he who, by falsehood and fraud, induces a man to marry a woman is guilty of a wrong that may be remedied by an action, the amount of damages to be recovered depending upon the circumstances of the particular case.

We have thus far considered the right of action as resting upon some pecuniary loss, which, although trifling in amount,

may be recovered as a matter of right, leaving it to the jury, in their sound discretion, as in a case for the seduction of a child or servant, to amplify the damages by way of punishment and example. We think, however, that the action can be maintained upon a broader and more satisfactory ground, and that is the loss of consortium, or the right of the husband to the conjugal fellowship and society of his wife. The loss of consortium through the misconduct of a third person has long been held an actionable injury, without proof of any pecuniary loss: *Bennett v. Bennett*, 116 N. Y. 584; *Hutcheson v. Peck*, 5 Johns. 196; *Hermance v. James*, 32 How. Pr. 142. As has been well said by a recent writer: "To entice away, or corrupt the mind and affection of one's consort is a civil wrong, for which the offender is liable to the injured husband or wife. The gist of the action is not in the loss of assistance, but the loss of consortium of the wife or husband, under which term are usually included the person's affection, society, or aid": *Bigelow on Torts*, 153. The damages are caused by the wrongful deprivation of that to which the husband or wife is entitled by virtue of the marriage contract. They rest upon the loss of a right which the marriage relation gives and of which it is an essential feature. Whether that right is wrongfully taken away after it is acquired, or the person entitled to it is wrongfully prevented from acquiring it does not change the effect or lessen the injury. While the plaintiff ¹⁸¹ has not been actually deprived of the society of his wife, he has been deprived of that which made her society of any value, the same as if she had been seduced after marriage. Although the formal right to consortium may remain, the substance has been taken away. In other words, when he entered into the marriage relation he was entitled to the company of a virtuous woman, yet, through the fraud of the defendant, that right never came to him. He has never enjoyed the chief benefit springing from the contract of marriage, which is the comfort, founded upon affection and respect, derived from conjugal society. If the defendant had deprived the plaintiff of his right to consortium after marriage, the law would have afforded a remedy by the award of damages. Yet the plaintiff, through the fault of the defendant, has suffered a loss of the same nature and to the same extent, except that, instead of losing what he once had, he has been prevented from getting it when he was entitled to it. This is a difference in form only, and is without substantial foundation. The injury, although effected by fraud

before marriage instead of by seduction after marriage, was the same, and why should not the remedy be the same? While the method of inflicting the injury is not the same, as it is tortious in character, has substantially the same effect, and causes damages of the same nature and to the same extent, why should damages be recovered in the one case if not in the other? Where false representations are willfully made as to a material fact for the purpose of inducing another to act upon them, and he does so act to his injury, he may recover such damages as proximately result from the deception. The representations in this case, as the jury has found, were made to promote the marriage, and they were false, as the defendant well knew. They were clearly material. The plaintiff acted upon them and was thereby injured, for he made a contract entitling him to certain rights, which he has not received and which the defendant knew he could never receive. Here are all the elements of a good cause of action founded upon fraud resulting in ¹⁸² damage. The contract induced by the fraud was of a peculiar nature, but it was in law simply a contract, conferring certain rights and imposing certain obligations. While it is not agreeable to treat a subject of sacred importance upon this narrow basis, it is necessary to do so, for our law considers marriage in no other light than as a civil contract. If the defendant had induced the plaintiff to enter into any other contract by making false statements of fact, which, if true, would have made the contract more valuable, he would have been liable for all the damages that naturally resulted. If he had induced the very marriage contract under consideration by representing to the plaintiff that he owed his proposed wife a certain sum of money, according to the common law, which entitles the husband to the personal property of his wife, he could have been compelled to make his representations good by the payment of that sum: *Montefiori v. Montefiori*, 1 W. Black. 363; *Redman v. Redman*, 1 Vern. 348; *Neville v. Wilkinson*, 1 Brown Ch. 543; *Scott v. Scott*, 1 Cox Eq. 378. These cases, as well as the more important case of *Piper v. Hoard*, 107 N. Y. 73, 1 Am. St. Rep. 789, rest upon the principle that fraudulent representations as to the pecuniary condition of one party to a proposed marriage, made by a third person to the other party thereto, in order to promote the marriage, are actionable and authorize the recovery of such damages as may be proved. In this case we have a representation that did not relate to property directly, although it involved rights in the nature of prop-

erty, but did relate to character, and so vitally that its falsity was destructive of all happiness belonging to the plaintiff by virtue of his marriage. The injury was not merely sentimental, for, as has been shown, it extended to a right which the law recognizes as of pecuniary value, and for the wrongful destruction of which it awards damages.

We think that the facts found warrant the recovery, and, after examining all the exceptions, are of the opinion that the judgment should be affirmed, with costs.

All concur, except Bartlett, J., not voting.

Judgment affirmed.

EQUITABLE ACTIONS.—THE MERE NOVELTY of a question does not justify an inference of want of jurisdiction in equity: *Lining v. Geddes*, 1 McCord Eq. 304; 16 Am. Dec. 606; *Piper v. Hoard*, 107 N. Y. 73; 1 Am. St. Rep. 789.

DAMAGES FOR FALSE REPRESENTATIONS.—Damages are entitled to be recovered in an action for false representations adequate to the injury sustained, as a general rule, if the plaintiff succeed: *Campbell v. Hillman*, 15 B. Mon. 508; 61 Am. Dec. 195; *Crater v. Binninger*, 33 N. J. L. 513; 97 Am. Dec. 737. See, also, the extended note to *Wells v. Cook*, 88 Am. Dec. 442.

SPENCER v. MYERS.

[150 NEW YORK, 269.]

INSURANCE, MARRIED WOMEN, POWER OF TO ASSIGN. A statute declaring that all policies of insurance heretofore or hereafter issued in this state upon the lives of husbands for the benefit of their wives, in pursuance of the laws of this state, shall be assignable by such a wife without the written consent of her husband authorizes such assignment, though the policy was issued in another state.

STATUTES, CONSTRUCTION OF.—A strict and literal construction is not always to be adhered to, and when a case is brought within the intention of the makers, it is within the statute, although by a technical interpretation it is not within its letter. A reasonable construction should be adopted in all cases where there is doubt or uncertainty in regard to the intention of the law-makers.

INSURANCE, ASSIGNMENT.—A stipulation in a policy of insurance against its assignment can be taken advantage of by the insurer only, and does not enable an assignor to avoid his assignment.

S. M. Lindsley, for the appellant.

William Kernan, for the respondent.

271 O'BRIEN, J. The plaintiff claimed to be entitled to the proceeds of a policy of insurance upon the life of her husband,

and the learned trial judge sustained her claim. The general term reversed the judgment, having arrived at a ²⁷² different conclusion, upon what seems to us to be a very reasonable construction of a statute which is involved. On the 28th of October, 1880, the plaintiff's husband insured his life for her benefit in the Connecticut Mutual Life Insurance Company. The policy was issued at Hartford and sent by mail to one of the agents of the company in this state, to be delivered to the husband, who had made the written application upon which it was issued. The insured died in January, 1890, with the policy in force. The plaintiff claimed the money payable under the policy, amounting to two thousand dollars, as widow of the insured and the payee named therein. The defendant also claimed it under a written assignment from the plaintiff, to which her husband, the deceased, had consented in writing executed in due form. Both parties claiming the money, the company refused to pay either, and the plaintiff brought the action against it alone. Subsequently, it paid the money into court, and the assignee was made a party. The controversy is, therefore, between the widow and her assignee, and turns upon the validity of the assignment.

It is quite true, as urged by the learned counsel for the plaintiff, that prior to the statutes (Laws 1873, c. 821; Laws 1879, c. 248) a married woman was incapable of assigning a policy of insurance for her benefit upon the life of her husband: *Miller v. Campbell*, 140 N. Y. 457; *Romaine v. Chauncey*, 129 N. Y. 574; 26 Am. St. Rep. 544; *Brick v. Campbell*, 122 N. Y. 343; *Eadie v. Slimmon*, 26 N. Y. 9; 82 Am. Dec. 395. But the obvious purpose of these statutes was to remove this disability, and it is not contended that the incapacity still exists in general, but only in particular, cases. The learned counsel for the plaintiff has devoted a considerable part of his argument to establish the proposition that the policy was issued and delivered in the state of Connecticut and not in this state, and, therefore, is a Connecticut contract. For the purposes of this case we will assume that he is correct in this contention. But we think that is not a material circumstance in the determination of the rights of the parties in a controversy between them with respect to the right to receive the money. Such a policy is ²⁷³ assignable by the wife under the laws of Connecticut: *Continental Life Ins. Co. v. Palmer*, 42 Conn. 66; 19 Am. Rep. 530; *Connecticut Mut. Life Ins. Co. v. Westervelt*, 52 Conn. 586; *Barry v. Equitable etc. Assur. Soc.*, 59 N. Y. 587. The law of the place where the con-

tract is made is sometimes important when questions concerning its validity or construction are involved. But in this case no such questions arise. The sole question is, whether it was transferable, and whether the defendant, by the assignment, has acquired the right and title to the proceeds. Nor is there any question made with respect to the sufficiency of the instrument of assignment, in form and substance, to pass the beneficial interest, if, by the laws of this state, the policy could be transferred under any circumstances. In whatever state or jurisdiction the obligation had its legal origin, it was held within this state as property, and was subject, in all respects, to the laws of this state.

The plaintiff's contention must rest entirely upon the proposition that, by the laws of this state, she was incapable of making a valid assignment, and this we understand to be the ground upon which she relies to sustain this appeal. The act of 1879 (Laws 1879, c. 248) is entitled "An act for the relief of policy holders in life insurance companies," and the first section reads as follows: "All policies of insurance heretofore or hereafter issued within the state of New York upon the lives of husbands for the benefit and use of their wives, in pursuance of the laws of the state, shall be, from and after the passage of this act, assignable by said wife with the written consent of her husband; or, in case of her death, by her legal representatives, with the written consent of her husband, to any person whomsoever, or be surrendered to the company issuing such policy, with the written consent of the husband."

That this statute has removed the disabilities of married women to assign insurance policies upon the lives of their husbands, at least to some extent, is not and of course cannot be denied. But the learned counsel for the plaintiff insists that it applies only to policies "issued within the state of New York." That is to say, that it extends no farther than ²⁷⁴ to enable them to assign policies issued by our domestic companies, and that, since the policy in question was issued by a foreign company and in another state, the disability to assign still exists and existed when the plaintiff made the assignment in question. We think that such a construction of the statute is altogether too narrow. It rests entirely upon a close adherence to the literal meaning of words and fails to take into consideration the policy and general purpose of the statute. Of course, it was passed for the purpose, as indicated by the title, of relieving married

women from the disability referred to. But what good reason is there for saying that the legislature intended, in a case where two policies were issued upon the husband's life for the benefit of the wife, one by a foreign and the other by a domestic company, that the latter was to be transferable and the former not. At the time of the passage of the act, probably one-half the policies for the benefit of married women within the state had been issued by foreign companies, and they were being constantly issued in the same proportion. It is difficult to suppose any practical or rational purpose which the legislature could have had in view, if it intended to remove the disability, to assign as to one-half these policies and retain it as to the other half. Nor can the purpose of discriminating against foreign companies and favoring our own be imputed to the law-making power with any more reason. It must be assumed that the intention of the statute was to make obligations of this character held in this state, wherever created, assignable. It is scarcely possible that the question as to which side of the boundary line of the state the policy was made or delivered could have been present to the legislative mind.

It is said that statutes changing the common law with respect to the rights and disabilities of married women must be strictly construed. That, of course, is a well-settled principle, but is hardly applicable here. That the common law has been changed by the statute there is no dispute and can be none. It is admitted that the intention was to remove the incapacity of a married woman to assign an insurance policy ²⁷⁵ issued for her benefit on the husband's life. What is claimed is, that the power thus conferred is not generally applicable to all such policies, but special, depending entirely on the place where they were issued, a circumstance that cannot be supposed to have had any influence upon the legislation or the choice of language for the expression of the thought in the legislative mind. The rule does not require courts in any case to seize upon some word or expression in a statute, and, by giving to them a narrow or literal meaning, defeat the general purpose and manifest policy intended to be promoted. It being conceded that the intention was to enable a married woman to transfer her interest in certain property, we are not required to resort to strict construction for the purpose of limiting the power to obligations created in this state when we can see that its convenience and necessity are equally applicable to contracts made elsewhere. In such a case,

we should be guided by the general and well-settled principles for the construction of statutes. They were well stated in the case of *People v. Lacombe*, 99 N. Y. 43, in this language: "In the interpretation of statutes, the great principle which is to control is the intention of the legislature in passing the same, which intention is to be ascertained from the cause or necessity of making the statute, as well as other circumstances. A strict and literal interpretation is not always to be adhered to, and where the case is brought within the intention of the makers of the statute, it is within the statute, although, by a technical interpretation, it is not within its letter. It is the spirit and purpose of a statute which are to be regarded in its interpretation; and, if these find fair expression in the statute, it should be so construed as to carry out the legislative intent, even although such construction is contrary to the literal meaning of some provisions of the statute. A reasonable construction should be adopted in all cases where there is a doubt or uncertainty in regard to the intention of the lawmakers. These general rules are upheld by numerous authorities": *People v. Davenport*, 91 N. Y. 574; *People v. Coleman*, 121 N. Y. 542; *Smith v. People*, 47 N. Y. 330.

²⁷⁶ The stipulations in the policy against an assignment do not affect the question as to the defendant's rights. Whatever force these clauses had, the company alone can take advantage of them, and as it has declined to and paid the money into court they do not concern the plaintiff.

We think that the assignment of the policy to the defendant is valid under the act of 1879, and he is entitled to the proceeds paid into court.

The judgment should be affirmed and judgment absolute rendered against the plaintiff, with costs.

All concur, except Martin, J., not sitting.

Judgment accordingly.

INSURANCE—LIFE—ASSIGNMENT BY WIFE.—The assignment by a wife of a policy of insurance on the life of her husband, which was made payable to her for her sole use, and, in case of her death before his, to be paid to her children, gives to the assignee no valid claim to the fund where the assignor died before her husband: *Connecticut etc. Ins. Co. v. Burroughs*, 34 Conn. 305; 91 Am. Dec. 725, and note. This subject is discussed in the notes to *Appeal of Elliott*, 88 Am. Dec. 533, and *New York Life Ins. Co. v. Flack*, 56 Am. Dec. 753.

STATUTES — CONSTRUCTION.—Every statute should be construed, not according to the letter, but according to the meaning.

The intention must govern, although such construction may not in all respects agree with the letter of the statute: *Rutledge v. Crawford*, 91 Cal. 526; 25 Am. St. Rep. 212; *Riggs v. Palmer*, 115 N. Y. 506; 12 Am. St. Rep. 819, and note.

WILSON v. LEWISTON MILL COMPANY.

[150 NEW YORK, 814.]

THE PLACE OF THE CONTRACT.—The place where a contract is executed is important, but does not necessarily determine the place of the law under which the contract must be performed. The place where the negotiations were had and the details of the contract arranged is also important. The place where the contract is to be executed is of equal importance in determining what must have been the intention and purpose of the parties.

CONTRACT, PLACE OF, EFFECT TO BE GIVEN TO.—THE INTENTION OF THE PARTIES to a contract, so far as it is disclosed, must control, and, where it appears, should not be overcome by considerations respecting the place where the contract was accepted or executed.

CONTRACT, PLACE OF ACCEPTANCE, WHEN DOES NOT CONTROL.—If an agent solicits a contract of sale in the state where the buyers reside, where all negotiations take place, and where the goods to be purchased were to be delivered, inspected, and paid for, the contract must be regarded as a contract of the state of the buyers' residence, though the final proposition for purchase, being delivered to the agent there, is accepted by the vendors in the state in which they reside.

STATUTE OF FRAUDS—SIGNING OF MEMORANDUM, SAME PERSON CANNOT BE AGENT OF BOTH PARTIES.—If an agent, seeking to effect a sale of goods, finally receives an oral proposition, which he transmits to his principal, by whom it is accepted, such agent cannot be deemed the agent of the purchasers so that the letters and other writings forwarded by him shall have the effect of a memorandum signed by them, and thus take the contract out of the statute of frauds.

STATUTE OF FRAUDS—MEMORANDUM, ADMISSION AS. If a vendor of goods writes a purchaser, purporting to confirm a sale of goods made by an agent of the former and stating its terms, to which the purchasers reply that it is impossible for them to take the goods mentioned in the vendor's letter because of want of funds, such reply does not admit the making of the contract of sale, and therefore does not take the case out of the statute of frauds.

Treadwell Cleveland, for the appellants.

Edward B. Hill and Sullivan & Cromwell, for the respondent.

317 **HAIGHT, J.** This action was brought to recover damages for an alleged breach of contract to purchase 1,000 bales of cotton of the plaintiffs, to be delivered to the defendant at Lewiston, Maine. The answer contained a general denial, an allegation to the effect that the alleged contract was within the

Maine statute of frauds, and that, by a custom of the cotton trade, no contract of sale arose under an offer, unless accepted on the same day that the offer was made. The plaintiffs were cotton brokers engaged in business in the city of New York; the defendant, a manufacturing corporation located at Lewiston, Maine.

On the first day of November, 1890, one Hawley, in the employ of the plaintiffs as a salesman, called at the defendant's ³¹⁸ place of business in Lewiston, Maine, and had a conversation with its president and treasurer with reference to selling cotton. In his testimony he states the conversation as follows:

"They had already bought a good deal of cotton, but that they were inclined to think well of the market and that they would be pleased to buy more cotton, provided they would not have to pay for it before February 1st; that they had bought at present all that their bank facilities allowed them to pay for, but that by February 1st they would be in position to pay for the cotton, and, if they could buy cotton the payment of which would come at that time, they would be inclined to accept an offer. I told them we could do that by arranging to sell them cotton for January shipment, and I explained somewhat, also, our mode of operation and the *modus operandi* of doing that. . . . After all that they asked me to make an offer based on contracts, and I told them I would make such an offer; that we would base it in this way, and that we would send them an offer; that I would write to the firm asking them to send them an offer based upon January contracts at a certain price, whatever that price happened to be at the time the firm made the offer, and that that, based on January contracts, would mean this, that if at the time when their reply to our offer reached the firm, if the market was higher by more than two points, we were not to be held by our offer; but that if the market should be lower by as much as six points, that is, 6-100 of a cent, they were to have the cotton at 1-16 cent of a pound less than our offer."

He then tells us that he forwarded to his firm, under date of November 1, 1890, the following letter:

"Dear Percey: . . . While at Lewiston, I also saw Mr. Barker, the Pres., and Mr. Parker, the Treas. (Eustis has resigned; make change in spinners' book), of the Lewiston Mills. They have already bought 3,500 bales, all they can pay for at present, but are bullish and would like to buy or engage a good

part of the rest of the cotton. They need about 2,500 bales. I have arranged with them that you shall make ³¹⁹ them an offer of 500 B. C. middling and 500 B. C. strict middling, all January shipment. Terms of payment cash on arrival, so as to bring payments in February. Make the offer and say in your telegram to them, 'based on January contracts,' whatever the price is on Monday, the understanding between them and me being that, if they accept your offer and January contracts are not more than two points above the figure named in your telegram, the sale is to stand, with the proviso, however, that if January contracts are six points lower when you hear from them, the price is to be 1-16 cent below your offer. I will be in Lewiston about 3 P. M. Monday, but do not wait for that, but telegraph your best offer to them as early in the day as you can. If you can offer the middling @ $10\frac{3}{8}$ and the strict middling @ $10\frac{1}{2}$, I am quite sure they will accept, and they may do so if you make a round price at $10\frac{1}{2}$ cents. I do not think they will go higher than that. But if you cannot get down to the figures I have named, make the best offer you can. This order, if we get it, can be filled from Alabama, Southwest Georgia, Mississippi, Texas, or Arkansas, at our option. Everybody I have met so far has had offers in hand of middling Texas at $10\frac{1}{4}$ and middling uplands at 10 cents to $10\frac{1}{8}$ cents. Mr. Barker, of the Lewiston Mills, handed me a telegram from Fowler, of Gadsden, Ala., offering him mid. at 10 cents, so Mr. Johnson had better hunt up another Gadsden correspondent for us and scratch Fowler off our books. This letter goes in the train leaving here 5 P. M. Saturday, and should reach you early Monday morning. Having two such large (and I will add hopeful) trades in prospect, I concluded to remain in this vicinity over Monday. If nothing happens, I will leave here for Marysville 11 o'clock Monday night. I sent you a second telegram from here announcing my purpose of remaining here and asking you to write to-day to this hotel.

"Yours, &c.,

"F. B. HAWLEY."

In answer to this letter, under date of November 3, 1890, the plaintiffs wired the defendant:

³²⁰ "We will sell 500 middling and 500 strict middling, January shipment, $10\frac{1}{2}$ landed, based on January contracts nine sixty-three."

Late in the afternoon of Monday, Hawley returned to the

defendant's, and was there shown the dispatch received from the plaintiffs. He then had a further talk with the defendant's president and treasurer, in which, as he testifies, they finally made a bid of $10\frac{3}{8}$ and told him that he could transmit it to the plaintiffs, and that they could have until Wednesday noon to reply, and that thereupon he wrote the plaintiffs as follows:

"Lewiston, Me., November 3, 1890."

"Dear Percey: . . . Here at Lewiston Mr. Barker had an offer from Blaisdell of mid. Texas at $10\frac{1}{8}$ cents. A week ago, when the contracts were some 30 points higher, Woodward & Stillman offered them mid. and strict mid., January shipment; at $10\frac{1}{2}$ cents. They would not, therefore, pay that price, nor even bid 10 7-16 cents, although I tried hard to get them to do so. They did, however, too late in the day to telegraph you, make me a bid of $10\frac{3}{8}$ cents, for 500 B. C. mid. and 500 B. C. strict mid., terms and conditions same as those mentioned in my letter of Saturday. I saw your telegram to them offering them these cottons at $10\frac{1}{2}$ cents, based on January at 9 63-100, but $10\frac{3}{8}$ cents is just $\frac{3}{4}$ cents above contracts and certainly would seem to be a very good bid, but you can judge better than I both the tone of the market and whether the already marvelous difference between contracts and spots is likely to widen. Remember this order can be filled with good staple Alabama and Mississippi as well as with Texas and Arkansas. As to-morrow is a holiday I have not wired this bid to you, as you will not be at the office, and as this letter goes to Boston at 11:30 to-night, it is sure to reach you early Wednesday morning. You are to reply to Lewiston Mills Wednesday morning. I hope you will be able to accept their bid for the 1,000 bales, and I do not think they will pay more, certainly not $10\frac{1}{2}$ cents, but if you cannot accept please so inform them by wire and name a price at ³²¹ which you will sell. It is possible that they would come up 1-16 cent if the market is not lower when they hear from you.

"Yours, &c.,

"F. B. HAWLEY."

"You understand the Lewiston Mills bid is good until noon Wednesday, November 5th; that is, you are to telegraph at or before that time."

In answer to this letter the plaintiffs wired the defendant, under date of November 5, 1890, as follows:

"Your offer accepted, $10\frac{3}{8}$, 500 middling and 500 strict middling, January shipment, delivered Lewiston."

And on the same day they wrote as follows:

New York, November 5, 1890.

"Lewiston Mills Co., Lewiston, Me., Dear Sirs: We hereby confirm our sale to you of 500 B. C. mid. landed Lewiston, January shipment, cash on arrival, at 10 $\frac{3}{8}$ per pound, and 500 B. cotton St. middling, January shipment, cash on arrival, at 10 $\frac{3}{8}$ per pound.

"Thanking you for the order,

"Yours truly,

"R. T. WILSON & CO.,

"Per Walker."

To which the defendant replied, under date of December 5th, 1890, as follows:

"R. T. Wilson & Co., New York:

"We find it will be impossible for us to take the 1,000 bales of cotton mentioned in yours of the 5th ult., as it is impossible to get the funds. Our payments for the next three months are all we can meet without taking any more burdens. The hope that the present stringency in the money market would cease soon seems certain not to be realized.

"Yours truly,

"F. W. PARKER, Treas."

At the conclusion of the plaintiffs' evidence, the defendant read in evidence the statute of frauds in Maine, together ³²² with the decision of the highest court of that state, made in the case of *Jenness v. Mt. Hope Iron Co.*, 53 Me. 20. The defendant then read in rebuttal the cases of *Horton v. McCarty*, 53 Me. 394, *Bird v. Munroe*, 66 Me. 337, 22 Am. Rep. 571, and *Williams v. Robinson*, 73 Me. 186; 40 Am. Rep. 352. The letters written by Hawley to the plaintiffs, to which we have alluded, were offered in evidence, but, under objection of the defendant, were excluded.

This is, in substance, the evidence bearing upon the questions presented for review. The defendant moved for a direction of a verdict on the ground that no contract had been proved binding upon the defendant, and upon the ground that it was in conflict with the laws of the state of Maine. This motion was granted, and an exception was taken by the plaintiffs.

It is now contended that the contract was a New York contract and not a Maine contract, and that consequently it is not controlled by the statute of frauds of Maine. Owing to the great number of cases appearing in the books bearing upon this

question, its solution is involved in some difficulty. The transactions of the business world are so numerous and of such a variety that it is difficult, if not impossible, to formulate a general rule that should control in all cases in the determination of such a question. In some cases, the place where the contract was accepted has been considered as controlling. In others, where the contract of affreightment was made, and still others, the place where the contract is to be performed: *Mactier v. Frith*, 6 Wend. 103; 21 Am. Dec. 262; *Vassar v. Camp*, 11 N. Y. 441; *Crown Point Iron Co. v. Aetna Ins. Co.*, 127 N. Y. 618; *Trevor v. Wood*, 36 N. Y. 307; 93 Am. Dec. 511; *Howard v. Daly*, 61 N. Y. 362; 19 Am. Rep. 285; *Sanders v. Pottlitzer Bros. Fruit Co.*, 144 N. Y. 209; 43 Am. St. Rep. 757; *Waldron v. Ritchings*, 9 Abb. Pr., N. S., 359; *Backman v. Jenks*, 55 Barb. 468; *Schuenfeldt v. Junkermann*, 20 Fed. Rep. 359; *Hyde v. Goodnow*, 3 N. Y. 266; *Liverpool etc. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397; *Wayne County Sav. Bank v. Low*, 81 N. Y. 566; 37 Am. Rep. 533; *Jewell v. Wright*, 30 N. Y. 259; 86 Am. Dec. 372; *Curtis v. Delaware etc. R. R. Co.*, 74 N. Y. 116; 30 Am. Rep. 271; ³²³ *Dickinson v. Edwards*, 77 N. Y. 573; 33 Am. Rep. 671; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367; 38 Am. Rep. 518; *Green v. Lewis*, 26 U. C. Q. B. 618; *In re Missouri S. S. Co.*, 42 Ch. Div. 321; *Hamlyn v. Talisker Distillery*, L. R. [1894] App. Cas. 208.

There are numerous other cases, but those above cited sufficiently call attention to the various subjects that have controlled the minds of the courts in determining like questions to that under consideration. A further discussion of them we do not deem necessary or profitable, for, as has well been stated, the question must be determined with reference to the facts and circumstances surrounding the parties in each case presented, and the intention of the parties, so far as it is disclosed, must control. The place where the contract is accepted is important. It fixes the time that the minds of the parties met and the contract consummated. It does not, however, necessarily determine the place or the law under which the contract must be executed. So, also, is the place important where the contract was talked over, and its substantial details arranged. Yet this, standing alone, may not control, for the place in which the contract is to be executed is of equal importance in determining what must have been the intention and purpose of the parties. The *lex loci solutionis* and the *lex loci contractus* must both be taken into

consideration, neither of itself being conclusive, but the two must be considered in connection with the whole contract, and the circumstances under which the parties acted in determining the question of their intent. We have in much detail already called attention to the facts. We have but briefly to refer to them again in order to make reasonably certain the intention of the parties. The plaintiffs were not merchants selling goods from their store located in the city of New York, or, as such, receiving orders from salesmen for their approval. They were dealers in cotton, which they purchased and shipped from Alabama, Mississippi, Texas, or Arkansas. The goods were not in store where they could be examined and their quality tested. This could only be done upon the arrival of the cotton at its destination. The plaintiffs ³²⁴ sent Hawley, their servant and agent, to the defendant to sell cotton. Its officers had already purchased heavily, and did not care to purchase more before February. Much discussion appears to have taken place between the defendant's president and the plaintiffs' salesman, all at the company's mills in Maine. All the details with reference to the January shipments and payments, and to the *modus operandi*, were there talked over and arranged. The defendant's officers then announced their willingness to entertain an offer for January shipments, and then the first letter was written by Hawley to his firm asking that an offer be made. An offer of 10½ cents was forwarded by the plaintiffs to the defendant's officers. Had they accepted the offer, the acceptance would have been made in the state of Maine, and then, under the plaintiffs' theory, it would have been a Maine contract. But this offer was not accepted. The plaintiffs' agent again returned to the defendant's mill, had another interview with its president and treasurer, and finally succeeded in getting a bid, which he says he was authorized to transmit to the plaintiffs, of 10⅔, and which was accepted. This bid was received in Maine by the plaintiffs' agent. All the talk and negotiation had taken place in Maine. The cotton was to be delivered to the defendant in Maine, there to be inspected and paid for; and it appears to us that there is no escape from the conclusion that it must have been within the contemplation of the parties that the contract should be considered a Maine contract and controlled by the laws of that state. This was evidently the understanding of the parties at the time of the trial. The defendant interposed in its answer the statute of frauds of that state. Both parties introduced decisions of the highest court of that state bearing upon the construction of the statute

of frauds of that state. The motion for a direction of a verdict was based upon that ground, and there is not a word or a suggestion appearing in the record on behalf of the plaintiffs claiming or intimating that it was a New York contract.

Was there any note or memorandum of the contract made and signed by the defendant's officers or agents? It is not ³²⁵ claimed that they made or signed any paper in connection with the transaction. The only thing that it is claimed that they did do was to authorize Hawley, the plaintiffs' salesman, to transmit to his firm the offer mentioned; that in writing these letters he was their agent, and that they were bound thereby. The statute, however, was to prevent frauds. Oral contracts for sales in small amounts are not fraudulent. It is only where the amount exceeds a certain fixed sum that the statute requires some written memorandum signed by the party to be bound or by his agent. The alleged contract in this case was for the purchase of goods to an amount of fifty thousand dollars. The answer denies that any contract whatever was made. Hawley, according to his own testimony, was concededly working for the interests of the plaintiffs. He says: "I was anxious to secure an order from the defendant; that was what I went there for." If he, by his oral testimony, can establish his authority to make offers of purchase on behalf of the defendant, then the statute of frauds would be of but little use or protection; for a party, or his agent, could prepare the memorandum in his own interest and then by his oral testimony establish its validity as against the opposing party. Browne on the Statute of Frauds, at section 367, says: "The statute does not require the party's own signature to the memorandum, but allows it to be signed by some other person thereunto by him lawfully authorized. . . . One rule, however, has been settled, both under the fourth and seventeenth sections, that neither party can be the other's agent to bind him by signing the memorandum."

Reed on the Statute of Frauds, at section 369, says: "One of the contracting parties cannot be the agent to make the memorandum."

In 1 Greenleaf on Evidence, section 268, it is said: "It is not necessary that the written evidence required by the statute of frauds should be comprised in a single document, nor that it should be drawn up in any particular form. It is sufficient if the contract can be plainly made out in all its terms from any writings of the party, or even from his correspondence, but ³²⁰ it must all be collected from the writings, verbal testimony not

being admissible to supply any defects or omissions in the written evidence. For the policy of the law is to prevent fraud and perjury by taking all the enumerated transactions entirely out of the reach of any verbal testimony whatever."

In *Jenness v. Mt. Hope Iron Co.*, 53 Me. 20-24, Walton, J., says: "Such a memorandum may be contained in the written correspondence of the party, but the correspondence, taken together, must establish the contract plainly in all its terms, or it will not be sufficient. It can receive no aid from parol evidence. The policy of the law is to prevent perjury by making it impossible for a party to profit by it."

In *Hinckley v. Arey*, 27 Me. 362, it was held as a general principle that the same individual cannot be the agent of both parties.

In *Strong v. Dodds*, 47 Vt. 348, it was held that the agent of the plaintiff to sell goods could not be regarded as the agent of the defendant in writing a letter ordering goods for the defendant; that the letter was not such a memorandum or note of the contract as was contemplated by the statute of frauds.

The defendant's letter of December 5th is not a recognition of the plaintiffs' contract. It does refer to the plaintiffs' communication of the "5th ult.," but it does not admit the making of the contract therein alluded to. It merely says, "We find it will be impossible for us to take the 1,000 bales of cotton mentioned in yours of the 5th ult." It then gives reasons, want of funds, etc. It nowhere concedes that an offer had been made by them and accepted by the plaintiffs.

The judgment should be affirmed with costs.

All concur (Bartlett, J., in result).

Judgment affirmed.

THE PLACE OF THE CONTRACT is the subject of the monographic note to *McGarry v. Nicklin*, ante, p. 44.

AGENCY FOR TWO PARTIES.—An agent cannot act for his principal and the adverse party in the same transaction, unless by the consent of his principal, given after a full knowledge of all the facts and circumstances: *Wildberger v. Hartford etc. Ins. Co.*, 72 Miss. 338; 48 Am. St. Rep. 558.

SALES—STATUTE OF FRAUDS—SUFFICIENCY OF MEMORANDUM.—A memorandum order for goods in which are stated all the terms of the proposed contract, signed by the buyer or his general manager, and the written acceptance of the order signed by the seller and accepted by the buyer, constitutes a sufficient memorandum to satisfy the statute of frauds: *Gerli v. Poldebard etc. Mfg. Co.*, 57 N. J. L. 432; 51 Am. St. Rep. 611, and note.

FARMERS' LOAN AND TRUST COMPANY v. NEW YORK AND NORTHERN RAILWAY COMPANY.

[150 NEW YORK, 410.]

ONE CORPORATION OWNING A MAJORITY OF THE STOCK OF ANOTHER and competing corporation, and thus having control thereof, may not divert the income from its business or refuse business which would enable it to pay interest on obligations held by the former corporation, for the purpose of obtaining control of its property at less than its value, to the injury of the minority stockholders of the debtor corporation; and if such practices are pursued and a suit is brought to foreclose the mortgage in the interest of the creditor corporation, such foreclosure may be denied.

STOCKHOLDERS, TRUST RELATIONS BETWEEN.—The law requires of a majority of the stockholders of a corporation good faith in their control and management of the corporation as regards the minority, and, in this respect, the majority stand in much the same attitude toward the minority that the directors sustain toward the stockholders.

ONE CORPORATION OWNING A MAJORITY OF THE STOCK IN ANOTHER, or whose stockholders own such majority, is guilty of fraud in managing the affairs of the second corporation for the benefit of the first. A court of equity will interfere to protect the minority stockholders.

CORPORATION, DEFAULT OF, DUE TO THE CONDUCT OF A CREDITOR CORPORATION.—He who prevents a thing being done shall not avail himself of the nonperformance he occasioned. This rule is applicable to corporations.

CORPORATIONS, RIGHT OF ONE TO PURCHASE STOCK AND BONDS OF ANOTHER FOR THE PURPOSE OF ACQUIRING CONTROL.—One corporation has no right to purchase the stock and bonds of another for the express purpose of obtaining control of the latter and of acquiring its property at less than its actual value, to the injury of a minority of its stockholders, and if, in pursuance of such a purpose, the former corporation acquires a majority of the stock and takes measures to prevent the other being able to meet its obligation, the minority stockholders are not without redress in equity.

PRACTICE—FINDINGS.—The refusal of a trial judge to find upon material issues involved in the evidence is error.

THOUGH ONE CORPORATION IS AUTHORIZED TO PURCHASE STOCK IN ANOTHER, it cannot by such purchase obtain any greater right than would have been obtained by a purchase by a natural person, and, upon acquiring a majority of the stock, it occupies toward the minority stockholders the same relation of trust and the same duty to respect the trust as must have arisen had the purchase been by a natural person.

MORTGAGE BONDS, REQUEST FOR FORECLOSURE, WHO MAY NOT MAKE.—If a mortgage to secure railway bonds requires that, upon the request of the holders of a specified amount thereof, an action may be brought for the foreclosure and sale of the mortgaged premises, a request made by persons claiming to represent that amount of bonds will not sustain an action, if such persons, though having that amount of bonds in their possession, did not own them.

MORTGAGE BONDS.—A SUIT TO FORECLOSE MORTGAGE BONDS purporting to be brought by a trustee upon the request of persons owning such bonds cannot be sustained on the ground that the trustee had authority to bring such suit without any request, if he acted upon the request made instead of upon his own judgment and discretion, and the persons making the request were not owners of the bonds which they professed to represent.

James C. Carter and Simon Sterne, for the appellants.

Ashbel Greene, David McClure, and Thomas Thacher, for the respondents.

423 MARTIN, J. That the New York Central and Hudson River Railroad Company purchased a majority of the second mortgage bonds and a majority of the stock of the New York and Northern Railway Company for the sole purpose of obtaining control of the property of the latter is clearly established by the proof contained in the record. Indeed, such was the avowed purpose of its purchase. The record renders it equally clear that the New York Central and Hudson River Railroad Company was the actual and beneficial owner of such bonds and stock for several months before the commencement of this action. They were retained in the hands of Drexel, Morgan & Co., not as owners or holders in their own right, but as agents or naked trustees for the New York Central and Hudson River railroad, and were clearly subject to the order and control of the latter. Moreover, the request that Drexel, Morgan & Co. made to the plaintiff to commence this action was not only based upon the bonds owned by the New York Central and Hudson River Railroad Company and others it had contracted to purchase, but the sole purpose of that request was to procure a foreclosure and thus enable the New York Central and Hudson River Railroad Company to acquire control of the property and franchises of the New York and Northern Railway Company for its own benefit, as set forth in the circular letter sent to the stockholders of the New York Central and Hudson River Railroad Company. The president of the latter company himself testified that that was the object and purpose which induced the sending of the notice requesting the commencement of this action. The notice given by the New York Central and Hudson River Railroad Company to its stockholders states the fact that on March 18, 1893, agreements had already been made in respect to the purchase of a controlling interest in the New York and Northern Railway Company, subject to the approval therein asked for. The letter of Drexel, Morgan & Co. to the treasurer of the New

York Central and Hudson River Railroad Company, dated April 5, 1893, shows that the majority of the stock and bonds mentioned therein was held by them, subject to the order of the ⁴²⁴ New York Central and Hudson River Railroad Company, and that they had received the note of that company in payment therefor. Thus, it is obvious that this action was procured to be commenced by the New York Central and Hudson River Railroad Company, while it owned a majority of the stock and bonds of the New York and Northern Railway Company, for the sole and avowed purpose of obtaining control of its property and business, regardless of the rights of the minority stockholders or the owners of the remainder of the bonds. The appellants contend that the New York Central and Hudson River Railroad Company, as such majority stockholder, also acquired the entire control of the affairs of the New York and Northern Railway Company through its board of directors, who were willing to serve the interests of those owning a majority of the stock, as was indicated by the resignation of three of the directors, the appointment of others in their places, by the resignation of two officers who occupied important positions in the affairs of that company, and by the appointment of two officers in their places who were in the employ of the New York Central and Hudson River Railroad Company to discharge the duties of such officers, and compensated for their services by the New York Central and Hudson River Railroad Company. While the proof upon that question was not, perhaps, conclusive, yet the circumstances developed by the evidence plainly indicate that after it became the owner of a majority of the stock and bonds, the New York Central and Hudson River Railroad Company dictated and governed the action of the board of directors and controlled the management of the affairs of the New York and Northern Railway Company.

The facts already referred to are strong proof that the New York Central and Hudson River Railroad Company was in the control of the affairs of the New York and Northern Railway Company. It is hardly to be supposed that a board of directors who was not under the control of another corporation would appoint three of the friends of the president of that corporation as directors of the company, and place the officers ⁴²⁵ of that company in control of its financial affairs, especially when it was the owner of competing lines of railroad. The clear and legitimate inference to be drawn from the circumstances proved in

this case is, that after the New York Central and Hudson River Railroad Company purchased a majority of the stock and bonds of the New York and Northern Railway Company, it controlled its officers and directors as fully and completely as though they had been elected by its votes. All the facts and circumstances, so far as the defendants were permitted to prove them, tend to show that such was the situation. Indeed, it is a matter of common knowledge that where the ownership of a majority of the stock of such a corporation changes, the board usually changes, unless its members are already in harmony with the policy of the purchasers.

On the trial, the appellants sought to prove that after the New York Central and Hudson River Railroad Company became the owner of such stock and bonds, and while its officers were in substantial control of the New York and Northern Railway Company, they declined to accept traffic from other roads that would have produced a fund with which to pay the interest due on the bonds in question; that the income of the road, which should have been employed to pay such interest, was used for other and improper purposes; and that such action caused the inability of the New York and Northern Railway Company to pay the interest and thus cure its default. This evidence was rejected as immaterial, and the appellants duly excepted.

In determining the correctness of the rulings made by the trial court, it becomes necessary to determine, incidentally, whether a corporation, purchasing a majority of the stock of another competing corporation, may thus obtain control of its affairs, cause it to divert the income from its business, or to refuse business which would enable it to pay the interest for which it was in default, and then institute an action in equity to enforce its obligations, for the purpose of obtaining control of its property at less than its value, to the injury of the ⁴²⁶ minority stockholders, and they have no remedy. Or, in other words, whether a court of equity, with those facts established, would lend its aid to such a stockholder by enforcing the mortgage and decreeing a foreclosure and sale of the mortgaged premises, at its request, in its behalf, and to accomplish such a purpose. If it would, then the rulings of the trial court were proper; if not, then the appellants were entitled to prove those facts, and it was error to reject the evidence.

In *Gamble v. Queens etc. Co.*, 123 N. Y. 91, in discussing a similar question, Judge Peckham, in effect, said that, although

it is not every question of mere administration or of policy upon which there might be a difference of opinion that would justify the minority in coming into a court of equity to obtain relief, yet, where the action of a majority of the stockholders of a corporation is fraudulent or oppressive to the minority shareholders, an action may be maintained by the latter, where the contemplated action of the majority is so far opposed to the interests of the corporation as to lead to a clear inference that such action is with an intent to serve some outside purpose, regardless of the consequences to the company and inconsistent with its interests.

In *Pondir v. New York etc. R. R. Co.*, 72 Hun, 385, 389, where the Erie Railroad Company, through the action of the Buffalo, Bradford, and Pittsburgh Railroad Company, whose directors were elected and controlled by the Erie Company, without consideration, obtained the property of the latter corporation and so arranged its affairs as to render all the shares of its stock, other than those held by the Erie Company, valueless, it was held that a stockholder of the Buffalo, Bradford, and Pittsburgh Railroad Company might maintain an action to redress the wrong done to his company. In that case, Mr. Justice Follett said: "This was a fraud on the Buffalo, Bradford, and Pittsburgh Railroad Company and its shareholders. Such frauds are not uncommon in the management of corporations, and, when they are exposed, should be condemned by the courts and a heavy hand laid upon all who participate in them."

⁴²⁷ In *Barr v. New York etc. R. R. Co.*, 96 N. Y. 444, where the officers of another corporation had leased the property of the first corporation, controlled a majority of its stock, and conspired to compel the minority to sell its stock by refusing to pay the rent due, it was held that a court of equity, on the application of the minority, would compel the payment of the rent, and that where the majority of the stockholders of a corporation are illegally pursuing a course which is in violation of the rights of the other stockholders, an action to obtain equitable relief may be maintained by an aggrieved stockholder.

Sage v. Culver, 147 N. Y. 241, is to the effect that when it can be fairly gathered that the officers and directors of a corporation have made use of relations of trust and confidence to secure or promote some selfish interest, it is enough to set a court of equity in motion, and to require them to explain such a transaction which there is a presumption against in equity.

In *Meyer v. Staten Island Ry. Co.*, 7 N. Y. St. Rep. 245, it was held that a majority of the stockholders of a corporation would not be permitted to sanction a transaction which is the outcome of a scheme, dishonest or fraudulent in its inception, and that the minority stockholders have rights which, under such circumstances, must be recognized; that the majority may legally control the company's business, but, in assuming such control, they take upon themselves the correlative duty of diligence and good faith, and that they cannot manipulate the company's business in their own interest to the injury of the minority stockholders.

In *Ervin v. Oregon Ry. & Nav. Co.*, 27 Fed. Rep. 630, it was held that when a number of stockholders combine to constitute themselves a majority, to control the corporation as they see fit, they become, for all practical purposes, the corporation itself, and assume the trust relation of the corporation toward its stockholders, and, if they seek to make profit out of it at the expense of those whose rights are the same as their own, they are unfaithful to the relation they have ⁴²⁸ assumed, and guilty, at least, of constructive fraud which a court of equity will remedy.

In *Wright v. Oroville etc. Co.*, 40 Cal. 20, it was, in substance, held that in dealing with the relations between a corporation and its officers on one hand, and the stockholders upon the other, in the management of the corporate affairs, courts of equity will look beyond the mere observance of the forms of law, and inquire if the authority has been in good faith exercised to promote the interests of the stockholders; and that a court of equity will, at the instance of a stockholder, control the corporation and its officers, and restrain them from doing acts even within the scope of the corporate authority, if such acts would amount to a breach of the trust upon which the authority had been conferred.

In *Meeker v. Winthrop Iron Co.*, 17 Fed. Rep. 48, it was held that a majority of the holders of the capital stock of a corporation could not, by their votes in a stockholders' meeting, lawfully authorize its officers to lease its property to themselves, or to another corporation formed for the purpose and exclusively owned by them, unless such lease was made in good faith, and supported by an adequate consideration; and that in a suit, properly prosecuted, to set aside such a contract, the burden of proof, showing fairness and adequacy, is upon the party or parties claiming thereunder.

In *Goodin v. Cincinnati etc. Canal Co.*, 18 Ohio St. 169, 98

Am. Dec. 95, a railroad company purchased a majority of the shares of stock in a canal company, elected for the latter a board of directors who were in the interest of the railroad company, and then, with the assent of such board, appropriated the entire canal and property of the canal company as a railroad track, paying therefor a price or compensation which was agreed upon by the directors of the two companies, but which was far below the actual value of the property. Under those circumstances, the court held that, although the stockholders and creditors of the canal company could not, after the road had been completed, reclaim the property, or enjoin its use, yet they were not concluded by such agreement, ⁴²⁹ as to the price of the property, but might compel the railroad company to account for its additional value.

In *Jackson v. Ludeling*, 21 Wall. 616, it was held that the managers and officers of a company where capital is contributed in shares are, in a very legitimate sense, trustees, alike for its stockholders and its creditors, though they may not be trustees technically and in form. They accordingly have no right to enter into or participate in any combination, the object of which is to divest the company of its property and obtain it for themselves at a sacrifice; they have no right to seek their own profit at the expense of the company, its stockholders, or even its bondholders. In case of embarrassment to the company, and any necessity to sell the estates of the company, it is their duty, to the extent of their power, to secure for all those whose interests are in their charge the highest possible price for the property which can be obtained.

In *Menier v. Hooper's Tel. Works*, L. R. 9 Ch. App. 350, it was held that where a majority of a company proposed to benefit themselves at the expense of the minority, the court might interfere to protect the minority, and that, in such a case, the bill is rightly filed by one shareholder on behalf of the others and against the company.

In *Gregory v. Patchett*, 33 Beav. 595, where the only available property of a company was transferred to two shareholders in lieu of their shares, and the company was thereby practically put to an end, and this was sanctioned by a majority of the shareholders at a general meeting, it was held that the majority could not bind the minority in such a transaction; that where measures were adopted which were plainly beyond the powers of the company, and inconsistent with the objects for which the

company was constituted, the court, at the instance of the minority, would interpose to prevent the performance of such an act.

While the opinions in the cases cited are instructive and have an important bearing upon the question under consideration, still, within the limits of this opinion, we have found it impracticable to quote from the language of the courts in those cases.

430 "The law requires of the majority of the stockholders the utmost good faith in their control and management of the corporation as regards the minority, and in this respect the majority stand in much the same attitude toward the minority that the directors sustain toward all the stockholders. Thus, where the majority are interested in another corporation, and the two corporations have contracts between them, it is fraudulent for that majority to manage the affairs of the first corporation for the benefit of the second. A court of equity will intervene and protect the minority upon an application by the latter": 2 Cook on Stocks and Stockholders, 3d ed. sec. 662, p. 945. The same principle is stated in 1 Morawetz on Private Corporations, 2d ed., sec. 529; 1 Beach on Private Corporations, sec. 70; 2 Bigelow on Frauds, sec. 645, and Beach on Modern Equity Jurisprudence, secs. 132, 686.

Hackettstown Nat. Bank v. Yuengling Brewing Co., 74 Fed. Rep. 110, is to the effect that every delegation of power implies that it will be honestly exercised, and in that case it was held that the evidence offered upon the trial presented a question of fact for the jury, whether a consent, given in pursuance of a resolution passed by a majority of the bondholders of a corporation, extending the time of payment of the principal and interest of its bonds, was given in good faith in the common interest of all, or amounted to an unwarranted exercise of the power of the majority because given in the interest of one bondholder, with a view of enabling him to compel the minority bondholders to sell their bonds on such terms as he might dictate.

While the question in some of the cases cited arose between stockholders and the directors and officers of a company who as such held a position of trust as to the former, still, where, as in this case, a majority of the stock is owned by a corporation or a combination of individuals, and it assumes the control of another company's business and affairs through its control of the officers and directors of the corporation, it would seem that, for all practical purposes, it becomes the corporation of which it

holds a majority of stock, and assumes the ⁴³¹ same trust relation toward the minority stockholders that a corporation itself usually bears to its stockholders, and, therefore, under such circumstances, the rule stated in *Sage v. Culver*, 147 N. Y. 241, and other similar cases applies to majority stockholders who control the affairs of the company, as well as to its directors or officers.

It is a controlling maxim that a court of equity will not aid parties in the perpetration or consummation of a fraud, nor give any assistance whereby either of the parties connected with the betrayal of a trust can derive any advantage therefrom: *Farley v. St. Paul etc. Ry. Co.*, 4 McCrary, 138. "It is a sound principle, that he who prevents a thing being done shall not avail himself of the nonperformance he has occasioned": *Fleming v. Gilbert*, 3 Johns. 528, 531; *United States v. Peck*, 102 U. S. 64; *Dolan v. Rodgers*, 149 N. Y. 491.

The principle of these authorities renders it quite obvious that a corporation, purchasing a majority of the stock of another competing one, cannot obtain control of its affairs, divert the income of its business, refuse business which would enable the defaulting company to pay its interest, and then institute an action in equity to enforce its obligations, for the avowed purpose of obtaining entire control of its property, to the injury of the minority stockholders. Such a course of action is clearly opposed to the true interests of the corporation itself, plainly discloses that one thus acting was not influenced by any honest desire to secure such interests, but that its action was to serve an outside purpose, regardless of consequences to the debtor company, and in a manner inconsistent with its interest and the interest of its minority stockholders.

The respondents, however, contend that the doctrine of the authorities cited is not controlling in this case, but that the New York Central and Hudson River Railroad Company had a right to purchase a majority of the stock and bonds of the New York and Northern Railway Company, for the express purpose of obtaining control of the affairs of the latter for its own use and benefit, and to thus acquire its property at less ⁴³² than its actual value, to the injury of the minority stockholders, and that such stockholders had no remedy in law or in equity to protect themselves against such action of the majority stockholders, although it diverted the income which should have been applied to the payment of such interest to other and improper pur-

poses, and refused business which would have enabled the defaulting company to pay its interest. In other words, the claim of the respondents is, and the general term in effect held, that the purpose for which the New York Central and Hudson River Railroad Company obtained a majority of the stock and bonds of the New York and Northern Railway Company is entirely immaterial, and that, notwithstanding the existence of such a purpose, a court of equity will aid them in enforcing the mortgage. To sustain this contention they cite *Morris v. Tuthill*, 72 N. Y. 575; *Phelps v. Nowlen*, 72 N. Y. 39; 28 Am. Rep. 93; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178; 38 Am. Rep. 407; *Ramsey v. Erie Ry. Co.*, 8 Abb. Pr., N. S., 174; *Clinton v. Myers*, 46 N. Y. 511; 7 Am. Rep. 373; *Simpson v. Dall*, 3 Wall. 476; *Oglesby v. Attrill*, 105 U. S. 605; *Adler v. Fenton*, 24 How. 407; *Beveridge v. New York etc. Ry. Co.*, 112 N. Y. 1.

In *Morris v. Tuthill*, 72 N. Y. 575, the action was to foreclose a mortgage brought by an assignee. There was no question or principle of trust involved in that case. The plaintiff owed the defendant no duty, and, hence, it was held that, under such circumstances, the plaintiff had a right to maintain an action for the foreclosure of the mortgage, although he took title to it from motives of malice, and the assignor assigned the mortgage to him from a like motive. That that case was correctly decided we have no doubt, but it is clearly distinguishable in principle from the case at bar, and has no bearing whatever upon the question under consideration.

In *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93, it was held that a party was not liable for the consequences of an act done upon his own land, lawful in itself, which did not infringe upon any lawful right of another, simply because he was influenced in doing it by wrong and malicious motives, and that courts would not ⁴³³ inquire into the motives actuating a person in the enforcement of a legal right. How the doctrine of that case is applicable to the question involved in this it is difficult to perceive. In that case the party simply exercised a lawful right, and the court held that no liability arose from his having done so. There the plaintiff owed the defendant no duty and sustained no relation of trust toward him, and, hence, it is clearly distinguishable from the case at bar. The same may be said of *Chenango Bridge Co. v. Paige*, 83 N. Y. 178, 38 Am. Rep. 407, *Ramsey v. Erie Ry. Co.*, 8 Abb. Pr., N. S., 174, *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373, *Simpson v. Dall*, 3 Wall. 476,

Oglesby v. Attrill, 105 U. S. 605, and Adler v. Fenton, 24 How. 407. We do not think these cases in any way aid the respondents.

In *Beveridge v. New York etc. Ry. Co.*, 112 N. Y. 1, this court held that all the powers conferred upon a corporation, unless otherwise expressly prescribed, must be exercised by its directors, who are constituted by law the agency for that purpose; that the consent or ratification by its stockholders was unnecessary, unless required by statute or its by-laws, and, therefore, that contracts which a corporation may legitimately make may be made by its board of directors, and, in the absence of fraud or collusion on the part of the directors, they are binding upon the corporation; that an appeal to equity on the part of the stockholders to be relieved from the acts of the directors, where they were within their powers and apparently uninfluenced by corrupt motives or personal interests adverse to those of the stockholders, should at least be justified by some showing that the acts were improper within the belief of a fair proportion of the stockholders. The principle enunciated and the decision made in that case are undoubtedly correct. But the question as to the right of a majority of the stockholders of a corporation to enforce its obligations as against the minority stockholders, to their injury, by reason of a default caused by the wrongful act or omission of the majority, was not considered or in any way involved. It, however, seems to recognize the principle that where there is fraud or collusion, corrupt motives, or personal interest adverse to the stockholders, another rule would apply.⁴³⁴ As we have already seen, there are circumstances under which the majority stockholders occupy substantially the same relation of trust toward the minority as the board of directors would occupy toward the stockholders it represents, and, hence, where there are corrupt motives, personal interest, or fraud, the case cited is an authority to sustain the conclusion which we have already reached.

That any person or corporation authorized to do so might have purchased the bonds of the New York and Northern Railway Company, and have rigorously enforced them by a sale of its property, there can be no doubt. They might also have purchased the stock of the company and thus have become the owners of both, and, while such owners might have enforced the liability of the company upon its bonds, so long as they acted in good faith and their purpose was proper; but when the

New York Central and Hudson River Railroad Company purchased the stock and bonds in question, thus obtaining a controlling interest in the affairs of the New York and Northern Railway Company for the avowed purpose of destroying it, to serve a purpose entirely outside of that for which it was organized, and in hostility to it, it becomes clear that as such stockholder, it owed a duty to the minority stockholders, that the law implied a quasi trust upon its part, and that a court of equity will not aid it in the destruction of that corporation and a confiscation of its property, although it held a majority of its stock and the required amount of its bonds.

Hence, we are of the opinion that the court erred in rejecting as immaterial evidence offered by the appellants to show that, after the New York Central and Hudson River Railroad Company became the owner of a majority of the stock and bonds of the New York and Northern Railway Company, and while its officers were in control of the latter corporation and its affairs, it declined to accept traffic from other roads which would have produced a fund with which to pay the interest that was due; that the income of the road, which should have been employed to pay such interest, was used for ⁴³⁵ other and improper purposes, and that such action upon the part of the majority stockholder occasioned the inability of the company to pay the interest and cure the default. To the rejection of this evidence the defendants excepted. We think many of these rulings were erroneous, and that the appellants had the right to make the proof offered, so far as it related to the transaction of the business of the New York and Northern Railway Company during the time the New York Central and Hudson River Railroad Company owned a majority of its stock and controlled its affairs, and for the error in those rulings the judgment should be reversed.

On the trial, the learned trial judge refused to find various facts, upon the ground that they were immaterial. It is manifest from an examination of the appellants' requests to find, and the rulings of the court thereon, that it refused to find many facts that were material to sustain the appellants' defense, and which were established by the undisputed evidence in the case. This, we think, constituted error, as it is the duty of a trial judge to find upon every material question submitted to him and involved in the evidence: *Callanan v. Gilman*, 107 N. Y. 360, 372.

The respondents claim that, by virtue of the provisions of sec-

tion forty of the stock corporation law, the New York Central and Hudson River Railroad Company had the right to acquire the stock of the New York and Northern Railway Company. We do not deem it necessary to either discuss or decide that question, for if it be admitted that the New York Central and Hudson River Railroad Company was authorized to purchase such stock and bonds, still nothing will be found in the statute which authorizes it to employ them for the purpose of destroying the property of the New York and Northern Railway Company, to the injury of its minority stockholders. If we are correct in our conclusion that a corporation cannot acquire the majority of the stock of another corporation, obtain control of its affairs, divert the income of its business, refuse business which would have enabled the defaulting company to pay its interest, and then institute an action ⁴³⁶ in equity to enforce its obligations against such company, with the avowed purpose of obtaining control of its property at less than its value to the injury of the minority stockholders, then it follows that this question is entirely immaterial. If the New York Central and Hudson River Railroad Company had a right to purchase the stock and bonds of the New York and Northern Railway Company, it obtained no better title and secured no greater right than any other stockholder would have acquired under a similar purchase. The right to purchase, even if given by statute, conferred upon the purchaser no authority to employ the stock and bonds for purposes condemned by the principles of equity.

The appellants also contend that the plaintiff had no authority or right to bring this action in the form in which it was brought, as it had not received a valid request to do so from a sufficient number of bondholders. The mortgage provides: "In the event of any of the defaults mentioned in the next preceding article, the party of the second part may, and upon the written request of the holders of two million dollars in amount of said bonds then outstanding and unpaid or unredeemed, the party of the second part shall, apply to any court having proper jurisdiction in the premises for a foreclosure and sale of the mortgaged premises." The plaintiff, in its complaint, alleged that it had received a written request, signed by the holders of more than two millions in amount of said bonds outstanding and unpaid or unredeemed, requesting it to bring proceedings for the foreclosure and sale of the property and premises covered by this mortgage. The only request which was made to the trustee

was that made by Drexel, Morgan & Co., who stated therein that they were the holders of one million seven hundred thousand dollars, and represented the owners in eight hundred and ninety-six thousand dollars of such bonds. It was upon this request alone that the action was instituted. The proof tends to show that, although bonds to the amount of one million seven hundred thousand dollars were in their hands, yet that they were not, in fact, the owners of such bonds, but they belonged to the New York Central and Hudson River Railroad Company. The ⁴³⁷ proof also tends to show that the other bonds which they claimed to represent were not owned by Drexel, Morgan & Co., but were bonds which the New York Central and Hudson River Railroad Company had made a contract to purchase. Thus we have a request for foreclosure by a firm who, in fact, was not the owner of any portion of the bonds upon which the request was based. It is true that one million seven hundred thousand dollars of the bonds were in their possession, but it clearly appears from the evidence they had been purchased and paid for by the New York Central and Hudson River Railroad Company, and were held by them subject to its order. It is also true that the contract with the New York Central and Hudson River Railroad Company for the purchase of the other bonds referred to in such request contained a provision that they might be used by Drexel, Morgan & Co. for the purpose of reorganizing the New York and Northern Railway Company. Without any lengthy discussion of this question, it would seem that the purpose of this provision in the mortgage was to prevent the trustee from being compelled to foreclose the mortgage, except upon the request of the owners of two million dollars in amount of the bonds. If such was its purpose, and such is a proper construction of that provision of the mortgage, then manifestly, the request was insufficient, as it was not thus made.

It is, however, contended that inasmuch as the plaintiff had the right of its own motion or in its discretion to commence this action without any request whatever, it follows that the action, having been commenced, was properly begun and the appellants' contention cannot be sustained. The mortgage provides for two cases, in either of which the action might be properly commenced. The trustee might act upon its own motion and exercise its own judgment and discretion upon the question whether it was for the interest of the bondholders and all concerned to have the mortgage foreclosed, and, if it so determined,

it might institute an action for its foreclosure, although no request whatever was made. On the other hand, it might be required to institute such an action upon the written ⁴³⁸ request of the owners of two million dollars of the bonds, notwithstanding the fact that it might be opposed to such a course and it was contrary to its judgment. One provision is permissive only while the other is mandatory. It does not necessarily follow, because the plaintiff might have instituted this action in the exercise of its discretion, but was induced to bring it, relying upon a request that was invalid, that it may now be upheld upon the ground that it possessed a discretion which it never exercised. The action was brought upon the theory that the holders of two million dollars of the bonds had made a proper written request upon the plaintiff to commence it. Such having been the original character of the action, as indicated by the complaint, can it now be said that, although no proper request was made, yet the action may be maintained because the plaintiff might, in its discretion, have determined to bring the action, although there had been no request? It would seem that, under the provision of the mortgage permitting the plaintiff to bring this action, to some extent at least, the question whether or not it would foreclose the mortgage and declare the whole amount due was one of judgment and discretion, to be exercised by it before the commencement of the action. Not having voluntarily sought to thus enforce the obligations of the company, but having had served upon it a request which purported to be signed by the holders of two million dollars of the bonds, and having commenced the action in pursuance of that request, we regard it as at least doubtful if it can now be maintained upon the ground that it was voluntarily commenced by the plaintiff if the request was invalid. But it is, perhaps, unnecessary to determine that question.

There are several other questions raised by the appellants, but as the judgment must be reversed for the errors already pointed out, it is unnecessary to discuss or determine them.

This consideration of the questions involved in the case has led us to the conclusions that the learned trial judge erred: 1. In refusing to find material facts upon the ground that they were immaterial; ⁴³⁹ 2. In declining to find other facts which were material and established by the uncontradicted evidence; 3. In rejecting, as immaterial, evidence offered by the appellants tending to show that the New York Central and Hudson River Rail-

road Company, while in control of the affairs of the New York and Northern Railway Company, declined to accept traffic from other roads which would have produced a fund with which to pay the interest due upon the bonds in suit; and, 4. In rejecting as immaterial, evidence to show that the income of the road, which should have been employed to pay the interest on such bonds, was used for other and improper purposes.

We think the judgment should be reversed, and a new trial granted, with costs to abide the event.

All concur, except Andrews, C. J., and Gray, J., not voting.

Judgment reversed.

CORPORATIONS—POWER TO ACQUIRE STOCK IN ANOTHER CORPORATION.—A contract for the purchase by one corporation of the stock of another for the purpose of enabling it to control and manage the business of the latter, though both corporations are engaged in a similar business, is against public policy, and void: *Marble Co. v. Harvey*, 92 Tenn. 115; 36 Am. St. Rep. 71. See, also, the extended note to *Denny Hotel Co. v. Schram*, 36 Am. St. Rep. 134.

CORPORATIONS—MORTGAGE BONDS—FORECLOSURE.—The holder of a bond secured by a trust mortgage may maintain an action to foreclose such mortgage if the trustee refuses or has become incompetent to act: *Ettlinger v. Persian Rug etc. Co.*, 142 N. Y. 189; 40 Am. St. Rep. 587, and note.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

GOODHART v. PENNSYLVANIA RAILROAD COMPANY.

[177 PENNSYLVANIA STATE, 1.]

DAMAGES FOR PERSONAL INJURY—EVIDENCE.—In an action against a railroad company to recover for personal injury, evidence of cruelty, rudeness and incivility on the part of the company's physician in examining the plaintiff to ascertain the extent of his injury and the company's liability, is immaterial and irrelevant. The physician is alone liable for his cruelty.

DAMAGES FOR PERSONAL INJURY consist of the expenses to which the injured person is subjected by reason of the injury complained of, the inconvenience and suffering naturally resulting from it, and the loss of earning power, if any, and whether temporary or permanent, consequent upon the character of the injury.

DAMAGES FOR PERSONAL INJURY.—Expenses for which a person may recover as an element of damages for personal injury must be such as have been actually paid, or such as, in the judgment of the jury, are reasonably necessary to be incurred, and he cannot recover for the nursing and attendance of the members of his own household, unless they are hired servants.

DAMAGES FOR PERSONAL INJURY.—PAIN AND SUFFERING as elements of damages for personal injury are not capable of being exactly measured by an equivalent in money and have no market price. The question in any given case is not what it would cost to hire some one to undergo the measure of pain alleged to have been suffered, but what under all the circumstances, should be allowed plaintiff in addition to the other items of damage to which he is entitled, in consideration of the suffering necessarily endured.

DAMAGES FOR PERSONAL INJURY.—PAIN AND SUFFERING.—INSTRUCTIONS which leave the jury to regard pain and suffering as an independent item of damages for personal injury, to be compensated by a sum of money that may be regarded as a pecuniary equivalent are not only inexact but erroneous.

DAMAGES FOR PERSONAL INJURY.—COMPENSATION for pain and suffering is not to be understood as meaning price, or value, but as describing an allowance looking toward recompense for, or made because of, the suffering consequent upon the injury.

DAMAGES FOR PERSONAL INJURY.—In computing damages sustained by an injured person, the calculation may include not only loss of time and loss of earning power, but, in proper cases, also an allowance because of suffering.

DAMAGES FOR PERSONAL INJURY.—LOSS OF EARNING POWER as an element of damages for personal injury involves an inquiry into the value of the labor, physical or intellectual, of the person injured, before the accident happened to him, and his ability to earn money by labor, physical or intellectual, after the injury is received, but profits derived from an investment or the management of a business enterprise are not earnings to be considered.

DAMAGES FOR PERSONAL INJURY.—EARNING POWER—PROFITS OF BUSINESS.—Evidence of business profits of a person injured, while showing the possession of business qualities, does not fix their value or show earning power; and the admission of evidence for such purpose is error, nor can the value of such earning power be fixed by expert evidence. The basis upon which this calculation must rest is not the possibility, as fixed by expert evidence, but the cold, commonplace facts as proved by those who know them.

DAMAGES FOR PERSONAL INJURY.—EARNING POWER—ELEMENTS OF.—In an action to recover for personal injury, the jury, in settling the question of the plaintiff's earning power, should consider, not only his past earnings, or the fair value of services such as he was able to render, but also his age, state of health, business habits, and manner of living.

DAMAGES—ANTICIPATION OF FUTURE PAYMENTS.—If future payments are to be anticipated and capitalized in a verdict, the plaintiff is entitled only to their present worth.

R. C. and G. W. Elder, for the appellant.

J. M. and D. W. Woods, for the appellee.

¹² WILLIAMS, J. The plaintiff received the injury complained of while a passenger on one of the trains of the defendant company. The train was being moved in two sections. The first section, on which the plaintiff was riding, had stopped to repair a break in one of its airpipes, and had sent its flagman back to warn approaching trains. The second section, having been misled by the signal displayed by an operator at a signal tower, came along at full speed, and its engineer failing to notice the flagman and his efforts to warn him of the position of the first section, the ¹³ accident resulted, and the plaintiff was thrown from his seat and injured. At the trial, but two questions were raised: 1. Was the accident, and the consequent injury to the plaintiff, due to the negligence of the employes of

the defendant? If so, then 2. What was the proper measure of damages to be applied by the jury? It does not appear that any contest was made over the first of these questions. The only real ground for controversy was over the measure of damages, and the evidence should have been confined to the issues of fact that related to this controversy. The evidence in regard to the examination made by Dr. Morton was not directed to the extent of the plaintiff's injuries, but to the severity of the examination. Its evident object was to persuade the jury that the character of the examination and the conduct of Dr. Morton and his assistants were unnecessarily harsh and annoying, and were proper subjects to be considered in assessing the plaintiff's damages. But it must be borne in mind that a claim was being made against the railroad company for damages based upon an alleged injury received in consequence of the accident already referred to. In order to determine intelligently the extent of its liability, it was important for the defendant to know the nature of the injury, and the extent to which the plaintiff was affected by it. This could only be known as the result of a medical examination made by competent and experienced physicians. Dr. Morton and his assistants were selected as proper persons to make the examination, and advise the defendant company of their estimate of the plaintiff's condition and its consequent liability. If, in the discharge of their professional duty to their employer, they went beyond what was reasonably necessary, and employed methods and tests that were cruel, and such as the judgment of the medical profession does not approve, and thereby inflicted injury on the plaintiff, they are liable for their own trespass, whether committed with malice or through ignorance. But rudeness and incivility in the manner in which the examination was conducted, if rudeness or incivility can be affirmed of anything that was said or done in that connection, could throw no light on the extent of the injury actually suffered by the plaintiff, and the evidence referred to in the first and second assignments of error should have been rejected.

The remaining sixteen assignments of error relate more or less ¹⁴ directly to the single question the case presented, viz.: the measure of damages, and can be most conveniently considered together. Damages for a personal injury consist of three principal items: 1. The expenses to which the injured person is subjected by reason of the injury complained of; 2. The inconvenience and suffering naturally resulting from it; 3. The

loss of earning power, if any, and whether temporary or permanent, consequent upon the character of the injury: *Owens v. People's etc. Ry. Co.*, 155 Pa. St. 334. The expenses for which a plaintiff may recover must be such as have been actually paid, or such as, in the judgment of the jury, are reasonably necessary to be incurred. The plaintiff cannot recover for the nursing and attendance of the members of his own household, unless they are hired servants. The care of his wife and minor children in ministering to his needs involves the performance of the ordinary offices of affection, which is their duty; but it involves no legal liability on his part, and therefore affords no basis for a claim against a defendant for expenses incurred. A man may hire his own adult children to work for him in the same manner and with same effect that he may hire other persons, but in the absence of an express contract the law will not presume one, so long as the family relation continues. Pain and suffering are not capable of being exactly measured by an equivalent in money, and we have repeatedly said that they have no market price. The question in any given case is not what it would cost to hire some one to undergo the measure of pain alleged to have been suffered by the plaintiff, but what, under all the circumstances, should be allowed the plaintiff in addition to the other items of damage to which he is entitled, in consideration of suffering necessarily endured: *Baker v. Pennsylvania Co.*, 142 Pa. St. 503. This should not be estimated by a sentimental or fanciful standard, but in a reasonable manner, as it is wholly additional to the pecuniary compensation afforded by the first and third items that enter into the amount of the verdict in such cases. By way of illustration, let us assume that a plaintiff has been wholly disabled from labor for a period of twenty days in consequence of an injury resulting from the negligence of another. This lost time is capable of exact compensation. It will require so much money as the injured man might have reasonably earned in the same time by the pursuit of his ordinary calling.¹⁵ But let us further assume that these days of enforced idleness have been days of severe bodily suffering. The question then presented for the consideration of the jury would be, What is it reasonable to add to the value of the lost time in view of the fact that the days were filled with pain instead of being devoted to labor? Some allowance has been held to be proper; but in answer to the question "How much?" the only reply yet made is, that it should be reasonable in amount. Pain cannot

be measured in money. It is a circumstance, however, that may be taken into the account in fixing the allowance that should be made to an injured party by way of damages. An instruction that leaves the jury to regard it as an independent item of damages, to be compensated by a sum of money that may be regarded as a pecuniary equivalent, is not only inexact, but it is erroneous. The word "compensation," in the phrase, "compensation for pain and suffering," is not to be understood as meaning price, or value, but as describing an allowance looking toward recompense for, or made because of, the suffering consequent upon the injury. In computing the damages sustained by an injured person therefore, the calculation may include not only the loss of time, and loss of earning power, but, in a proper case, an allowance because of suffering. The third item, the loss of earning power, is not always easy of calculation. It involves an inquiry into the value of the labor, physical or intellectual, of the person injured before the accident happened to him, and the ability of the same person to earn money by labor physical or intellectual after the injury was received.

Profits derived from an investment or the management of a business enterprise are not earnings. The deduction from such profits of the legal rate of interest on the money employed does not give to the balance of the profits the character of earnings. The word "earnings" means the fruit or reward of labor, the price of services performed: Anderson's Law Dictionary, 390. Profits represent the net gain made from an investment or from the prosecution of some business after the payment of all expenses incurred. The net gain depends largely on other circumstances than the earning capacity of the persons managing the business. The size and location of the town selected, the character of the commodities dealt in, the degree of competition encountered, the measure of prosperity enjoyed by the community, ¹⁶ may make an enterprise a decided success, which under less favorable circumstances, in the hands of the same persons, might turn out a failure. The profits of a business with which one is connected cannot, therefore, be made use of as a measure of his earning power. Such evidence may tend to show the possession of business qualities, but it does not fix their value. Its admission for that purpose was error. It was also error to treat this subject of the value of earning power as one to be settled by expert testimony. An expert in banking or merchandising might form an opinion about what a man possessing given business

qualifications ought to be able to earn, but this is not the question the jury is to determine. They are interested only in knowing what he did actually earn, or what his services were reasonably worth, prior to the time of his injury. In settling this question, they should consider not only his past earnings, or the fair value of services such as he was able to render, but his age, state of health, business habits, and manner of living: *McHugh v. Schlosser*, 159 Pa. St. 480; 39 Am. St. Rep. 699. The basis on which this calculation must rest is not the possibility, as judged of by the expert witness, but the cold, commonplace facts as proved by those who knew them. It does not follow, as a necessary conclusion, that the services of the plaintiff were worth no more at the time of his injury than the eighty dollars per month he was receiving from the company in whose service he was, but the fact that he accepted service at that price was an important one, and was persuasive, though not conclusive, evidence that the price was considered by himself a fair one.

We think the twelfth assignment also points out a substantial error. The plaintiff was hurt on the twentieth day of September, 1893. In May, 1894, he was appointed postmaster at Lewistown, Pennsylvania, at a salary which leaves him a net balance of five hundred and forty dollars per year after the payment of all expenses. He is still holding the office and in receipt of the salary. Notwithstanding this fact, the learned judge said to the jury: "It seems to the court, and we do not understand that it is denied by the defendant, that since the accident, he has been totally disabled and utterly unable to do anything." For eighteen months before this instruction was given the plaintiff had been receiving the salary attached to the office of postmaster at Lewistown, and had been giving sufficient attention to the duties of the office to see that they were properly ¹⁷ performed by his clerks and deputies. In other words, he had been earning five hundred and forty dollars per year and was still earning it at the time the trial took place. Another subject requires consideration. The verdict rendered by the jury gives the calculation upon which the enormous sum awarded to the plaintiff was based. From this, it appears that the sum of nineteen thousand five hundred and twenty-six dollars and fifty cents was given as the cost of an annuity of seventeen hundred and fifty dollars per annum for nineteen years. This calculation assumes, first, that the plaintiff's earning power was nearly twice as great as he had himself offered it for to the company, whose president and man-

ager he was. It assumes, second, that he had a reasonable expectation of life for nineteen years, being at the time of the trial about fifty-three years old. It assumes, third, that his earning power, instead of steadily decreasing with increasing years, would hold up at its maximum to the very end of life. It assumes, in the fourth place, that he is entitled to recover not only the present worth of his future earnings as the jury has estimated them, but a sufficient sum to enable him to go out into the market and purchase an annuity now, equal to his estimated earnings.

The first, second, and third of these are assumptions of fact. The fourth is an assumption of law, and is clearly wrong. When future payments are to be anticipated and capitalized in a verdict, the plaintiff is entitled only to their present worth. This is the exact equivalent of the anticipated sums.

From what has been now said, it follows that substantially all of the assignments of error are sustained. The judgment is reversed and a venire facias de novo awarded.

Sterrett, C. J., dissents.

DAMAGES FOR PERSONAL INJURIES GENERALLY.—Where one has been injured by the negligence of another, the jury, in estimating the damages, may take into consideration his physical and mental suffering arising from the injury, his medical expenses in getting his injuries healed, his loss of wages for the time he was prevented from working, and proper compensation for his being deprived by the injuries from following his calling or business: *Richmond etc. Ry. Co. v. Norment*, 84 Va. 167; 10 Am. St. Rep. 827, and note; *People's Bank v. Morglofski*, 75 Md. 432; 32 Am. St. Rep. 403; *Pennsylvania R. R. Co. v. Books*, 57 Pa. St. 339; 98 Am. Dec. 229, and note; *Chicago v. Martin*, 49 Ill. 241; 95 Am. Dec. 590, and note. See, also, the notes to *Heddles v. Chicago etc. Ry. Co.*, 20 Am. St. Rep. 114, and *Stephens v. Hannibal etc. R. R. Co.*, 9 Am. St. Rep. 344.

DAMAGES FOR PERSONAL INJURIES—PAIN AND SUFFERING.—In an action for personal injuries, the future pain and suffering for which a recovery may be had is that only which the plaintiff is reasonably certain to endure: *Smith v. Milwaukee Builders' etc. Exchange*, 91 Wis. 360; 51 Am. St. Rep. 912, and note. A plaintiff, in an action for personal injuries, may recover a fair compensation for any suffering, mental or physical, theretofore experienced by him directly resulting from the injury and for any suffering or disability that may be believed from the testimony to be reasonably certain to be experienced by him in the future: *Standard Oil Co. v. Tierney*, 92 Ky. 367; 36 Am. St. Rep. 595, and note.

DAMAGES FOR PERSONAL INJURIES—LOSS OF EARNING POWER.—A plaintiff, in an action for personal injuries, may recover for any reduction in his power to earn money during the remainder of his life, if such reduction there be directly resulting from the

injury: *Standard Oil Co. v. Tierney*, 92 Ky. 367; 36 Am. St. Rep. 595, and note; *Alabama etc. R. R. Co. v. Yarborough*, 83 Ala. 238; 3 Am. St. Rep. 715, and note; *Treadwell v. Whittier*, 80 Cal. 575; 13 Am. St. Rep. 175.

BAKER v. HAGEY.

[177 PENNSYLVANIA STATE, 128.]

NEGLIGENCE—ERRONEOUS INSTRUCTION.—It is reversible error to charge the jury, in an action to recover for personal injury caused by a piece of steel flying from a building where defendants were breaking up steel ingots by dynamite, that they are liable, no matter what precautions they took, if the missiles flew from their place and caused the injury, although the jury were previously charged that defendants were not liable unless they were guilty of negligence.

NEGLIGENCE—EVIDENCE.—In an action to recover for personal injury caused by a piece of steel flying from an establishment where steel ingots were being broken up by dynamite, evidence is admissible to show that, prior to the accident, both large and small pieces of steel shattered by blasts had been thrown out and scattered about the building.

NEGLIGENCE—DAMAGES—LOSS OF ARM.—In an action to recover for personal injury caused by negligence, plaintiff may recover all future expenses, for medical attendance and nursing caused by the loss of an arm in the accident sued for, although, some years before, he had lost his other arm.

NEGLIGENCE—EVIDENCE—LETTERS.—If, in an action to recover for personal injury, it is sought to charge one of two defendants with being actually engaged in the business in which the accident occurred, a letter written by the son of the defendant sought to be charged and signed with the name of the latter, is admissible in evidence, if the son has general authority to sign the name of his father and such letter is part of a large correspondence material to the case.

NEGLIGENCE—PRESENCE OF DEFENDANT.—The actual presence of one of two owners of a joint business at the time of an accident is not necessary to render him liable for negligence in the management of the business, if the other facts and circumstances are sufficient to show his liability.

NEGLIGENCE—LIABILITY OF INDEPENDENT DEFENDANTS—INSTRUCTIONS.—If two persons sued for negligence are charged as independent parties, both of whom are liable for a permanent injury inflicted by both, it is proper for the court to charge that, if both are liable under the evidence, the verdict should be against both, and that if one only is liable, while the other is not, the verdict should be against the one liable and in favor of the other, and that, if neither is liable, the verdict should be for the defendants.

NEGLIGENCE—QUESTION FOR JURY.—In an action seeking to charge two persons with negligence, the question of the liability of each is for the jury to determine, if the evidence is conflicting as to whether they were jointly engaged in business, causing the accident.

Trespass for personal injury. Plaintiff, while employed and engaged in an adjoining establishment, was struck by a piece of steel thrown by a blast from the defendants' establishment, where they were breaking up steel ingots. The evidence tended to show that defendants, father and son, were engaged in breaking up such ingots, but George Hagey, one of the defendants, claimed that he had no interest in the business, and that he simply advanced money to his son to carry it on. Prior to the accident, plaintiff had lost one arm, and, as a result of the injury received, he lost the other. He gave evidence showing the degree of care and attention which the injured arm required and the amount of the cost of such care. Verdict and judgment in favor of plaintiff in the sum of ten thousand dollars, defendants appealed.

E. E. Long, R. O. Moon, and G. W. Harkins, for the appellants.

J. P. Holland, of Holland & Dettra, and N. H. Larzalere, of Larzalere & Gibson, for the appellee.

138 GREEN, J. We do not see how we can avoid reversing this judgment on the fifth assignment of error. The learned court below charged **139** the jury thus: "But I instruct you, as a matter of law, that no matter what precautions they took, if, notwithstanding these precautions, these missiles did fly from that place and did cause this injury, then in the law they would be liable in this action. So far as that branch of the case, therefore, is concerned, I apprehend you will have no difficulty in arriving at a conclusion." The plain meaning of this language is, that the defendants were absolutely liable if the missiles did fly from the place of blasting, and did cause the injury. As there was no dispute about either of these facts, the instruction was a practical direction to find for the plaintiff, without any reference to the question of negligence. Of course, this is not the law, and the learned court had previously instructed the jury that the defendants were not liable unless they were guilty of negligence. But, in the above quoted extract from the charge, the learned judge told the jury that no matter what precautions were used to prevent the discharge of the missiles, the defendants were liable if the missiles escaped and caused the injury. In other words, the mere fact of the accident established the right of recovery without proof of negligence. As this is in direct hostility with the earlier part of the charge, there would necessarily be much confusion in the minds of the jurymen as

to what the law really was. Thus the learned court, at the opening of the charge, said to the jury: "It is undisputed that he [the plaintiff] sustained an injury. This, in itself, would not sustain his action, unless he shows to your satisfaction that it was caused by negligence, and therefore, in considering this case, our first duty is to inquire as to whether the evidence convinces you that there was negligence in the case." According to the part of the charge covered by the fifth assignment, no inquiry as to negligence was necessary, because, no matter what precautions were taken by the defendants, they were absolutely liable if the plaintiff sustained his injury by missiles thrown from the quarry. As these conflicting instructions would materially tend to mislead the jury, and as the part of the charge excepted to is clearly erroneous, the fifth assignment must be sustained.

We do not think the first assignment can be sustained. The evidence offered and admitted under exception tended strongly to show a negligent condition of the structure within which the blasts were discharged, as well as specific resulting acts of discharge. ¹⁴⁰ These latter were manifested by the omission and scattering of both large and small pieces of the steel which had been shattered by the blasts, and in this regard the testimony is quite similar to that which is always admitted in cases of fires caused by the emission of sparks from locomotive engines. If the engine is known, all the authorities concur that previous emissions of sparks by that engine may be shown. This whole subject is so thoroughly discussed in an elaborate opinion by our late Brother Clark in the case of *Henderson v. Philadelphia etc. R. R. Co.*, 144 Pa. St. 461, 27 Am. St. Rep. 652, that a mere reference to it is sufficient. Here the discharges took place from a known building or structure, and certainly evidence of its condition before and at the time of the discharge in question was competent, and, as the testimony showed frequent discharges through, and from it, the proof tended to show its condition.

The second and sixth assignments cannot be sustained, as the testimony offered and received was clearly competent and germane to the plaintiff's cause of action. Of course, the previous loss of the other arm could not be considered as a cause of damage in this case, and there was no such instruction in the charge. The testimony as to the plaintiff's actual condition could not be excluded.

The third assignment is without merit. The conversations

testified to by the witness Petry were between third persons so far as the plaintiff was concerned, and the proposed inquiry would develop that which was mere hearsay. But the whole of the evidence as to this conversation was subsequently admitted, and no harm was done to the defendants by its exclusion at this stage.

It is not correct to say that the letter of April 12, 1894, from George Hagey to the steel company was admitted without any proof of its being written or authorized by George Hagey. It was written as a direct reply to a letter received by him from the Norristown Steel Company, and it was written on a letterhead sheet of George Hagey's, and both he and his son Samuel testified substantially that it was written or signed by George Hagey's son Percy. It was one of a series of letters all on the same subject, and formed part of a quantity of correspondence which was material to the case. George Hagey, being examined as a witness in regard to it, did not deny his son's authority to ¹⁴¹ sign such a letter in his name. We think the testimony was sufficient to justify its admission in evidence. The fourth assignment is, therefore, dismissed.

Seventh and eighth assignments. The answer to the eighth point of the defendant was certainly correct. The actual presence of the defendant at the moment of the accident was not necessary to make him liable, if the other facts and circumstances were sufficient to show liability.

The answer to the seventh point of defendant seems to us to be entirely correct. The plaintiff's statement of claim does not charge the defendants as partners, nor as joint tort feasons in the sense that they were subject to a joint obligation, or had a joint interest in the business. They were charged rather as two independent persons both of whom were liable for a permanent injury inflicted by them both. Of course, if both were liable under the evidence, the verdict should be against both; if one only was liable in accordance with the testimony, and the other was not, the verdict should be against the one who was, and in favor of the one who was not. If neither was liable, the verdict should be for the defendants. This is precisely what the court charged, and we fail to discover any error in it. These assignments are dismissed.

Ninth, tenth, and eleventh assignments. There is no merit in these assignments, and they are not sustained. The court below was not asked to charge the jury that if they believed the

testimony of the witnesses named in the ninth assignment, George Hagey had no interest in the business, and therefore there was no error in not so charging. The court could not possibly instruct the jury that there was no evidence that there was any joint ownership, interest, or management in the business of steel blasting at the place in question, because there was much testimony showing the participation of both in the conduct of the business. The evidence was necessarily for the jury, and could not be withdrawn from them. It must be confessed that the explanatory testimony of the fact that George Hagey's name appears in the papers as the party contracting and otherwise participating, and the positive testimony of both defendants that George Hagey had no interest in the business, seem to be sufficient to establish that fact, yet it is a question of fact, and the credibility of the witnesses, and the effect of the various ¹⁴² facts and circumstances in evidence as they bear upon that subject, was for the jury to determine, and could not be taken from them. We think the court below was not in error in submitting the case to the jury, although it is quite possible that we would have reached a different conclusion if we were disposing of the facts.

Judgment reversed and new venire awarded.

NEGLIGENCE—EVIDENCE OF SIMILAR OCCURRENCES.—

In an action to recover for injury caused by negligence, evidence that other accidents have occurred of a similar character to that which resulted in the injury in question is competent, not for the purpose of showing independent acts of negligence, but as tending to prove that the common cause of the accidents is a dangerous, unsafe thing: *Bloomington v. Legg*, 151 Ill. 9; 42 Am. St. Rep. 216, and note.

DAMAGES FOR PERSONAL INJURIES consist of the expenses to which the injured person is subjected by reason of the injury complained of, the inconvenience and suffering naturally resulting from it, and the loss of earning power, if any, and whether temporary or permanent, consequent upon the character of the injury: *Goodhart v. Pennsylvania R. R. Co.*, 177 Pa. St. 1; ante, p. 705, and note.

KLEIN v. LIVINGSTON CLUB.

[177 PENNSYLVANIA STATE, 224.]

INJUNCTION AGAINST CRIME.—A bill in equity having for its sole purpose an injunction against crime, does not lie; but equity may interfere if the alleged criminal act goes further and operates to the destruction or diminution of the value of property of the complainant.

SOCIAL CLUBS—SALE OF LIQUOR.—If an incorporated club is organized and conducted in good faith with a limited and selected membership, really owning its property in common, and formed for social, literary, or other purposes to which the furnishing of liquors to its members is merely incidental and without profit, the furnishing of liquors to members is not a sale within the meaning of a liquor license statute restraining and regulating the sale of intoxicating liquors.

J. B. Deshler, for the appellant.

E. Harvey, R. E. Wright, and M. L. Kauffman, for the appellee.

227 DEAN, J. The plaintiff is a member in good standing of the Livingston Club of Allentown, Lehigh county; the club was duly incorporated April 7, 1890; its purpose, as declared by its articles of association, is the social enjoyment of its members by friendly intercourse. It is the owner of a lot in the city, on which is erected a valuable brick building, containing parlors, reception room, library room, banquet hall, dining rooms, kitchen, committee rooms, billiard rooms, and private rooms occupied by the club steward and servants. The cost of the buildings and grounds was twenty-three thousand dollars. The membership is limited to one hundred residents of the city, or resident not exceeding one mile beyond, and all must be over twenty-one years of age. There are no sleeping rooms in the building for members or guests, but some of the members not having families make the club their home during club hours. No games of chance are permitted. The affairs of the club are controlled by a president, vice-president, secretary, treasurer and twelve governors, known as the governing committee. Immediately before the filing of this bill, this committee adopted this resolution:

“Resolved, That the steward be directed to purchase a stock of spirituous and malt liquors, etc., and furnish the same to the members of this club, and receive pay therefor from them only, and turn over the moneys so received to the treasurer of said club, which money shall be again used to replenish the liquors,

etc., so furnished to its members, and in the purchasing of eatables, cigars, etc., and also for the defraying of the expenses connected therewith."

Plaintiff admits in his bill the club receives no profit on liquors so furnished, but he avers the steward is about to carry out the directions of the resolution; that the proposed action will be a violation of the license laws of the commonwealth, thus putting in peril the charter of the club, which may be forfeited, and, in consequence, he, as a member having an interest in the club property, will be thereby damaged. He therefore prays for an injunction restraining the steward and the governors from carrying out the resolution.

The purpose of the bill is to enjoin defendants from the commission of an alleged indictable misdemeanor, because the misdemeanor, if committed, will probably damage his property ²²⁸ rights. A bill having for its sole purpose an injunction against crime or misdemeanor, it is well settled, does not lie; but it is just as well settled, equity will interfere, if the alleged criminal acts go further and operate to the destruction of or diminution of value of property. This case and that of *Manderson v. Commercial Bank*, 28 Pa. St. 379, are alike in their essential facts. In the bank case, the law authorized the directors to discount paper at a rate not exceeding one-half of one per cent a month. *Manderson*, a stockholder, averred that the president and cashier were in the habit of meeting after banking hours and passing paper for discount at a rate exceeding the lawful rate, thus violating the usury laws and subjecting the bank to the penalty therefor, and putting in peril the bank's charter; therefore, his property interest in the bank was endangered. It was decided a stockholder had the right to prevent by injunction a practice which might produce such injury to him, and the writ was awarded. In *Sparhawk v. Union Pass. Ry. Co.*, 54 Pa. St. 401, the writ was refused by a majority of the court, because the sole purpose of the bill was to prevent an alleged violation of the act of 1794, in which question the complainant had no other interest than that of the public generally.

If either the commission of the act here alleged or its criminality depended on the evidence of witnesses, we might well leave it to the proper criminal court for determination; the hand of a chancellor would not be put forth to restrain the commission of what might not be intended as, or what if actually done might not be, criminal, because of the absence of criminal

intent. But here the declared purpose to commit the act complained of is admitted; whether it be criminal, if committed, is a pure question of law, for defendant's only plea is, that the proposed act is not in violation of law.

Would the act when committed be a sale of liquor? That is the only question, for it is not alleged it is the purpose of defendant to furnish liquor to persons of intemperate habits, to those visibly intoxicated, or to minors. The act of May 13, 1887, known as the Brooks law, is entitled "An act to restrain and regulate the sale of vinous and spirituous, malt or brewed liquors or any admixture thereof." This is a license act, and prohibits the keeping of any house, room, or place, inn or tavern for sale of liquors, without a license first had and obtained; ²²⁹ it further prescribes the mode of procedure in all its details to obtain license to sell, and prohibits the sale or gift either by licensed dealers or unlicensed dealers on certain days and to certain classes. Our Brother Williams, in *Commonwealth v. Carey*, 151 Pa. St. 371, referring to the title of the act and the body of it, has so clearly stated its purpose, that his reasoning and conclusion are almost as demonstrative of the truth as the solution of a problem in geometry. He says: "There is no hint of a purpose to restrain and regulate the use of them by private citizens in their own dwellings. We look next into the body of the act, and there we find a comprehensive license system. We have first a restriction of the sale to persons holding licenses, and punishments prescribed for sales by unlicensed persons; next, the proceedings to obtain a license; third, provisions regulating the exercise of judicial discretion in granting or refusing licenses; fourth, penalties for violations of the law by licensed dealers; fifth, exceptions from the power to sell conferred by a license, as to certain days and certain classes of persons. The seventeenth section belongs to this class of provisions. To the excepted classes and upon the excepted days no man can lawfully sell, or furnish for use as a beverage, any intoxicating liquors. The unlicensed cannot, for the traffic is wholly forbidden to him. The licensed cannot, for an express exception as to these is made in the law under which the license is granted. If, notwithstanding the prohibition, any person does sell or furnish contrary to the seventeenth section, his conduct is a misdemeanor, and the house, room, or place kept or maintained by him for such unlawful sales or furnishings may

be abated as a public nuisance under the provisions of the eighteenth section.

"These provisions are not applicable to the table, or the personal habits of citizens within the precincts of their own homes, and they cannot be extended by any known rule of interpretation so as to include them. The furnishing of liquors on Sunday, or to any of the excepted classes, that is made punishable, is a furnishing in evasion of the law forbidding sales. It would be of little avail to close the bars on election days if candidates might open rooms near the polls and furnish liquors free to voters. It would not help the cause of good morals if those who were forbidden to sell on Sunday could, under some specious ²³⁰ pretext, profess to supply their customers without charge on that day. But if, for reasons of health or habit, one chooses to supply his own table with his own liquors for use by himself, his family or his guests on Sunday, there is not now, and, so far as I am aware, there has never been, in this state any statute forbidding him to do so."

The Brooks law only reduced to a comprehensive system all the features of all the license laws at its date on our statute books. There is not in it, nor in any of the statutes which it replaces, a prohibition of the use of liquors in clubs, any more than there is a prohibition of its use in a family. No indictment for furnishing liquors to members of a club could be sustained, unless the evidence showed, beyond reasonable doubt, such furnishing constituted a sale. The statute being penal, it must be subject to a strict construction. We cannot extend it beyond its letter. If we, in construing the Brooks statute, adopt the settled rule of construction, consider the old law, the mischief and the remedy, then we have these questions: The old law regulating and restraining the sale of liquors was disjointed or fragmentary, because it was made up of separate statutes passed at intervals of years, not seldom presenting conflicting provisions, and often provisions in conflict with special local laws; at the same time, there was a settled conviction in the public mind that the license law did not produce the revenue that ought to have been exacted for the privilege of selling liquor. In view of the ineffectiveness of the old law, and the smallness of the revenue produced by it, the Brooks law was enacted; its intention was to stop what, in the interests of good order, ought to be unlawful sales of liquor, and to exact a larger revenue from those sales made lawful by license. Probably, at

the date of this act, club organizations, wherein liquor was furnished, as here, had been in existence in large towns and cities for fifty years. The legislature was not ignorant of the fact; if such use tended to disorder or bad morals, the legislature knew it; if such use was not of immoral tendency, yet was a luxury or privilege that would bear taxation and yield revenue, they knew that fact; yet there are no words in the act which, by any possible construction, can be stretched into a prohibition of the use of liquor in clubs, or that can be deemed as requiring they shall be licensed. There is, in fact, no express legislation ²³¹ concerning this distinctive, open, notorious, long-existing use of liquor; the plain implication is, that the consumption of liquor in clubs, as known to the legislature, was not deemed a sale. The general words of the law, however, make the sale of liquor without license illegal everywhere in the commonwealth; and whether this be a sale is now a judicial, and not a legislative, question.

The bill admits the club will receive no profit on the liquors bought and consumed by the members, so that, as concerns this usual incident of a sale, it is not present. The club buys the liquors and distributes them to the members; those who drink them pay in proportion to the quantity drank; the money for the purchase of the liquor in quantities from the liquor dealer comes out of the treasury of the club; nothing in the shape of food or drink is distributed equally to the members; there is an equal distribution of light and heat; members have like access to the reading rooms and library; but, when it comes to food and drink, each contributes to the common fund in proportion as he consumes. Some eat of terrapin and game, while others prefer less costly and plainer food; the member who is fond of terrapin contributes to the club the cost of it; it would be inequitable that the member who does not touch it should share in paying for it by an equal contribution. The same rule is enforced in regard to liquors; some do not touch them, they pay nothing; those who drink them pay. The purpose of the whole system is to distribute the advantages, comforts, and luxuries of the club among the members, so that there shall not be unequal contributions to the treasury which purchases them. They are all owners of the property when purchased, in equal shares; and, if a division were then made, each would be entitled to an equal share of the liquor; but one consumes his share and that of others who do not drink liquor, and he puts

back into the common treasury the value of the others' shares; therefore, although by consumption the division is not equal, yet it is made equal by the contribution to the treasury; that has neither lost nor gained; consequently the distribution is equitable. Does this constitute a sale? We think not; there is no element of bargain, only a method of distribution of the common property. We are aware there is and has been much difference of opinion among courts on the question. In England, ²³² the transaction has been held no sale: *Graff v. Evans*, L. R. 8 Q. B. Div. 373. In a recent case in Missouri, *State v. St. Louis Club*, 125 Mo. 308, the opinion contains a review of all the cases on the subject, and it is held to be no sale. In the still more recent case in New York court of appeals, *People v. Adelphi Club*, 149 N. Y. 5, 52 Am. St. Rep. 700, all the judges concurred in pronouncing it no sale. The act then in force, and under which the indictment was framed and conviction had, prohibited the sale of spirituous liquors to be drank upon the premises. There was no question as to the fact that under substantially the same club rules as here spirituous liquors were distributed to the members and by them drank upon the club premises, those drinking returning to the treasury the cost of the liquor. Black on Intoxicating Liquors, section 142, after citing the authorities from many states, comes to this conclusion: "Upon the whole, therefore, notwithstanding some conflicting rulings, the rational conclusion is, that the intent must govern. On the one hand, if the object of the organization is merely to provide members with a convenient method of obtaining a drink whenever they desire it, or if the form of membership is no more than a pretense, so that any person without discrimination can procure liquor by signing his name in a book, or buying a ticket or a chip, thus enabling the buyer to conduct an illicit traffic, then it falls within the terms of the law. But, on the other hand, if the club is organized and conducted in good faith, with a limited and selected membership, really owning its property in common, and formed for social, literary, or other purposes, to which the furnishing of liquors to its members would be merely incidental, in the same way to the same extent that the supplying of dinners or daily papers might be, then it cannot be considered as within either the purpose or letter of the law."

As before noticed, there could have been no special intent on part of the legislature to prohibit the act here complained of;

there was a general intent to restrain the use of intoxicating liquor by prohibiting unlicensed sales thereof. If this were an unlicensed sale under the guise of a club distribution, it would clearly be unlawful; the law would look through all disguises, and so pronounce it. But as, on the undisputed facts, we are ²³³ of the opinion the act apprehended by plaintiff is not a sale, there can be no violation of law which will imperil his property rights.

It has been argued that the effect of our decision, if against plaintiff, will be to deprive the licensed hotels of patronage to which they are impliedly entitled, by payment of heavy license fees under the Brooks' law; that members of clubs will consume such liquors as they desire in their clubrooms, instead of at licensed bars. This is not without force, but it should be addressed to the legislature, who seem for fifty years in all the legislation on the liquor question to have carefully refrained from prohibiting the furnishing of liquor to club members by their clubs, as well as neglected to impose on them license fees.

The decree is affirmed.

INJUNCTION AGAINST CRIME is the subject of the monographic note to *Creighton v. Dahmer*, 35 Am. St. Rep. 670-681.

SOCIAL CLUBS—SALES OF LIQUOR BY.—A social club, not organized for the purpose of evading any law, but to establish and maintain a library and reading rooms, and to promote social intercourse among its members, and which serves liquors to them upon their written order at a price fixed by one of its committees, is not guilty of selling liquors within the meaning of a statute prohibiting any person, without a license, from selling either strong or spirituous liquors in less quantity than five gallons at a time to be drunk or used on the premises where the same shall be sold: *People v. Adelphi Club*, 149 N. Y. 5; 52 Am. St. Rep. 700, and note.

BENNETT v. EASTERN BUILDING AND LOAN ASSOCIATION.

[177 PENNSYLVANIA STATE, 233.]

CONFLICT OF LAWS—CONTRACTS—PLACE OF.—A contract made by a resident of one state who applied to become a member of a loan association situated in another state, to pay it money at the place of its residence, is to be governed by the law of the latter state as to usury, although the contract was made through an agency situated within the state of the residence of such member, and the payment of the money is secured by mortgage on land therein.

T. M. B. Hicks and W. H. Spencer, for the appellant.

W. C. Gilmore, for the appellee.

235 GREEN, J. The defendant is an incorporated building and loan association, duly incorporated by the laws of New York, and located and transacting business at Syracuse in that state. The plaintiff, in October, 1891, made application to become a member of the association by purchasing two shares of its stock, and in November following received a certificate for the shares. In **236** May, 1892, he made application for a loan of two hundred dollars which was granted in December of the same year. As security for the loan, he gave a bond and mortgage on some land in Lycoming county, Pennsylvania, for the sum of two hundred and seven dollars and eighty-nine cents, which included the premium paid for the loan. The actual money paid to the plaintiff was one hundred and eighty dollars. At the same time, he gave to the defendant sixty-seven promissory notes, for three dollars and seventeen cents each, except three for one dollar and sixty-seven cents each, the aggregate amount of which was secured by the mortgage, and represented the monthly payments to be made by the plaintiff as a member of the association. On August 31, 1893, the plaintiff paid the mortgage debt in full, the amount being one hundred and eighty-one dollars and seven cents, after deducting the withdrawal value of his stock and a rebate premium. He now claims that the premium retained by the defendant, and the fines charged against him in the settlement were usury, and seeks to recover in this action fifty dollars and ninety-five cents, alleging that this amount was the excess over legal interest on the amount of money actually loaned to him by the defendant. He contends that his contract with the defendant was a Pennsylvania contract and to be governed by the law of that state. The defendant had an agency at Williamsport in Pennsylvania, and the transaction was conducted between the plaintiff and the defendant's agent at that place. That circumstance, however, is of no account if the contract was to be performed in the state of New York. The appellant does not at all dispute the proposition that contracts are to be governed by the law of the place where they are to be performed, nor does he contend that he would have any right of recovery under the law of New York, which permits building and loan associations to charge usurious rates of interest on loans. The learned court below decided that

the place of performance was the state of New York, and the contract was, therefore, to be governed by the law of that state. In this opinion we concur. A point was also made that if the contract was made for the purpose, and with the intent, of evading the usury laws of Pennsylvania, it must be governed by the law of Pennsylvania, and not of New York. As to this the court below held that there was not a scintilla of evidence of any such intent, and, therefore, the doctrine could not apply to this case, and in that ruling also we fully concur.

It is only necessary to examine briefly the contract of the parties ²³⁷ in order to determine at what place it was to be performed. The defendant's place of business was at Syracuse in the state of New York. The plaintiff's application for membership was in the following words, "I, Joseph Bennett, of Williamsport, county of Lycoming, state of Pennsylvania, hereby apply for membership in the Eastern Building and Loan Association of Syracuse, Onondaga county, New York, and subscribe for two shares of installment stock. I hereby agree to abide by all the terms, conditions, and by-laws contained or referred to in the certificate of shares, and will also comply with all the rules and regulations of said association." The plaintiff's application was accepted, and he thereupon became a member, consciously and intentionally, of an association of the state of New York, and contracted that he would abide by their by-laws and comply with all their rules and regulations. His subsequent application for a loan was entitled, "Application for loan from the Eastern Building & Loan Association of Syracuse, N. Y." He afterward signed an application for an advance, addressed as follows, "To the Board of Directors of the Eastern Building and Loan Association of Syracuse, N. Y.," requesting the advance to be made, and again agreeing to comply with the charter and by-laws of the association and all requirements defined by the committee of the board of directors. Thereupon sixty-seven notes were prepared, sent to him for signature and signed by him in the following words:

"On or before the last Saturday of March, 1893, I promise to pay three dollars and seventeen cents to the order of the Eastern Building & Loan Association of Syracuse, N. Y., at its office in Syracuse, N. Y., value received.

"Williamsport, Jan. 2nd, 1893.

"JOSEPH C. BENNETT."

When he gave his bond for the money loaned, he obligated himself as follows: "I, Joseph C. Bennett, am held and firmly bound unto the Eastern Building and Loan Association of Syracuse, N. Y., in the sum of four hundred dollars, lawful money of the United States of America, to be paid to said Eastern Building & Loan Association of Syracuse, N. Y.," etc. In the condition of the bond it is provided that if he pays to the association, repeating its name and place, two hundred and seven dollars and eighty-nine cents in sixty-seven equal payments of three dollars and seventeen cents each, except three of one dollar and sixty-seven cents ²³⁸ each, "payable monthly to said association at its office in Syracuse, N. Y., on or before the last Saturday of this and each and every month," etc. The mortgage, also executed by the plaintiff, repeats the name and designation of the defendant, and its place, recites the bond with its condition for making all the payments at the office of the company at Syracuse, New York, and then grants to the defendant, repeating its name and place, certain described land of the plaintiff situate in Lycoming county, Pennsylvania, with the usual proviso that if the payments are all made to the defendant, the bond and mortgage should become void.

Thus it will be seen that, in every possible way in which the English language could express it, the plaintiff entered into a written contract with the defendant to pay it, in sixty-seven different payments, every one of which was to be made at the office of the defendant in Syracuse, New York, a designated aggregate sum of money. What is the use of discussing the question whether this was a contract to pay money in the state of New York? What is there to discuss? Nothing. No other place of payment is mentioned or can possibly be implied. This one place is positively expressed over and over again, and many times over, in solemn instrument signed and sealed by the plaintiff himself, and in sixty-seven different notes also signed by the plaintiff. It is a waste of time to discuss so plain a matter. The fact that the plaintiff lived in Pennsylvania and negotiated there with an agent of the defendant either for the membership or for the loan is not of the slightest significance. The contract must be adjudged by its express terms, no matter where the parties were when it was made. And when those terms are clear, explicit, involved in no doubt whatever, they must prevail, and it is the duty of the courts to enforce them according to their literal meaning. Nor is there the slightest

ground for an allegation that the contract was made for the purpose of evading the usury laws of Pennsylvania. Who had such a purpose and what is the evidence of it? Did the plaintiff have it, and, if so, did he communicate it to the defendant? If so, where is the evidence of it? There is none whatever. The defendant's business was transacted at its proper place of business in the state of New York. This business was a part of its regular business done in its usual way, and, as a matter of course, the mere fact that this loan was made to a ²³⁹ citizen of Pennsylvania cannot justify an inference that it was done with an intent to evade the laws of Pennsylvania. This business was done just as all its other business was done. The defendant had a lawful right to loan money wherever it pleased, and it would be most absurd to say that, because it lent money to a Pennsylvanian, it therefore intended to evade the laws of Pennsylvania. The Pennsylvanian had a right to borrow money in the state of New York if he chose to do so, and, if he contracted to pay it in the state of New York, he must be conclusively presumed to know that his contract would be governed by the law of that state. In all this there is not a shadow of an unlawful intent to evade the law of Pennsylvania. There was, therefore, nothing to submit to the jury on that question.

Judgment affirmed.

USURY—PLACE OF CONTRACT.—A contract entered into in Alabama with a foreign loan association, by which the borrower, who does not share in the profits or assets of the corporation and has no voice in its management, agrees to pay interest in excess of the rate allowed in Alabama, is usurious, and can be enforced only as to the principal, although such contract is not usurious under the law of the state where the association was created: *Falls v. United States Sav. etc. Co.*, 97 Ala. 417; 38 Am. St. Rep. 194; to the same effect, *Meroney v. Atlanta Building etc. Assn.*, 116 N. C. 882; 47 Am. St. Rep. 841. This subject is fully discussed in the extended note to *Bank v. Cook*, 46 Am. St. Rep. 201.

WOOD v. PENNSYLVANIA RAILROAD COMPANY.

[177 PENNSYLVANIA STATE, 306.]

NEGLIGENCE—PROXIMATE CAUSE.—To warrant a finding that negligence or an act not amounting to wanton wrong, is a proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.

NEGLIGENCE—PROXIMATE CAUSE.—If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to others, actually results in injury, through the intervention of other causes not wrongful, the injury must be referred to the wrongful cause.

CARRIERS—DUTY TO PASSENGER AT STATION.—A person who, having purchased a railroad ticket, is injured through the remote negligence of the railroad company while standing on a railroad station platform, but not from any cause attributable to such station or platform, is in no more favorable situation as a suitor against the railroad company than if he had been walking alongside the railroad on the public highway, or at any other place where he had a right to be.

NEGLIGENCE — PROXIMATE CAUSE.—Failure to give warning of the approach of an express railroad train, which strikes and kills a person, hurling a portion of the body against another person standing on a railroad station platform, is not the proximate cause of the injury to the latter so as to make the railroad company liable therefor.

T. Leaming and F. J. Knaus, for the appellant.

G. T. Bispham and J. H. Barnes, for the appellee.

³⁰⁸ DEAN, J. We take the facts as stated by the court below, as follows: "On the 26th of October, 1893, the plaintiff, having bought a return ticket, went as a passenger upon the railroad of the defendant company from Frankford to Holmesburg. After spending the day there attending to some matters of business, he concluded to come back upon a way train due at Holmesburg at five minutes after six in the evening. While waiting for this train, the plaintiff stood on the platform of the station, ³⁰⁹ which was on the north side of the tracks, at the eastern end of the platform with his back against the wall at the corner. To the eastward of the station, a street crosses the railroad at grade. How far this crossing is from the station does not appear from the evidence. It was not so far away, however, but that persons on the platform could see objects at the crossing. For at least one hundred and fifty yards to the eastward of the crossing, the railroad is straight, and then curves to the right. About 6 o'clock, an express train coming from the east-

ward upon the north track passed the station, and the plaintiff, while standing in the position described, was struck upon the leg by what proved to be the dead body of a woman, and was injured. The headlight of the approaching locomotive disclosed to one of the witnesses who stood on the platform two women in front of the train at the street crossing, going from the south to the north side of the tracks. One succeeded in getting across in safety, and the other was struck just about as she reached the north rail. How the woman came to be upon the track, there is nothing in the evidence to show. There was evidence that no bell was rung or whistle blown upon the train which struck the woman before it came to the crossing, and some evidence that it was running at the rate of from fifty to sixty miles an hour. Upon this state of facts, the trial judge entered a nonsuit."

The court in bank having afterward refused to take off the nonsuit, we have this appeal.

Was the negligence of defendant the proximate cause of plaintiff's injury? Judge Pennypacker, delivering the opinion of a majority of the court below, concluded it was not, and refused to take off the nonsuit. Applying the rule in *Hoag v. Lake Shore etc. R. R. Co.*, 85 Pa. St. 293, 27 Am. Rep. 653, to these facts, the question on which the case turns is: "Was the injury the natural and probable consequence of the negligence—such a consequence as, under the surrounding circumstances, might and ought to have been foreseen by the wrongdoer as likely to flow from his act?"

As concerns the situation of plaintiff at the time of his injury, and the relation of that fact to the cause, whether near or remote, we do not consider it important. He was where he had a right to be, on the platform of the station; that he had purchased a ticket for passage on defendant's road, and was waiting ³¹⁰ on its platform for his train, has no particular bearing on the question. The duty of defendant to him at that time was to provide a platform and station, safe structures, for him and others who desired to travel. In this particular, its duty was performed; the injury is not in the remotest degree attributable to the platform or the station. It is sufficient to say, when there he was not a trespasser on defendant's property, and therefore his action does not fail for that reason; but he is in no more favorable situation as a suitor than if he had been walking alongside the railroad, on the public highway, or at any other place where he had a right to be.

The rule quoted in *Hoag v. Lake Shore etc. R. R. Co.*, 85 Pa. St. 293, 27 Am. Rep. 653, is, in substance, the conclusion of Lord Bacon, and the one given in Broom's Legal Maxims. It is not only the well-settled rule of this state, but is, generally, that of the United States. Professor Jaggard, in his valuable work on Torts, after a reference to very many of the cases decided in a large number of the states, among them *Hoag v. Lake Shore etc. R. R. Co.*, 85 Pa. St. 293, 27 Am. Rep. 653, comes to this conclusion: "It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is a proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances": Jaggard on Torts, c. 5. Judge Cooley states the rule thus: "If the original act was wrongful, and would, naturally, according to the ordinary course of events, prove injurious to some others, and result, and does actually result, in injury, through the intervention of other causes not wrongful, the injury shall be referred to the wrongful cause, passing through those which were innocent": Cooley on Torts, 69. This, also, is in substance, the rule of *Hoag v. Lake Shore etc. R. R. Co.*, 85 Pa. St. 293; 27 Am. Rep. 653. All the speculations and refinements of the philosophers on the exact relations of cause and effect help us very little in the determination of rules of social conduct. The juridical cause, in such a case, as we have held over and over, is best ascertained in the practical affairs of life by the application to the facts of the rule in *Hoag v. Lake Shore etc. R. R. Co.*, 85 Pa. St. 293; 27 Am. Rep. 653.

Adopting that rule as the test of defendant's liability, how do we determine the natural and probable consequences which ³¹¹ must be foreseen, of this act? We answer, in this and all like cases, from common experience and observation. The probable consequence of crossing a railroad in front of a near and approaching train is death or serious injury; therefore, acting from an impulse to self-preservation, or on the reflection that prompts to self-preservation, we are deterred from crossing. Our conduct is controlled by the natural and probable consequence of what our experience enables us to foresee. True, a small number of those who have occasion to cross railroads are reckless, and, either blind to or disregarding of consequences,

cross and are injured, killed, or barely escape; but this recklessness of the very few in no degree disproves the foreseeableness of the consequences by mankind generally. Again, the competent railroad engineer knows, from his own experience and that of others in like employment, that to approach a grade highway crossing with a rapidly moving train without warning is dangerous to the lives and limbs of the public using the crossing; he knows death and injury are the probable consequences of his neglect of duty; therefore, he gives warning. But does any one believe the natural and probable consequence of standing fifty feet from a crossing to the one side of a railroad, when a train is approaching, either with or without warning, is death or injury? Do not the most prudent, as well as the public generally, all over the land, do just this thing every day, without fear of danger? The crowded platforms and grounds of railroad stations, generally located at crossings, alongside of approaching, departing, and swiftly passing trains, prove that the public, from experience and observation, do not, in that situation, foresee any danger from trains. They are there, because, in their judgment, although it is possible a train may strike an object, animate or inanimate, on the track and hurl it against them, such a consequence is so highly improbable that it suggests no sense of danger; they feel as secure as if in their homes; to them it is no more probable than that a train at that point will jump the track and run over them. If such a consequence as here resulted was not natural, probable, or foreseeable to anybody else, should defendant, under the rule laid down in *Hoag v. Lake Shore etc. R. R. Co.*, 85 Pa. St. 293, 27 Am. Rep. 653, be chargeable with the consequence? Clearly, it was not the natural and probable consequence of its neglect to give warning, and, therefore, was not one which it was ³¹² bound to foresee. The injury, at most, was remotely possible, as distinguished from the natural and probable consequence of the neglect to give warning. As is said in *South Side etc. Ry. Co. v. Trich*, 117 Pa. St. 399, 2 Am. St. Rep. 672: "Responsibility does not extend to every consequence which may possibly result from negligence."

What we have said thus far is on the assumption the accident was caused solely by the negligence of defendant, or by the concurring negligence of defendant and the one killed going upon the track with a locomotive in full view. This being an action by an innocent third person, he cannot be deprived of

his remedy because his injury resulted from the concurrent negligence of two others. He fails because his injury was a consequence so remote that defendant could not reasonably foresee it.

But there is another view which may be taken of this evidence. Assuming defendant was negligent, did that negligence contribute in any degree to the result? The uncontradicted evidence showed the train could be seen from one hundred and fifty to two hundred yards distant; plaintiff himself testifies he heard it coming, although he heard no whistle or bell; and all his witnesses had notice of it; even those sitting in the waitingroom got up to go out, supposing it was their train; some heard the rumbling, some saw the headlight. Assume, then, the fact to be that no warning was given by bell or whistle, and in that particular, defendant, in its general duty to the public, was negligent, was this the cause of the injury? To so find, we must presume the deceased and her companion failed to hear or see what all the others saw or heard. There is no reason for such presumption. While, in the absence of any evidence on the question, the presumption would be, that the two women, before crossing, stopped, looked, and listened, and then, because no warning was given, they, without apprehension of danger, attempted to cross, still, when all the other witnesses with like opportunity either saw the headlight or heard the rumbling of the approaching train, the reasonable presumption is they saw and heard it too. If this be so, they attempted to cross, with the same knowledge of the same peril, they would have had if the bell had been rung and whistle blown; therefore, the sole cause of the injury was not the negligence of defendant, but the negligence of deceased. In such case, there could have been no recovery by the representatives of the deceased woman, ³¹³ for whatever might have been the negligence of defendant, it was no more the cause of the accident than if it had neglected to give warning at some other crossing. The case could not have reached the jury, unless they had been permitted to infer she had neither seen nor heard the same warnings that all plaintiff's witnesses saw and heard. If the companion of deceased, or other witnesses, had testified they neither saw nor heard the approaching train, the case would have been altogether different; but, as it stood, there was no proof that the alleged negligence of defendant contributed to the death of the woman. In this view, the negligence was not even concurrent; true, there was negligence, but the same result followed as if defendant had

exercised care; therefore, the injury was attributable to her sole negligence. While the proper warning on approaching a crossing is the sound of a whistle or the ringing of a bell, no accident can be properly said to be the consequence of the neglect to give such warning if the public be apprised of the danger by other sounds or signals; the injury, then, is caused solely by the neglect of the injured person to heed the danger.

On both grounds we think the nonsuit was properly entered. The judgment is affirmed.

NEGLIGENCE — PROXIMATE CAUSE.—Negligence is not the proximate cause of an accident, unless, under all the circumstances, it might have been reasonably foreseen by a man of ordinary intelligence and prudence: *Huber v. La Crosse etc. Ry. Co.*, 92 Wis. 636; 53 Am. St. Rep. 940, and note; *Yoders v. Amwell Tp.*, 172 Pa. St. 447; 51 Am. St. Rep. 750, and note. If an injury results from the negligent act or omission of a wrongdoer, such act or omission is deemed the proximate cause, unless the consequences are so unnatural and unusual that they could not, by the highest practical care, have been foreseen and provided against: *Reid v. Evansville etc. R. R. Co.*, 10 Ind. App. 385; 53 Am. St. Rep. 391, and note. See, also, the extended note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 809, 810.

LONG v. HARVEY.

[177 PENNSYLVANIA STATE, 473.]

RELIGIOUS SOCIETIES.—THE POWER OF COURTS to adjudicate disputes between warring church parties is limited to an examination of the rules of the church organization to ascertain the church law, and if that is not in conflict with the law of the land, to protect the rights of the parties under the law they have made for themselves.

RELIGIOUS SOCIETIES—RIGHTS OF MAJORITY.—A majority of a church organization may direct and control church matters, consistently with the particular and general laws of the organization or denomination to which it belongs, but not in violation of them.

RELIGIOUS SOCIETIES—OFFICERS—RIGHT OF MAJORITY TO DEPOSE.—A majority of the members of an absolutely independent church congregation, acting in conjunction with members of other similar congregations, or alone, cannot exercise authority to remove duly elected officers in the former congregation whose terms of office are indefinite, except by acting in compliance with the rules and discipline of the church to which they belong.

I. C. Mitchell and C. P. Hewes, for the appellants.

W. F. Reeder, for the appellees.

476 DEAN, J. The plaintiffs' bill in this case avers, as follows: In 1832 a religious congregation was organized at How-

ard, Centre county, Pennsylvania, denominated "Disciples of Christ"; at the commencement of these proceedings, it numbered sixty persons, and was not incorporated; one R. C. Leathers made a report to the Pennsylvania conference for the year 1889 that there were but fifteen members in good standing composing the congregation; that this report dropped from the rolls of the congregation a majority of its members without notice or hearing, and without warrant. On February 7, 1890, the majority appealed to an impartial tribunal (not named), and asked the elders to join in choosing said tribunal, which they, the elders, refused to do; then, a majority of the congregation, acting through a committee, appealed to the elders of a sister church at Eagleville to hear and determine the complaint which had created schism; the elders of the Eagleville church entertained the appeal, and called in elders of the sister congregations of Lock Haven and Williamsport, and together they heard the complaint on June 13, 1890, and rendered a decision, recommending the calling of a meeting of the ⁴⁷⁷ congregation at Howard on June 25, 1890, following; due notice of the meeting was given; on the day named, defendants closed and locked the doors of the church and prevented the meeting in the church; those members who had complained and appealed then organized a meeting outside and in front of the church, presided over by Rev. Ryan of Williamsport; at this meeting, J. Z. Long, one of plaintiffs, was elected a trustee in place of H. L. Harvey, then a trustee, and one of these defendants, N. G. Pletcher, theretofore and then a trustee, and one of plaintiffs, was approved, as was also A. J. Gardner, one of defendants; A. J. Gardner and R. C. Leathers were deposed as elders, and the congregation, for the time being, was placed under the supervision and jurisdiction of the elders of Eagleville and Lock Haven; notwithstanding their deposition, the old board of trustees continued to act, and the old board of elders persisted in holding on to their offices, and by force and violent demeanor prevented the elders of Eagleville and Lock Haven churches from assuming and exercising the jurisdiction and supervision conferred upon them by the 25th of June meeting, and persisted, by force and threats, to debar a majority of the congregation from engaging in worship in the church; that the 25th of June meeting was constituted and held by competent authority of the denomination, and all its proceedings were regular under the usages of the church, and that the exercise of authority by defendants was wrongful. The

prayers for relief were, that Harvey, the two Gardiners, and Leathers be enjoined from acting as trustees or elders, and from preventing Long and Pletcher from assuming the offices to which they had been elected, and that they be further enjoined from preventing the elders of Eagleville and Lock Haven from assuming supervision of the congregation; and, further, that they and each of them be enjoined from excluding a majority of the congregation from worshiping in the church.

The answer of defendants denies that those who appealed, called on the elders of Eagleville and Lock Haven churches, and held the meeting of the 25th of June, are a majority of the congregation; on the contrary, they aver that they compose but a small minority; that O. T. Noble and A. M. De Haas, neither of them members of the congregation, but acting as a committee for the meeting, attempted to take possession of the church ⁴⁷⁸ property and turn it over to the minority composing the meeting, thus ousting the regular organization and putting a wholly irregular one in control; they admit they resisted this unauthorized interference; they further aver that one Rev. W. L. Hayden, of Bellefonte, came with the sheriff at the hour of public worship, on the 10th of August following the meeting, and read a lecture or proclamation to them, commanding them to surrender possession of the church to the minority, which they refused to do. They further aver that the action of the 25th of June meeting with the elders of the churches of Eagleville and Lock Haven and clergymen from other congregations was wholly unauthorized and unknown to the rules and discipline of the church; that there exists no other power to adjust differences in a Disciple congregation but the elders and the congregation, and the congregation alone can depose officers duly elected. That this was a regular and fully organized congregation, with a duly elected pastor, Rev. G. W. Headley; that the defendants, the duly elected officers representing a majority of the congregation, do not exclude any, but invite all the members to worship in said church. They therefore pray that the bill be dismissed at plaintiffs' costs.

The court appointed the late D. S. Keller, Esq., master to report facts and suggest a decree; he took much testimony, and heard full argument by counsel, but died before reporting to the court. Clement Dale, Esq., was appointed in his stead, who, without hearing the argument, made report; he suggested for decree that defendants be enjoined from acting as officers, or

otherwise interfering with the occupation of the church, and that some person be appointed to give two weeks' notice of a congregational meeting of the members now in good standing, for the purpose of electing two elders, three deacons, and three trustees to serve for two years, and thereafter the elections to be conducted according to the usages of the church; the same person appointed to give notice, to preside at the election; after the election, the terms of present incumbents' office to end. The president judge approved the report of the master, made in substance the decree suggested by him, and appointed A. M. De Haas, one who sided with plaintiffs, to give notice and preside at the meeting of the congregation. The two associate judges filed a dissenting opinion, dismissing the bill at the costs ⁴⁷⁹of plaintiffs. We have before us now the appeal from the decree of the president judge awarding the injunction.

Our power of adjudication in disputes between warring church parties is limited. In such cases, we can look into the rules of a church organization only to ascertain the church law, and, if that be not in conflict with the law of the land, all we can do is to protect the rights of parties under the law they have made for themselves. Our brother Williams has so fully discussed this subject, and so clearly stated the rules that must govern courts in such litigation in the late case of *Krecker v. Shirey*, 163 Pa. St. 551, that we need not repeat them.

Each party here claims to be a majority; when this trouble arose the defendants were in office; presumably, they were put there by a majority, and there was no evidence even offered to rebut this presumption. It is admitted their term of office was indefinite, and they could only be deposed by a majority of the members. Assuming that a majority of the members demand the removal of these officers, what method should they legally adopt to effect their purpose? The law is settled that it must be done in compliance with the rules and discipline of the church. "A majority of a church organization may direct and control church matters consistently with the particular and general laws of the organization or denomination to which it belongs, but not in violation of them": *Sutter v. Church Trustees*, 42 Pa. St. 503. The master finds as a fact that every Disciples' congregation is practically independent; other congregations of the same denomination may advise, but there is no superior tribunal of appeal. Both parties concede that they recognize no rule of conduct in cases of dispute except the New Testament.

Alexander Campbell, the Disciples' greatest preacher, if not their founder, says, "It (the church) knows nothing of superior or inferior church judicatures, and acknowledges no laws, no canons or government, other than that of the Monarch of the Universe and its laws." Daniel Sommer, an authority in the church, discusses the whole subject, and, while he favors an appeal to other churches for advice and aid in allaying church dissensions, he comes to this conclusion: "The question is often asked, Have we no right to appeal from the decision of a church? Certainly, the right of appeal is as free as the air we breathe. For our own justification, we may appeal to one church or a dozen, to ⁴⁸⁰ one man or a hundred; but, among religious people who are strictly congregational in their church government, there is no authority in any tribunal that may be thus selected, especially a tribunal chosen by only one party. The decision of such a tribunal may have a moral weight, but it has no legal authority. There is nothing official about committees, even if mutually chosen. . . . As each family is a separate government by itself, so is each congregation. No other family on earth has a right to come in and dictate to me and my family, and no other congregation on earth has the right to come in and dictate with reference to the affairs of the congregation where I hold my membership."

Many other authorities were put in evidence before the master; the decided weight of them tends to establish the rule in this particular denomination that each congregation is absolutely independent of any legal control by any other congregation, or by the clergy or officers of such other congregation. What are the admitted facts here? Against the protests of defendants, delegations from Eagleville and Lock Haven churches, two ministers, one from Bellefonte and one from Williamsport, met with members of this congregation outside the church, and by a vote deposed these defendants and elected in their places part of these plaintiffs, and approved and continued in office part of them. Where, in the rules of the church organization, exists the semblance of authority for this proceeding? The master does not point out, and we have failed to find it in the evidence. It is said that Leathers and one of the Gardners were present at one of the hearings before the 25th of June, and had notice of the meeting; this is denied; but assume it to be true; both objected to the meeting when held, and refused to take part. We decline to consider the arguments bearing on the fair-

ness and desire for peace displayed by the respective parties; discussion of this subject would neither determine the existence of authority in the meeting nor the want of it. In the exercise of such a high authority as was attempted here, parties must point us to a clear "thus saith our church law." We are of opinion, the meeting of June 25th was wholly without authority to depose the old officers or to elect new ones.

But, it is asked, if the members represented by these plaintiffs be in a majority, how shall they obtain the rights of a majority? ⁴⁸¹ We reply, by exercising them as members of the congregation, and as the majority, for more than sixty years, has exercised them; the reply to this, perhaps, is, those in possession will exclude us from lawful participation in congregational government. We are averse to assuming that any of the members of this congregation, now that their lawful course of action is pointed out to them, will act with lawlessness; but if peace among members of a christian church be impossible, then the courts are open to the wronged members, as members, and such remedy as the law warrants will be afforded. But the courts cannot sustain wholly unlawful attempts to right even wrongs.

The decree of the court below is reversed and set aside, and the bill is dismissed at costs of plaintiffs.

RELIGIOUS SOCIETIES—JURISDICTION OF COURTS.—If a revised confession of faith is adopted by a religious society, and the question is one of doctrine alone, the courts are inclined to treat the decision of the general conference of the association as final in so far as it determines that such confession does not so change the distinguishing doctrine of the church as to destroy its identity or operate as a perversion of the trust under which its property is held: *Russie v. Brazzell*, 128 Mo. 93; 49 Am. St. Rep. 542. To the same effect, see *Roshi's Appeal*, 69 Pa. St. 462; 8 Am. Rep. 275; *Gaff v. Greer*, 88 Ind. 122; 45 Am. Rep. 449. The civil courts never take up matters of religious doctrines for the purpose of determining the abstract truth or falsity thereof, and they never consider them at all except where civil rights, rights of property or contract respecting the holding, use, control, or enjoyment of property are dependent on them: Extended note to *Connolly v. Masonic etc. Assn.*, 18 Am. St. Rep. 302. Legal tribunals as such have no jurisdiction over the church as such except so far as is necessary to protect the civil rights of others and to preserve the public peace: *First Baptist Church v. Witherell*, 3 Paige, 296; 24 Am. Dec. 223.

HIGHLANDS v. LURGAN MUTUAL FIRE INSURANCE CO.

[177 PENNSYLVANIA STATE, 566.]

INSURANCE—ASSIGNMENT OF INSURED PROPERTY—ESTOPPEL.—If an insurer of property assigned for the benefit of creditors is, through his authorized agent, informed of the assignment by the assignee, who requests a transfer to himself, and, after being informed by such agent that a transfer before sale and conveyance is not necessary, pays an assessment demanded by the insurer, the latter is estopped from asserting the want of such transfer as a defense to liability for loss happening after the assignee's sale of the property and before a deed is made to the purchaser.

F. E. Beltzhoover, H. M. Leidigh, and S. M. Leidich, for the appellant.

J. W. Wetzel, for the appellee.

569 GREEN, J. There is but one question in this case that needs consideration. It is the question of estoppel. Can the defendant be permitted to set up the defense it has made against the plaintiff's claim? We are clearly of opinion it cannot. There is no controversy as to the facts. The learned court below granted a compulsory nonsuit at the end of the plaintiff's testimony upon a theory to which we cannot possibly assent. The question of waiver is of no consequence, in view of the facts given in evidence by the plaintiff. The legal plaintiff, Hiram Highlands, held a fire insurance policy issued by the defendant, covering a barn and its contents and a dwelling-house and furniture. This policy was executed on May 26, 1891, to continue for five years. On August 2, 1892, Mr. Highlands made an assignment for the benefit of creditors to Charles B. Baker, who accepted and executed the trust. Mr. Baker testified on the trial that, within a few days after the assignment was made, he went to the agent of the defendant, Meredith, for the purpose of having the policy transferred to him as assignee, but was assured by the agent that the policy was good as it was, and did not require any transfer until after deeds were made to the purchaser of the property from the assignee. Later on, at another conversation on the same subject, he said the agent told him "there was no occasion to have that policy transferred until after the deed was made; otherwise, he said, if it was transferred before the deed was made, it would be just about in the same shape as it was before; that it would leave it stand in my hands." In consequence of this he retained the policy, and the transfer was not made. During the following year, 1893, the same agent

of the defendant, Meredith, made a demand upon the assignee for an assessment for a loss which had occurred after the assignment. The witness took the advice of his counsel as to whether he should pay the assessment, and, upon being advised to make the payment, he did so, and took a company ⁵⁷⁰ receipt for it, signed by Meredith as collector. That assessment was made on October 14, 1892, and the receipt was given on March 18, 1893, for an assessment of seven dollars and fifty cents, due the defendant company. The assignee made a sale of the farm on which the barn in question was situated in October, 1892, under an order of the court of common pleas, but the sale was not perfected at that time, and no deed was made to the purchaser until April 21, 1894. In the mean time, on April 3, 1894, the barn and its contents were entirely destroyed by fire, and the company refuses to pay because the property had been sold by the assignee, and the court was of opinion that the confirmation of the sale avoided the policy, although no deed was made to the purchaser.

The assignee having been assured by the defendant through its authorized agent that the policy was good as it was until a deed was made to the purchaser, and the defendant having claimed an assessment for a loss which occurred not only after the assignment, but also after the sale was made by the assignee, and that assessment having been paid, the case comes clearly within the operation of at least three of our decisions, the last of which was made only one year ago. These cases are *Mentz v. Lancaster Fire Ins. Co.*, 79 Pa. St. 475; *Wachter v. Phoenix Assur. Co.*, 132 Pa. St. 428; 19 Am. St. Rep. 600; *Light v. Countrymen's etc. Ins. Co.*, 169 Pa. St. 310; 47 Am. St. Rep. 904. In all of these we held the company estopped by declarations of their agent of a character precisely similar to those made in this case. In the *Mentz* case, because the agent told the policy holder that the proper indorsement had been made on the policy, we held the company estopped by his declaration. The *Wachter* case was almost precisely similar to this, and the company was estopped, because the agent assured the policy holder that the policy was properly transferred to the mortgagee, and that nothing more need be done. In the *Light* case we expressly held that there was no insurable interest in the policy holder after the sale of the property, but we refused to permit that defense to be made. There as here, the policy holder informed the agent of the sale, and wanted to know what was to be done in re-

gard to the policy. The agent told him he had better hold the policy and have the assessments sent to him, which was done, and they were paid by the insured, who delivered the deed to the purchaser without transferring the ⁵⁷¹ policy in pursuance of the advice of the agent. Although the defense of want of insurable interest at the time of the fire was a perfectly good defense, and although there actually was no insurable interest in the plaintiff when the fire occurred, we refused to allow such a defense to be made solely because of the declaration of the agent and the subsequent acceptance of assessments by the company from the insured. We can see no difference between that case and this. Here the assignee of the insured went to the agent of the company shortly after the assignment and informed him of the assignment, and proposed to have a transfer made. But the agent told him it was not necessary, and therefore it was not done. Subsequently, the company demanded an assessment from the assignee and it was paid. These were the exact facts upon which the *Light* case was ruled and they rule this. The company treated the policy as an active subsisting policy after the assignment, and after the sale by the assignee, and they shall not now be permitted to escape liability by asserting the want of a transfer, which was not made because its omission was induced by their own declarations and acts. We cannot understand why the testimony of Hiram Highlands was stricken out, or why the amendment asked for was refused, but, as no assignments of error on that account were made, those questions are not before us.

Judgment reversed and new venire awarded.

INSURANCE—ESTOPPEL.—If a policy of insurance exists upon buildings at the same time that the land upon which they stand is sold and conveyed, and it is continued in force in favor of the vendor by an agreement between himself and the insurer, and the assessment and collection of premiums up to the time of the loss of the buildings by fire, the insurer is liable for the loss and estopped from asserting a want of insurable interest in the vendor: *Light v. Countrymen's etc. Ins. Co.*, 169 Pa. St. 310; 47 Am. St. Rep. 904; to the same effect, *Curtiss v. Aetna etc. Ins. Co.*, 90 Cal. 245; 25 Am. St. Rep. 114. An insurance company is estopped from denying the authority of its agent, where it issues a policy of insurance upon an application procured by him and receives from the assured up to the time of his decease all the dues and assessments payable to the company under the policy: *McArthur v. Home etc. Assn.*, 73 Iowa, 336; 5 Am. St. Rep. 684, and note; to the same effect, *Kitchen v. Hartford etc. Ins. Co.*, 57 Mich. 135; 58 Am. Rep. 344. See, also, the notes to *Mitchell v. Mississippi Home Ins. Co.*, 48 Am. St. Rep. 538; *Plumb v. Cattaraugus County etc. Ins. Co.*, 48 Am. St. Rep. and *Beal v. Park etc. Ins. Co.*, 82 Am. Dec. 722.

BLOOD v. CREW LEVICK COMPANY.

[177 PENNSYLVANIA STATE, 606.]

DEEDS—COVENANTS—EFFECT OF ACCEPTANCE.—If a grantor conveys land by his deed upon terms and conditions stated therein, the grantee, by accepting the deed, consents to its conditions and is bound by them as fully as he could have bound himself by signing and sealing the covenants and conditions contained in the deed, and they may be enforced by the parties in whose behalf they are made with substantially the same effect.

DEEDS—ASSUMPTION OF MORTGAGE.—A vendee who accepts a deed stipulating that it is made "under and subject to the lien of certain mortgages," and that it is agreed between the parties that the grantee accepts the title subject to the payment of the mortgages, but does not assume the payment of the various outstanding notes given for the debts secured by such mortgages, is personally liable for the payment of the mortgage debt, and, if he fails to pay it, his grantor may maintain an action against him to recover the sum remaining unpaid.

DEEDS—EFFECT OF ACCEPTANCE—PAROL EVIDENCE TO VARY COVENANTS AND CONDITIONS.—If a vendee of land accepts a deed from his vendor, containing covenants and conditions to be performed by such vendee, the latter is bound by such covenants and conditions in the absence of proof that anything was added to or omitted from the deed by fraud, accident, or mistake, or that it was incorrectly read or explained to the vendee, and, in such case, he cannot introduce parol evidence to vary the stipulations contained in the deed.

RES JUDICATA—INSUFFICIENT DEFENSE.—An answer alleging that the matter in suit has already been adjudicated in equity, and that the bill in equity was so proceeded with, that it was by the court dismissed, is insufficient to prevent judgment, as the bill in equity may have been dismissed on the ground that the remedy was at law and not in equity.

DEEDS—EFFECT OF ACCEPTANCE—ASSUMPTION OF MORTGAGE.—If a vendee of land accepts a deed therefor from his vendor containing a covenant of general warranty, and also a covenant on the part of the vendee to pay off a mortgage debt, existing against the land, the failure of the grantor to pay off other incumbrances existing against the land, does not relieve the vendee from liability to pay the amount of the mortgage to the mortgagee.

SET-OFF—ESTOPPEL.—A party may debar himself by his own agreement, or by his conduct, from insisting upon a set-off.

Rule for judgment for want of sufficient affidavit of defense, The action was by Clara S. Blood, executrix of A. R. Blood, deceased. In her complaint, she alleged that A. R. Blood, being the owner of certain lands, sold them, and in part payment of the purchase price received certain notes, aggregating the sum of forty-six thousand dollars, secured by a mortgage on the same lands. That he afterward negotiated the notes to other persons, and thereafter purchased back the lands from the mortgagor

and undertook to pay the notes as fast as they became due. That he subsequently sold the same lands to the defendant. That a part of the consideration of the sale was that the defendant would hold the land subject to the lien of the mortgage, and that the grantee would accept the title and possession of the land upon condition of payment of the sums secured by the mortgage thereon. To the complaint the deeds made to and accepted by the defendant were annexed as exhibits, and from such deeds it appeared that the defendants accepted them "under and subject to the lien" of the mortgages for the unpaid purchase money, and they also contained a further stipulation as follows: "It is hereby agreed between the parties to this instrument that the said party of the second part accepts the title to the foregoing and described pieces and parcels of land, and all rights, subject to the payment of the mortgages hereinabove mentioned; but does not assume the payment of the various outstanding notes given for the debts described by said mortgages." In the affidavit of defense filed by the defendant, it denied that by such deeds or otherwise, it agreed to indemnify A. R. Blood, or his executrix, or any other person, against the payment of the mortgages referred to in the deeds, and denied that it covenanted in any manner that it would accept title or possession of the lands upon condition of the payment of the sums, or any part thereof, described in said mortgages. The affidavit did not, however, deny that the exhibits annexed to the complaint were true copies of the deeds referred to therein. By an additional affidavit, the defendant asserted the existence of an agreement, made prior to and at the execution of the deeds, between it and Arthur R. Blood to the effect that it should not in any way become liable or responsible, either as a principal debtor or surety, or in any other capacity whatsoever, for any of the mortgages or any debt or part of debt described therein, and that the company accepted the deeds under the belief that they carried out such agreement, and if the deeds did not carry out that agreement they did not correctly state the terms and conditions under which the conveyance of properties was to be made by Blood and accepted by the company. Judgment was entered in favor of the plaintiff for the want of a sufficient affidavit of defense.

T. F. Jenkins and Allen & Sons, for the appellant.

S. T. Neill and H. E. Brown, for the appellee.

⁶¹⁶ WILLIAMS, J. The judgment now appealed from was entered for want of a sufficient affidavit of defense. The original and supplemental affidavits of defense are therefore to be examined to see if they set forth any ground of defense good against the Brown Oil Company. Looking at them as constituting together a statement ⁶¹⁷ of the defendant's case, we find four lines of defense alleged. These are: 1. A denial of liability under the covenants contained in the deed under which the defendant acquired title to the freehold estates; 2. The existence of a parol understanding or agreement between A. R. Blood, the vendor, and the defendant that the defendant should not be "personally liable" for the payment of any part of the mortgage of the Brown Oil Company; 3. An adjudication in favor of the defendant upon the question of its liability, resulting from the dismissal of a bill in equity filed in the same court by the same plaintiff against the defendant; 4. The existence of cross-demands against A. R. Blood for the nonpayment of encumbrances upon the property conveyed by him to the defendant, not assumed in any manner by it, and some of which had been proceeded upon by the holders, to the great loss, as it is asserted, of the defendant. Is either of these a good defense against the use plaintiff in this case? The first is effectually disposed of by the case of *Blood v. Crew Levick Co.*, 171 Pa. St. 328, in which we held that the acceptance by the defendant from A. R. Blood of the deed for the properties conveyed in fee, with its stipulations relating to this and other encumbrances, amounted to an express covenant to pay them which would support an action in the name of the covenantee for the use of the holder of the mortgage. We are agreed that the deed was correctly interpreted in that case, and that the question of the liability of the defendant upon its express covenant is not an open one. Since that case was decided, substantially the same question has arisen in the court of errors and appeals of New Jersey in the case of *Green v. Stone*, 54 N. J. Eq. 387, ante p. 577. In that case, a vendee had covenanted to pay a mortgage covering the property purchased by him. Its amount was taken into consideration, as in this case, as part of the purchase money, and was to be paid directly to the holder of the mortgage. Proceedings for foreclosing the mortgage were entered upon, and the property brought to sale. It did not bring enough to pay the mortgage debt, and the purchaser was held liable to the holder of the mortgage on his covenant for the residue of the mortgage debt.

A parol agreement was set up in that case, as in this, that the purchaser was not to be personally liable on his covenant, but, in the absence of fraud or mutual mistake, the court declined to ~~the~~ reform the covenant sued on. The reason for this holding is very plain. When a grantor conveys land by his deed upon terms and conditions stated therein, the grantee by accepting the deed consents to its conditions. He is bound by them as fully as he could have bound himself by signing and sealing the covenants and conditions contained in the deed, and they may be enforced by the persons in whose behalf they are made with substantially the same effect.

The second line of defense is equally unavailing. It is not alleged that anything was omitted from, or added to, the deed by fraud, accident, or mistake. It is not alleged that it was incorrectly read or explained to the defendant. It is, in substance, an averment that the defendant understood the stipulation that it was not to look after the individual notes secured by the mortgage as relieving it from its express covenant to pay the mortgage itself. This construction was not adopted in *Blood v. Crew Levick Co.*, 171 Pa. St. 328, and cannot be sustained. The parties dealt at arms' length. The amount of this mortgage was part of the purchase money which the defendant agreed to pay for the property it purchased. It was to be paid, not to Blood, but to his creditor; and this was expressly provided for by the covenant in the deed. In the absence of any definite allegation of fraud or mistake, it is elementary law that the written covenant must prevail. The allegation of "*res adjudicata*" does not rest on any such statement of the case, or of the point decided in the equity proceeding, as would enable us to determine whether the court below was in error or not. It may well be that the bill was dismissed because the plaintiff's remedy was thought to be at law and in just such a form of action as we now have before us. The averment in the affidavit of defense is, "that the said bill was so proceeded in that it was by the court dismissed." This does not show us what was decided, or the reason for which the bill was not entertained. This brings us to the fourth and last line of defense, viz., the existence of cross-demands against A. R. Blood. If this action was brought for the recovery of purchase money belonging to A. R. Blood, and payable to him as owner, a cross-demand could be properly set up against him. But while it is for purchase money for property sold to the defendant by Blood, it is for the use of one

to whom so much of the purchase money as is now in controversy ⁶¹⁰ was appropriated at the time of the purchase, and to whom, by the covenants in the deed, the defendant undertook to make payment. The amount of this mortgage debt was a part of the purchase money to be paid for the property conveyed, and it was to be paid directly to the holder of the mortgage who is now asking payment. It is alleged that there were other encumbrances upon the property that the vendor agreed to remove, and that he has not done so. The defendant was, at the time, content to take the vendor's covenant of general warranty as the security for the payment of these known encumbrances and upon this basis to enter into the covenant to pay the plaintiff's mortgage. There has been no change in the situation since. Nothing is now known that was not fully known at the time, and that did not enter into the transaction when the covenant on which this action rests was made. A party may debar himself by his own agreement, or by his conduct, from insisting upon a setoff: *Ardesco Oil Co. v. North American Oil etc. Co.*, 66 Pa. St. 375; *Reed v. Penrose*, 36 Pt. St. 214. The defendant is in that situation. It is not now satisfied with the covenants of general warranty of its vendor as security against the encumbrances he assumed to pay. It thinks it should have more protection than it provided for itself when its own covenant was entered into. If so, its remedy is against its vendor. It may be that the covenant to pay this mortgage was an improvident one. It may be that the warranty of A. R. Blood is an inadequate protection for the defendant against encumbrances the existence of which it knew at the time it accepted the deed for the freehold properties, but the payment of which it did not assume. This is not our question. The point we are to consider and determine is, whether the failure of Blood to pay the debts which he promised to pay is any just reason for relieving the defendant from its express covenant to pay this mortgage, made with full knowledge of all the circumstances and upon such security for Blood's performance as was at the time satisfactory. Upon this question, our judgment is in harmony with that of the learned judge of the court below.

The judgment was rightly entered and is now affirmed.

THE EFFECT OF OTHER CONVEYANCES similar in form to that involved in the principal case was presented and decided by the same court in *Blood v. Crew Levick Co.*, 171 Pa. St. 328. The court, after referring to the stipulations in the deed, and particularly to the

stipulation that the party of the second part accepted the title to the premises subject to the payment of the mortgages above named, construed such stipulation as follows: "This stipulation is, therefore, a covenant to pay to the mortgagees the amount due upon the mortgages referred to, followed by a provision that the covenant shall not impose upon the purchasers the duty of hunting up the notes and paying the same to the holders, but that payment to the holder of the mortgage should discharge their obligation. We have, then, both an implied covenant to indemnify arising from the 'under and subject to the lien of' clause, and an express covenant in the stipulation beginning with the words, 'It is hereby agreed,' to pay the mortgage debt to the holder of the mortgage. We can see no reason why an action in the name of covenantee might not have been brought upon it to the use of the party entitled to receive the money."

DEEDS—EFFECT OF ACCEPTANCE.—The acceptance by a grantee of a deed-poll makes a stipulation therein on his part binding on him, if he has legal capacity to contract, so that assumpsit can be maintained against him for nonperformance thereof: *Burbank v. Pillsbury*, 48 N. H. 475; 97 Am. Dec. 633. See, also, the extended note to *Clifton v. Jackson Iron Co.*, 16 Am. St. Rep. 622.

DEEDS—ASSUMPTION OF MORTGAGE.—A grantee who covenants with the grantor to pay off a mortgage on the premises becomes in equity the principal debtor with respect to the mortgage debt: *Klapworth v. Dressler*, 13 N. J. Eq. 62; 78 Am. Dec. 69, and extended note. A stipulation in a deed that the grantee assume and pay a debt secured by a mortgage on the premises, for the payment of which the grantor is liable, is a contract by the grantee with the grantor for the indemnity of the latter, and inures in equity for the benefit of the mortgagee, and may be enforced by the latter to the extent of the unpaid part of the mortgage debt, after the proceeds of the mortgaged estate have been applied thereon: *Green v. Stone*, 54 N. J. Eq. 387; ante, p. 577, and note. See, also, the note to *Gifford v. Corrigan*, 15 Am. St. Rep. 514.

WOOD v. BOYLE.

[177 PENNSYLVANIA STATE, 620.]

LIBEL—PUBLICATION LIBELOUS PER SE.—A newspaper publication, stating that the manager of a pipe line, engaged in business of a public character, has set himself up as a political boss, without brains, capital, or credit, and has appeared at the head of a gigantic business enterprise requiring liberal bank balances and a large mental endowment, that he has never succeeded in any undertaking because invariably associated with movements that ought not to succeed, and that he has entered into a scheme to steal a pipe line from poor producers, in order to give it to opulent refiners and arrogant exporters, masquerading as a certain pipe line, impeaches the private, individual, and personal, and not the official, character of such manager, and is not a privileged communication, but is libelous per se.

LIBEL—PRIVILEGED COMMUNICATION.—A newspaper publication directed against a person engaged in business of a public character, and attacking and impeaching his private, individual, and personal character and capacity, is not privileged.

LIBEL—DEFAMATION OF CHARACTER.—Any publication, injurious to the social character of another, and not shown to be true, or to have been justifiably made, is actionable as libelous.

ARREST—PRIVILEGE FROM WHILE ATTENDING COURT.—A defendant in a criminal case is not privileged from arrest on civil process while attending court to answer the criminal charge.

PRACTICE.—IF PLAINTIFF DIES AFTER VERDICT and before judgment thereon, the judgment may be entered before two terms after the verdict was rendered.

Trespass for libel: Plaintiff was manager of a pipe line company, and defendant's newspaper published the following article relating to him on which action was brought:

"A PROMISING SCHEME."

"A. D. Wood, the variously notorious young Napoleon of politics and pipe lines, will assemble his small brood at Warren this morning, and together vote on the proposition to turn over the Producers' Oil Company's real pipe line to the refiners and exporters doing business as the fake United States Pipe Line, a concern that exists on paper and subsists on wind. Mr. Wood has accomplished some surprising things in his day. Without a following in politics, he has set up a political boss; without brains or capital or credit, he has appeared at the head of a gigantic business enterprise requiring liberal bank balances and a large mental endowment. He never yet has succeeded in anything he has undertaken involving the peace and prosperity of the community, for the excellent reason that he is invariably associated with movements that ought not to succeed. We dare say that his scheme to steal a pipe line from the poor producers, in order to give it to the opulent refiners and arrogant exporters masquerading as the United States Pipe Line, will fail, as it properly should. It would seem that there is no limit to the greed of this fiend in corporate form, the insatiate monster called United States Pipe Line. Up in McKean county it has Billee Burdick, the boy statesman, running for assembly, and if he is elected the refiners and exporters' pipe line will have a personal representative in the legislature. This is a good place to say much and saw Wood. Saw his official head off."

Verdict and judgment for plaintiff, and defendant appealed.

W. M. Lindsey, of Lindsey & Parmlee, Allen & Sons, Wilbur & Schnur, E. Mullen, and H. McSweeney, for the appellant.

S. T. Neill, J. W. Lee, and C. Walker, for the appellee.

629 GREEN, J. We are clearly of opinion that in every point of view, and in every way of reading the publication in

question, it was plainly and grossly libelous in itself. Nor is there the slightest reason or excuse for the attack upon the plaintiff in the contention now made that he was an official person, engaged in a business of a public character, and therefore the publication was privileged. It was not his official character or the conduct of his official business that was impeached. On the contrary, the publication was a coarse, brutal, malevolent, and purely personal attack upon the plaintiff in his private, individual, and personal capacity. The words used are not in the least degree ambiguous, their meaning is perfectly clear and plain, and they do not require the help of any innuendo. The full proof of this is the mere citation of some of the words of the libel. Thus, "Without a following in politics, he has set up a political boss; without brains or capital or credit, he has appeared at the head of a gigantic business enterprise requiring liberal bank balances and a large mental endowment." Every word of this is private and personal only. It is an assertion that the plaintiff, that is, the individual, was a person "without brains," that he was "without credit," and that he was "without capital." There could not be a more personal accusation than is contained in these words. There is nothing official about it. When it was added in the immediately following words, and as a part of the same sentence, that "he appeared at the head of a gigantic business enterprise requiring liberal bank balances and a large mental endowment," it was clearly implied that he was entirely unfitted for such a position because he was without brains or capital or credit. These deficiencies are, of course, purely personal and ⁶³⁰ would, if true, disqualify him as an individual from the occupancy of such a place in the business world.

Another sentence of the article is no better than the last in this respect. "He never yet has succeeded in anything he has undertaken involving the peace and prosperity of the community, for the excellent reason that he is invariably associated with movements that ought not to succeed." That is, the plaintiff, as an individual, was invariably associated with enterprises which did not succeed because they ought not. Whether they were disreputable, or fraudulent, or immoral makes but little difference. In any view of the words, they, and consequently he, were subject to just reproach and condemnation. If he was a person of that character, he was to be despised and condemned

by all good citizens, and, especially, he was unworthy to be employed in the management of any business enterprise.

Another sentence of the article is still worse: "We dare say that his scheme to steal a pipe line from the poor producers, in order to give it to the opulent refiners and arrogant exporters masquerading as the United States Pipe Line, will fail, as it properly should." Granting that this was not a literal charge of larceny, in that the subject was not a tangible chattel, yet it was an accusation of very gross fraud, practically amounting to an attempt to divest the title of the real owners to a valuable property and give it to others without consideration. In moral character, it was as evil an act as the embezzlement of corporate money by a person having it in his custody. It is not necessary to pursue this branch of the discussion. In many of the decided cases the publications adjudged to be libelous were far less offensive than this. Thus in *Hayes v. Press Co., Limited*, 127 Pa. St. 642, 14 Am. St. Rep. 874, we held that the following publication was libelous.

"HOTEL PROPRIETORS EMBARRASSED."

"A judgment was entered by the Third National Bank against J. F. and W. N. Hayes, of the St. George Hotel, on a promissory note dated August 6th, and payable on demand for \$1,500."

While the mere statement of the entry of a judgment was a matter of public information and appeared upon the records of the courts, the mere use of the word "embarrassed," in the same connection, was held to be libelous. The present chief justice, delivering the opinion, said: "Written or printed ⁶³¹ words which are injurious to a person in his office, profession, or calling, or which impeach the credit of any merchant or trader, by imputing to him insolvency, or even embarrassment, are libelous. The law carefully guards the credit of merchants and traders. Imputations of their solvency, or suggestions that they are in pecuniary difficulties, etc., are, as a general rule, actionable: *Odgers on Libel*, 19, 29, 80, 81, and authorities there cited. . . . The office of an innuendo is to aver the meaning of the language published, but, if the common understanding of mankind takes hold of the published words, and at once, without difficulty or doubt, applies a libelous meaning to them, an innuendo is not needed, and, if used, may be treated as useless surplusage. . . . The publication as a whole, including the headline, was in no sense privileged." If the mere implication from the use of the word "embarrassed," makes a publication libelous, with how

much greater force does that conclusion follow from words which directly charge against a citizen that he is without brains, credit, or capital? How much more severely do they impugn his business capacity, and his business standing and character in the community?

In *Collins v. Dispatch Pub. Co.*, 152 Pa. St. 187, 34 Am. St. Rep. 636, we held that any publication, injurious to the social character of another and not shown to be true, or to have been justifiably made, is actionable as a false and malicious libel.

It is needless to argue the direct application of that principle to the words of the publication in the present case. The words used in the case cited were, "complaints from outside parties were sent to the department, one asking for his dismissal on account of intimacy with a well known young local electionist." Of these words we said, "On their face, without more, the words complained of are defamatory and actionable. In the statement they are laid with an innuendo which, if true, intensifies and greatly aggravates their meaning." This is precisely true of the present case. The words used are far more damaging, scandalous, and defamatory in themselves than the words used in the last cited case, and are, therefore, manifestly libelous in themselves, and the innuendo "greatly aggravates their meaning." Further argument on this subject is superfluous. Other and equally strong cases will be found in *Conroy v. Pittsburgh Times*, 139 Pa. St. 334, 23 Am. St. Rep. 188; *Seip v. Deshler*, 170 Pa. St. 334, and numerous decisions there cited.

⁶³² It is almost unnecessary to add that no attempt was made by the defendant to prove the truth of the matters contained in the libel, and it is most certainly true that the publication was not privileged. The truth of the innuendoes, and the question of damages, were submitted to the jury with entire correctness. So far as we can see, the publication in question was a wanton, malicious, and utterly unjustifiable attack upon the personal and business character of the plaintiff, without the least cause or reason. The defendant has much reason to be thankful for the extreme moderation of the verdict. The views we have expressed dispose of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth assignments of error. They are all dismissed.

It is very doubtful whether a question of privilege in the service of the writ can be considered in error after a trial on the merits. But if it can, the great preponderance of authority is,

that the defendant in a criminal case is not privileged from arrest on civil process, while attending court to answer a criminal charge. There are a few contrary decisions in the lower courts but none in this court, nor in any other court of last resort, English or American, to which we have been referred. In the case of *Key v. Jetto*, 1 Pittsb. Rep. 117, Judge Woodward, sitting at nisi prius in 1854, held that the privilege did not extend to defendants in criminal cases. In 1 American and English Encyclopedia of Law, page 724, there is an extensive collection of decisions of both English and American courts of last resort, in all of which it is held that the privilege did not extend to defendants in criminal cases. We see no good reason for departing from the current of authority on this subject. The first assignment is not sustained.

The eleventh assignment raises the question whether judgment could be entered on the verdict, where the plaintiff has died after verdict and before judgment. In *Chase v. Hodges*, 2 Pa. St. 48, it was held that the death of the defendant between verdict and judgment, if not more than two terms intervene, cannot be averred for error since the statute of 17 Charles II., chapter 8, and 1 James II., chapter 17, section 5. Burnside, J., said: "The statute of 17 Charles II, chapter 8, made perpetual by 1 James II, chapter 17, section 5, enacts that when either party dies between verdict and judgment, the death shall not be averred for error, so that the ⁶³³ judgment be had within two terms after verdict." The same ruling was made in *Murray v. Cooper*, 6 Serg. & R. 126. The English cases are to the same effect, and all that it is necessary to do is to enter the judgment within the two terms, which was done in this case, nunc pro tunc.

The case of *Stroop v. Swarts*, 12 Serg. & R. 76, is not in point. There the wife did not die until after the judgment had been arrested for other cause, and hence there never was any judgment in the court below. Here the death of the party between verdict and judgment, under the statute, did not prevent the entry of judgment within the two terms. Hence the record was complete, and a valid final judgment was entered in the court below before the appeal was taken. Of course, such a judgment could not be reversed on appeal for such a reason. In *Griffith v. Ogle*, 1 Binn. 172, the situation of the record was precisely as it is here. The action was case for conspiracy. The plaintiff recovered a verdict for \$600 in October, 1802. Reasons for a new

trial and in arrest of judgment were filed which were overruled in October, 1804. The plaintiff died in March, 1803, and the court below entered judgment on the verdict as of a term in which the plaintiff was living, and this court sustained the judgment.

The eleventh assignment of error is not sustained.

Judgment affirmed.

LIBEL—CRITICISM OF PUBLIC WORK—DEFAMATION OF PERSON.—So long as comment and criticism upon a public work are confined to it, and are fair and reasonable, there is no libel, because there is no defamation of the individual who performed the work, and it cannot be made libelous by any attack upon the private or business reputation of some other person, however much malice may exist, but when it becomes an attack upon the private or business character of the one who performed the work, the element of malice comes in and stamps the language as libelous: *Bearce v. Bass*, 88 Me. 521; 51 Am. St. Rep. 446, and note. See, especially, the extended note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 358, 360.

LIBEL.—ANY PUBLICATION INJURIOUS TO THE SOCIAL CHARACTER of another, and not shown to be true or to have been justifiably made, is actionable as a false and malicious libel: *Collins v. Dispatch Pub. Co.*, 152 Pa. St. 187; 34 Am. St. Rep. 636, and note. See, also, the extended note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 333.

ARREST ON CIVIL PROCESS—PRIVILEGE.—A person brought into court on criminal process and admitted to bail is not privileged while in court from arrest on civil process: *Moore v. Green*, 73 N. C. 394; 21 Am. Rep. 470. See, also, the extended note to *In re Healey*, 38 Am. Rep. 718.

BATES v. CULLUM.

[177 PENNSYLVANIA STATE, 633.]

CONSTITUTIONAL LAW—LIMITATIONS — RETROSPECTIVE STATUTE.—A statute depriving nonresidents of the benefit of the statute of limitations when the cause of action arises in the state and the defendant therein subsequently becomes a nonresident of the state, although retrospective in its effect, is not unconstitutional when applied to pre-existing debts and obligations, and applies to a nonresident defendant who, prior to the enactment of such statute, had obtained leave of court to open a judgment, in order to permit him to plead the statute of limitations. In such case, the plaintiff may prove that the defendant became a nonresident after the cause of action had arisen.

S. T. Neill, for the appellant.

W. M. Lindsey, J. O. Parmlee, and E. Lindsay, for the appellee.

⁶³⁵ **STERRETT, C. J.** In June, 1881, judgment was entered against defendant by virtue of a warrant of attorney contained in an unsealed note for four thousand dollars payable one day after the date thereof, November 10, 1873.

On defendant's application, the court in January, 1893, made a decree opening the judgment, for the purpose of enabling him to interpose the statute of limitations, and awarded an issue in which it is provided that "the judgment note shall stand for a declaration and defendant shall plead the statute of limitations, and no other plea, within ten days; the plaintiff on the trial to be at liberty to show any matter in bar of the running of the statute, subject to the usual rules as to notice of special matter." On appeal to this court, the action of the court below, in thus opening the judgment and awarding the issue, was affirmed: *Bates v. Cullum*, 163 Pa. St. 234.

By agreement of the parties, the cause was tried January 27, 1896, by the court without a jury. On the trial, evidence relating to the merits of the claim and also tending to prove that, within a few weeks after the note in question was given, defendant left the state of Pennsylvania and ceased to be a resident thereof, and thenceforth continued to reside without the state, etc., was offered by the plaintiff and received under objection. In connection with the evidence of defendant's nonresidence, ⁶³⁶ etc., he also cited and relied on the act of May 22, 1895 (Pub. Laws, 112), which declares: "That in all civil suits and actions in which the cause of action shall have arisen within this state, the defendant or defendants in such suit or action, who shall have become nonresident of the state after such cause of action shall have arisen, shall not have the benefit of any statute of this state for the limitation of actions during the period of such residence without the state."

Referring to the evidence that was received under objection, the learned trial judge, in his opinion, says: "All this evidence should have been excluded, and we accordingly now sustain the objection, exclude the evidence from consideration, and seal bill of exceptions for plaintiff. The plaintiff's evidence having been excluded, that offered by the defendant may be treated as withdrawn." As to the act above quoted, he says: "The language of the act before us does not seem to require a retrospective construction—at least not such as to compel us, on ascertaining a fact by the trial of an issue, to enter a different judgment from that which we should have entered had the fact been judicially

ascertained at the time of the order awarding the issue." He accordingly held that "no fact appears by which the running of the statute of limitations was prevented"; and, having found that the note in suit "was due more than six years before the judgment was entered" thereon, he enforced the bar of the statute and entered judgment for the defendant. Hence this appeal, in which the correctness of the learned judge's rulings are challenged.

If the act, properly construed, is applicable to suits and actions, such as this, in which the cause of action arose in this state prior to the passage of the act of 1895, etc., and is not unconstitutional on that or any other ground, it is impossible to justify the action of the court below in excluding the evidence of defendant's "residence without the state," for more than twenty years, as a fact "in bar of the running of the statute." One of the terms of the issue, awarded by the court, is that, on the trial thereof, the plaintiff shall "be at liberty to show any matter in bar of the running of the statute." The trial did not take place until January 27, 1896, more than eight months after the act was passed. All that was adjudicated prior thereto was the authority of the court to open the judgment ⁶³⁷ and award the issue on the terms therein specified. The issue was pending and undetermined when the act went into operation. The learned counsel for defendant, in their argument, candidly "admit that the weight of authority is in favor of the power of the legislature to repeal and pass laws changing the methods of procedure, and relating solely to the remedy, pending litigation"; but they claim "that the peculiar situation of this case" renders those authorities, as well as the act itself, inapplicable. For reasons above suggested, we are unable to see wherein either the act or the authorities referred to are not strictly applicable to the case in hand. The language of the act is clear, specific, and imperative. It applies to "all civil suits and actions in which the cause of action shall have arisen within this state." It affects all defendants "who shall have become nonresident . . . after said cause of action shall have arisen." This language is clearly retrospective, at least as applied to the cause of action and residence of the defendant.

Whether our statute of limitations should or should not continue to run in favor of persons who had abandoned their residence in this state was purely a legislative and not a judicial question. The defendant had no right in or under the statute

that could interfere with the power of the legislature to declare that he and all others similarly situated should not have the benefit thereof "during the period of" their "residence without the state." As was said in *Campbell v. Holt*, 115 U. S. 628, "no man promises to pay money with any view of being released from that obligation by lapse of time. It violates no right of his, therefore, when the legislature says time shall be no bar, though such was the case when the contract was made."

We are of opinion that the act of 1895 is neither unconstitutional nor inapplicable to the facts of this case, and that the learned court erred in holding otherwise and excluding plaintiff's evidence.

Judgment reversed, and record remitted for further proceedings in accordance with this opinion.

LIMITATIONS OF ACTIONS—ABSENCE FROM STATE.—The statute of limitations does not run in favor of a defendant while he is absent from the state, no matter if he was so absent when the cause of action accrued, and whenever he departs from the state after having come into it, the running of the statute is suspended from that time and during his absence, whether the cause of action first accrued while he was in, or while he was absent from, the state: *Stanley v. Stanley*, 47 Ohio St. 225; 21 Am. St. Rep. 806, and note. The statute of limitations is suspended during the time of defendant's absence from the state by change of residence after the cause of action accrues, where the statute provides that "if, after a cause of action shall have accrued, such person depart from and reside out of this state, the time of his absence shall not be deemed or taken as a part of the time limited for the commencement of the action: *Cook v. Holmes*, 29 Mo. 61; 77 Am. Dec. 548, and note. See, also, the extended note to *Moore v. Armstrong*, 36 Am. Dec. 72.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

DAVIS v. CHILDERS

[45 SOUTH CAROLINA, 133.]

CHATTEL MORTGAGES—EQUITABLE. — An agreement founded on a valuable consideration to give a mortgage on a chattel constitutes an equitable mortgage.

CHATTEL MORTGAGES.—EQUITABLE chattel mortgages may be created by parol, and it is not necessary that the agreement to give such mortgage should be in writing.

CHATTEL MORTGAGES.—EQUITABLE chattel mortgages are of two kinds: those which do, and of those which do not contain words of alienation sufficient in form to pass the legal title.

CHATTEL MORTGAGES — EQUITABLE — EFFECT OF WORDS OF ALIENATION.—If an equitable chattel mortgage contains words of alienation sufficient to pass the legal title, and the property mentioned therein is not in esse when the mortgage is executed, the mortgagee has the right to take the property into his possession when it comes into existence; but his right to seize it is based solely upon such words of alienation.

CHATTEL MORTGAGES — EQUITABLE — LACK OF WORDS OF ALIENATION.—If an equitable chattel mortgage contains no words of alienation sufficient to pass the legal title, the mortgagee has no right to seize and sell the property at law, but must seek the aid of a court of equity.

Shuman & Dean, for the appellants.

Bonham & Watkins and Tribble & Prince, for the appellees.

142 GRAY, J. This action was commenced in January, 1894, by the plaintiff against the defendants, to recover possession of a buggy, set of harness, and one horse, of the alleged values, respectively, of sixty dollars, six dollars, and one hundred and fifty dollars; also to recover five thousand dollars damages for the alleged wrongful and malicious seizure of said property.

It is alleged in the complaint that the defendant S. D. Childers procured and directed the defendant, J. B. Laboon, to seize and take from the possession of the plaintiff said property, during the absence of the plaintiff from home, and in defiance of the direction and command of the plaintiff's wife, who forbade such taking; it was further alleged that the defendant J. B. Laboon seized and carried away said property without any authority of law or right whatever, and delivered it to the defendant S. D. Childers, or kept or disposed of said property under the direction of said Childers, and that the defendants refused to deliver possession of said property to the plaintiff.

The defendants answered said complaint by separate answers, alleging that about the sixth day of January, 1890, the plaintiff, wishing to borrow the sum of two hundred and ninety-two dollars from John Tompkins, requested the defendant, S. D. Childers, to sign a note with him to said Tompkins for said amount, as surety for the plaintiff, and that said Childers agreed to sign said note as surety, if the plaintiff would execute and deliver to him a mortgage on said property, and other property not in dispute here, to indemnify and save him harmless on account of such suretyship; that the plaintiff agreed to execute to said Childers said mortgage, and that Childers, relying upon the said agreement of the plaintiff, ¹⁴³ signed said note as surety for him; that after Childers signed said note as surety for the plaintiff, he refused to execute and deliver to him the said mortgage, as he had agreed to do; that said plaintiff having failed to pay said note at maturity, the said Childers was compelled and did pay the same; that having requested the plaintiff to execute and deliver the said mortgage according to his agreement, and he having refused to do so, the said Childers, being advised that said agreement to mortgage constituted an equitable mortgage, with the right in said defendant to seize said property and sell the same for the purpose of indemnifying himself, caused said property to be seized and sold, and the proceeds applied to reimburse him and save him harmless, and that the same was done in a peaceable manner. And they allege, further, that the said agreement constituted an equitable mortgage, giving said Childers the right to seize said property and sell the same for the purpose of saving himself harmless, he having paid the note which he signed as surety, and that he caused said seizure to be made by his codefendant, J. B. Laboon, whom he appointed as agent for that purpose.

The cause came on for trial at the October (1894) term of the court for Anderson county before his honor, Judge Watts, and a jury.

The note and mortgage which, it is alleged, the plaintiff agreed to sign, is set out in the case, upon which is this indorsement: "South Carolina, county of Anderson. I hereby appoint J. B. Laboon my agent to execute the within mortgage. November 13th, A. D. 1893. S. D. Childers." In the "case" the following statement appears: "On line 8, page 44, and on line 20, page 45, appears the name of A. A. Davis, as signed to the note and mortgage therein set forth; whereas it was never signed by Davis, he being unable to write, nor did he ever authorize any other person to sign his name or affix his mark to the said note and mortgage; but, on the contrary, when the same had been prepared and presented to him, he refused to sign the same. ¹⁴⁴ His name was written by the person who prepared the papers in the anticipation of his affixing his mark to it, but this he refused to do."

The jury rendered the following verdict: "We find that the plaintiff is entitled to recover the possession of the property sued for, and, in case delivery cannot be had, for the value thereof, one hundred and seventy-five dollars, and for two hundred and thirty-five dollars damages." The charge of the presiding judge to the jury and the appellants' exceptions will be set forth in the report of the case.

In considering the questions raised by the exceptions, we will follow the arrangement adopted by the appellants' attorneys in their argument before this court, to wit: "1. Whether or not an agreement founded on valuable consideration to give a mortgage on a chattel constitutes an equitable mortgage; 2. If such agreement does constitute an equitable mortgage, whether or not it must be reduced to writing in order to have that effect; or, in other words, whether or not verbal agreement founded on valuable consideration to give a mortgage on a chattel, constitutes an equitable mortgage; 3. Assuming that such agreement does constitute an equitable mortgage, whether or not the equitable mortgagee, having taken possession of the property covered thereby after default in the payment of the obligation which the same was intended to secure, and having sold the same for the purpose of paying such obligation, can successfully plead such agreement in defense to an action brought against him for the possession of said property."

The cases of *Read v. Gaillard*, 2 Desaus. Eq. 552, 2 Am. Dec. 696, *Dow v. Ker*, Spear Eq. 413, *Parker v. Jacobs*, 14 S. C. 112, 37 Am. Rep. 724, show that the first of said questions must be answered in the affirmative. The American and English Encyclopedia of Law, volume 3, page 179, under the head of "Chattel Mortgages," and *Cobbey on Chattel Mortgages*, volume 1; sections 14 and 15, show that such mortgage may be created by parol, and that it is not necessary that the agreement to give such mortgage should be in writing.

We come next to a consideration of the exceptions raising ¹⁴⁵ the third question. Chattel mortgages are divided: 1. Into legal and equitable mortgages; 2. The equitable mortgages are divided into those containing words of alienation sufficient in form to pass the legal title to property; but where the property at the time of the execution of the mortgage is not in esse, and those where there are no words of alienation sufficient in form to pass the legal title to the property mortgaged. When the mortgage contains words of alienation as aforesaid, and the property mentioned therein is not in esse at the time the mortgage is executed, the mortgagee has the right to take the property into his possession when it comes into existence, but his right to seize the property is based upon the words of alienation contained in the mortgage.

When there are no such words of alienation, the mortgagee must seek the enforcement of his rights in a court of equity. By observing this distinction is the only way in which the cases of *Perkins v. Loan etc. Bank*, 43 S. C. 39, *Whilden v. Pearce*, 27 S. C. 44, and *Moore v. Bynum*, 10 S. C. 452, 30 Am. Rep. 58, can be harmonized with the case of *Green v. Jacobs*, 5 S. C. 280.

There was, in the case before us, only an equitable mortgage, without words of alienation; and his honor, Judge Watts, was right in charging the jury that such a mortgage did not confer upon the mortgagee the right to seize and sell the property in dispute.

Although it was error on the part of the presiding judge in charging the jury that it was necessary that the agreement should be in writing in order to create an equitable mortgage, such error was harmless, as, under the view which we take of the case, the defendants had no right to seize the property, even admitting that Childers had an equitable mortgage. The allegations of the answer do not constitute a defense to the plaintiff's

cause of action, not because there may not be merit in them, but because the defendants, by their wrongful act, have estopped themselves from interposing such defense in this proceeding.

¹⁴⁶ It is the judgment of this court, that the judgment of the circuit court be affirmed.

MORTGAGES — EQUITABLE.—An agreement to give a mortgage, based upon sufficient consideration, will, in equity, be treated as a mortgage: Extended note to Hutzler v. Phillips, 4 Am. St. Rep. 700.

LUDDEN v. SUMTER.

[45 SOUTH CAROLINA, 186.]

ATTORNEY AND CLIENT—POWER TO RELEASE LIEN.
An attorney at law, to whom a claim is sent for collection, has no power to release a lien upon property held by his principal, and take a lien upon other property, without express authority from his principal. Want of such authority may always be shown.

Haynsworths & Cooper, for the appellant.

Purdy & Reynolds, for the appellee.

¹⁸⁶ POPE, J. The plaintiff's action for claim and ¹⁸⁷ delivery of a piano was tried at the October, 1894, term of the court of common pleas for Sumter county, in this state, before his honor, Judge Townsend, and a jury. The verdict was for the defendant, and, after entry of judgment thereon, an appeal was taken to this court on the single ground that his honor, the circuit judge, erred in ruling out and holding the question incompetent propounded to plaintiff's witness, to wit: "Were you authorized by your client to accept any other security in substitution or in payment of the piano note?"

To understand the vitality of the question here under review to the plaintiff's case, a statement of facts will be necessary. The plaintiff, Ludden & Bates Southern Music House, sold to the defendant, Mrs. Catherine W. Sumter, a certain piano on the twenty-eighth day of May, 1890, at the price of three hundred dollars—a very large part of the purchase price being on a credit, which was secured by a mortgage. Payments were made from time to time on this indebtedness, but on the twenty-first day of June, 1892, there was still due as principal and interest the sum of one hundred and seventy-seven dollars and sixty-five cents. The plaintiff, a month or two before this last-named date, had sent this claim to Messrs. Lee & Moise, of Sumter,

South Carolina, for collection. Finding that payment in money was not in the power of Mrs. Sumter, and inasmuch as Mrs. Sumter was about that time proposing to give a second mortgage on a tract of land containing three hundred and one acres to some other creditors, Major Moise suggested that the claim of the present plaintiff be secured by that same mortgage. After some delay, this was done—to wit, on the twenty-first of June, 1892. The note which represented the claim of the present plaintiff against Mrs. Sumter for one hundred and seventy-seven dollars and sixty-five cents was made payable to Lee & Moise, attorneys, and the mortgage was executed to Richard D. Lee as trustee. After maturity of these notes, this mortgage was foreclosed; but alas! the proceeds of sale only paid about one-half of the prior or first mortgage. Some confusion occurred as to the meaning or purpose of Mrs. Sumter, the mortgagor, and Lee & Moise, the equitable mortgagees, in executing and accepting such ¹⁸⁸ mortgage. She claimed that it was in substitution and satisfaction of the mortgage held by plaintiff on the piano, while Lee & Moise contended that it was only as additional security to the chattel mortgage of the piano. It was while Major Moise was on the witness stand testifying as to all these matters that the question was propounded by plaintiff: Were you or your firm of attorneys authorized by Ludden & Bates Southern Music House to accept any other security in substitution or in payment of the piano note? It seems to us that this touches the vital question. Clearly, an attorney at law, to whom a claim is sent for collection, has no power to release a lien upon property held by his principal without express authority from his principal. The case of *Mayer v. Blease*, 4 S. C. 14, is directly in point. Here a most excellent gentleman, as attorney at law, having obtained a judgment for his client, which was duly entered, and constituted a first lien upon property, assumed the responsibility of accepting one-half the debt in cash, and actually entered satisfaction of the judgment. When Mayer, the principal, heard of it, he disavowed the act of his attorney, and the supreme court held the action of the attorney null and void. Now, if the attorney had been authorized by his principal to accept one-half in payment of the debt, and enter a discharge or satisfaction of the judgment, the principal would have been bound by such discharge and satisfaction. Generally, it is no part of the attorney's business, in attending to the business of his client, to alter or change by substitution or satisfaction any

liens held by his client, unless he is authorized to do so. And other people deal with such attorneys at their peril when they have such attorneys to change or substitute one security for another. A claim is sent to an attorney for collection. He must collect it dollar for dollar before he enters any satisfaction of such debt or before he satisfies any security therefor. Within the scope of his agency he has great power. Beyond it he has none. We do not feel called upon to say a word more ¹⁸⁹ in regard to this delicate matter—especially as it must be carried again to the circuit court for trial.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case be remanded to that court for a new trial.

ATTORNEY AND CLIENT—RIGHT OF ATTORNEY TO RELEASE LIEN OF CLIENT.—An attorney at law has no right to release his client's judgment without his knowledge or consent: Kirk's Appeal, 87 Pa. St. 243; 30 Am. Rep. 357, and extended note; extended note to Clark v. Randall, 76 Am. Dec. 260. Nor has he power, under a general employment to collect a debt, to release a debtor without an actual payment of the full amount of the debt in money: Smith v. Jones, 47 Neb. 108; 53 Am. St. Rep. 519, and note.

GIST v. WESTERN UNION TELEGRAPH COMPANY.

[45 SOUTH CAROLINA, 344.]

PLEADING—CONTRACTS RELATING TO "FUTURES."—A complaint in an action to recover for negligent delay or failure in delivering a telegram relating to a contract for the sale of cotton in the future must allege all of the facts enumerated by statute as necessary to render such a contract valid, otherwise the complaint is insufficient.

CONFLICT OF LAWS.—THE VALIDITY OF CONTRACTS IS TO BE DETERMINED by the law of the forum, in the absence of allegation and proof of what the *lex loci contractus* is.

CONFLICT OF LAWS—CONTRACTS AGAINST PUBLIC POLICY.—Contracts which are regarded as *contra bonos mores* in one state cannot be recognized there, although they are regarded as valid in another state where made and to be performed.

CONTRACTS FOR SALE OF "FUTURES" are void as gambling contracts, unless there is a bona fide intention that the article contracted to be sold shall be actually delivered and received in kind at the time appointed by the contract.

CONTRACTS—INVALIDITY—RIGHT TO ENFORCE.—If a contract grows immediately out of, or is connected with, an illegal or immoral act or contract, a court cannot lend its aid to enforce it, though it be in fact a new contract.

Cothran, Wells, Ansel & Cothran, for the appellant.

Hunt & Hunt and J. Y. Culbreath, for the appellee.

³⁶¹ McIVER, C. J. This was an action to recover damages for loss sustained by plaintiff by reason of the negligence of the defendant company in the delivery of a telegram sent to him by Roddy & Watts, of New York. Inasmuch as the questions presented by this appeal arise upon a demurrer to the complaint, upon the ground that the allegations therein contained are not sufficient to constitute a cause of action, it will be necessary to state, substantially, such allegations, though a copy of the complaint should be embraced in a report of the case. Omitting the formal allegations of the corporate character of the defendant company, and as to the nature of the business in which it was engaged, the material allegations may be substantially stated as follows: 1. That plaintiff, on the 15th of January, 1894, employed defendant to transmit by telegraph a message to Roddy & Watts, in New York, instructing them to buy for him 300 bales of cotton to be delivered in April, 1894, and 200 bales of cotton to be delivered in March, 1894, in the city of New York, "these purchases being made to protect himself from loss by reason of other transactions in cotton"; 2. That said order was executed by said Roddy & Watts on the same day by the purchase of the March cotton at \$8.24 per 100 pounds and the April cotton at \$8.32 per 100 pounds; 3. That on the same day, to wit, the 15th of January, 1894, the said Roddy & Watts delivered to the defendant company a message to be transmitted by telegraph to the plaintiff, informing him of said purchase on his account, which message was not delivered to the plaintiff by defendant company until after the close of business hours on the 18th of January, 1894, although it could and should have been delivered to the plaintiff at Newberry, South Carolina, during business hours, on the 15th of January, 1894; and that defendant well knew that said Roddy & Watts were cotton brokers in the city of New York, engaged in buying and selling cotton for parties desirous of speculating in the same on the New York Cotton Exchange, and also knew that plaintiff was engaged in buying and selling cotton, ³⁶² through cotton brokers, subject to the rules governing said cotton exchange; 4. That the failure to deliver said telegraphic message to the plaintiff on the day of its date, as it was the duty of defendant company to have done, was due to the "utter negligence and careless-

ness of the defendant company"; 5. That immediately after said purchases were made for the plaintiff by said Roddy & Watts, cotton began to decline in price, and the plaintiff, "in order to protect himself against loss from other purchases made by him in the same manner, sold an equal amount of cotton to be delivered in the said city of New York, thereby indemnifying himself against any loss, and would have pursued the same course in reference to said purchase had the defendant promptly delivered the said last-mentioned message"; 6. That by reason of the said negligence of the defendant company, the plaintiff has been damaged in the sum of \$1,520, "in that said cotton continued to decline until the months of March and April, 1894, and after the nineteenth day of January, 1894, to wit, on the twenty-second day of January, 1894, 500 bales of cotton was sold for the plaintiff to protect said loss, which amounted on said last-mentioned day to \$1,520, . . . and if the sales had been made after the twenty-second day of January, 1894, for said months, the loss would have been still greater, and that even if the said 500 bales of cotton had been sold on the nineteenth day of January, 1894, the said loss would have amounted to \$1,520, which was the earliest day that the plaintiff could have protected himself after receiving the said message of Roddy & Watts"; 7. That within sixty days after the said 15th of January, 1894, the plaintiff demanded payment of said loss by defendant, which demand was refused. The defendant bases its demurrer upon the following specifications: 1. That the alleged loss arising under a contract for the future delivery of cotton, the complaint was defective in failing to allege that the plaintiff was the actual owner of the cotton, or that at the time of making the contract it was the bona fide intention of both parties that the cotton should be actually delivered and received ³⁶³ in kind; 2. That it appears upon the face of the complaint that the parties did not intend an actual delivery, but that the transaction was a gambling one—a wager as to the rise or fall of the price of cotton—and as such could form no basis for an action for damage; 3. That the damages alleged are remote, speculative, and uncertain, and are not the proximate consequences of defendant's negligence; 4. That no facts are stated in the complaint from which the damages claimed can be inferred, inasmuch as it is not stated what disposition was made by plaintiff of the cotton bought on the 15th of January, 1894, or of that sold on the 22d of January, 1894; 5. That the action being for special damages, the com-

plaint fails to state that the defendant company had any notice of the damages which would result from the failure to deliver the message promptly.

Upon this demurrer, the case came on to be heard by his honor, Judge Aldrich, who rendered judgment overruling the demurrer, upon grounds which need not be stated here, as they are fully set forth in the circuit decree, which should be incorporated in the report of the case. From this judgment defendant appeals, upon the several grounds set out in the record, which should likewise be incorporated in the report of the case.

The first question which presents itself is, whether it appears from the complaint that the contract upon which the plaintiff's claim for damages rests was such a contract for the future delivery of cotton as our statute declares to be void. By the act of 1883 (18 Stats., 454), now incorporated in the Revised Statutes of 1893 as section 1859, the general assembly has declared that "every contract, bargain, or agreement, whether verbal or in writing, for the sale or transfer at any future time of . . . any cotton, . . . shall be void, unless the party contracting, bargaining, or agreeing to sell or transfer the same is, at the time of making such contract, bargain, or agreement, the owner or assignee thereof, or is at the time authorized by the owner or assignee thereof, or his duly authorized agent, to make ³⁶⁴ and enter into such contract, bargain, or agreement, or unless it is the bona fide intention of both the parties to the said contract, bargain, or agreement, at the time of making the same, that the said . . . cotton . . . shall be actually delivered in kind by the party contracting to sell and deliver the same, and shall be actually received in kind by the party contracting to receive the same at the period in the future mentioned and specified in the said contract, bargain, or agreement"; and by the next section (1860) it is provided that "In any and all actions brought in any court to enforce such contracts, bargains, or agreements, or to collect any note or other evidence of indebtedness, or any claim or demand whatever founded upon any such contract, bargain, or agreement, the burden of proof shall be upon the plaintiff to establish that, at the time of making such contract, bargain, or agreement, the party making the same was the owner or assignee of the . . . cotton . . . so agreed to be sold and transferred, or was at the time authorized by the owner or assignee thereof, or his duly authorized agent, to make and enter into such contract, bargain, or agreement, or that, at

the time of making such contract, bargain, or agreement, it was the bona fide intention of both parties thereto that the said cotton so agreed to be sold and transferred shall be actually delivered and received in kind by the said parties at the future period mentioned therein." Now, it is clear, upon the plainest principles of pleading, that if an action should be brought to enforce the performance of a contract for the future delivery of cotton, or to recover damages for the breach of such contract, it would be necessary to state all the material elements constituting such contract. For example, it is well settled that in an action of assumpsit for the breach of a simple contract, it is necessary to allege and prove the consideration of the contract, except in cases falling under the statute of Ann, promissory notes, etc.; and this for the reason that the consideration is an essential element of the contract. If, therefore, in an action ³⁶⁵ based upon a contract for the future delivery of cotton, the complaint should simply state, as it does in this case, the making of the contract, without alleging that the plaintiff was the owner or assignee of the cotton at the time the contract was made, or was at the time authorized by the owner or assignee, or his duly authorized agent, to enter into such contract, or that it was the bona fide intention of both parties, at the time of making said contract, that the cotton should be actually delivered and received in kind at the future period mentioned, it is clear that such complaint would not state facts sufficient to constitute a cause of action, because it omitted these allegations material to the validity of the contract, which constituted the basis of the action. Indeed, such a complaint would state nothing more than a contract expressly declared by statute to be void. Again, section 1860 of the Revised Statutes, above quoted, throws upon a plaintiff in an action based upon a contract for the future delivery of cotton the burden of proving that he was the owner or assignee of the cotton, or that he was authorized by such owner or assignee, or by his duly authorized agent, to make such contract, or that it was the bona fide intention of both parties that the cotton should be actually delivered and received in kind at the future period designated in the contract; and the rule of code pleading is, that what must be proved must be alleged. As is said in *State v. Williams*, 19 S. C. 65: "For a complaint to be thus defective, something must be omitted which the plaintiff is required to prove in order to maintain his suit." And, as is said in *Lilly v. R. R. Co.*, 32 S. C. 144: "A good rule

by which to test the sufficiency of a complaint, when assailed by a demurrer like that interposed here, is to inquire what facts are necessary to constitute a cause of action, and then to examine whether such facts are alleged, the plaintiff, in his evidence, being confined to such alleged facts." Under this rule, it is clear that the plaintiff could not be permitted to make the proof of such facts as the statute requires him ³⁶⁶ to prove, because such facts are not alleged in the complaint, and hence it is amenable to the demurrer interposed. It is contended, however, that while this may be true where the action is brought to enforce a contract for the future delivery of cotton, or to recover damages for the breach of such a contract, yet it does not apply to the present case, which is not of that character. The next question, therefore, presented is, whether the principles above set forth can be applied to the case under consideration. While it is true that the action is not brought to enforce the performance of a contract for the future delivery of cotton, nor to recover damages for the breach of such a contract, yet it is equally true that one of the essential elements of the plaintiff's claim for damages is, that being under contract—of course, meaning a valid contract—for the purchase and sale of cotton for future delivery, he has been damaged by the negligence of defendant company in delivering a message relative to such contract. If the plaintiff saw fit to voluntarily stand to and abide by a contract which he was under no legal obligation to fulfill, it is difficult to understand what claim he can have to recover, at the hands of a court of justice, damages which he has sustained while engaged in the violation of a law passed by the state in which such court is held. It is, therefore, necessary, in this case, to inquire into the validity of the contract as set forth in the plaintiff's complaint giving rise to his claim of damages against the defendant, and without which he would have no such claim; and if it is found that such contract was illegal, as we have seen that it was, then the plaintiff has no foundation for his claim. As is said in 25 American and English Encyclopedia of Law, 814: "The better rule seems to be that where the message relates to a gambling or similar illegal transaction, neither the sender nor receiver can maintain an action for damages on the ground that the company refused to transmit the message. If, while attempting to transmit such message, the company failed to exercise proper care, whereby an erroneous message was ³⁶⁷ sent, the sender may recover the price paid for transmission; but

neither he nor the receiver can invoke the illegal contract, or the gain or loss resulting from it, to measure the damages sustained by him in consequence of an erroneous transmission." Of course, the same principle would apply to the case of a message delayed through the negligence of the company. The doctrine above quoted from the Encyclopedia is fully sustained by *Melchert v. American Union Tel. Co.*, 11 Fed. Rep. 194, and *Cothran v. Western Union Tel. Co.*, 83 Ga. 25. In that case, Bleckley, C. J., in delivering the opinion of the court, says that the previous case of *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480, holding otherwise, was decided at a time when it was held that dealings in futures "were regarded as legal and obligatory; but that since that time such dealings had been declared illegal, and hence the case of *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480, stands as overruled." It is true, that in the subsequent case of *Gray v. Western Union Tel. Co.*, 87 Ga. 350, 27 Am. St. Rep. 259, it was held that in an action against a telegraph company to recover the statutory penalty incurred by a failure to deliver with due promptness a message which it had received for transmission, and accepted payment for the same, cannot defend the action upon the ground that the message related to a transaction in futures, and, consequently, to an illegal transaction. But Chief Justice Bleckley, in delivering the opinion of the court, rests the decision upon the terms of the statute imposing the penalty, and draws a distinction between that case and the previous case of *Cothran v. Western Union Tel. Co.*, 83 Ga. 25, which is recognized and affirmed. But, in addition to this, our statute, section 1860 of the Revised Statutes of 1893, expressly declares not only that in any action upon a contract for the future delivery of cotton, or to collect any note or other evidence of indebtedness growing out of such contract, the burden of proof shall be upon the plaintiff to prove the conditions set forth in the preceding section, upon which alone such ³⁶⁸ contract can be regarded as legal, but it also imposes a like burden of proof upon the plaintiff in any action on "any claim or demand whatever founded upon any such contract, bargain or agreement." Now, if the claim or demand of the plaintiff in this action is not founded upon a transaction in "futures," then it has no foundation at all. The ground upon which transactions in "futures," as they are ordinarily conducted, are held to be illegal is, that they amount to nothing but gambling. As is said by Mr. Justice Mathews,

in *Irwin v. Willar*, 110 U. S. 508: "The generally accepted doctrine in this country is, as stated by Mr. Benjamin, that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them; but such contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer; and if, under the guise of such a contract, the real interest be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void." And as is further well said by the same justice, in the same case, at page 511, borrowing the language of the circuit judge: "It makes no difference that a bet or wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of legitimate trade." These views have been recognized and approved in the subsequent cases of *Embrey v. Jemison*, 131 U. S. 336, and *Bibb v. Allen*, 149 U. S. 481.

While it is true that formerly the burden of proof was upon the party seeking to impeach such a transaction by showing affirmatively its illegality, as was held in *Roundtree v. Smith*, 108 U. S. 269, *Irwin v. Williar*, 110 U. S. 508, and *Bibb* ³⁶⁹ *v. Allen*, 149 U. S. 481, as well as in our own case of *Williams v. Connor*, 14 S. C. 621, decided in 1881, yet since that time the act of 1883, above referred to, has been passed, which places the burden of proof upon the plaintiff.

It is said, however, that this contract was made in New York, and was to be performed there, and hence the question of its illegality must be tested by the law of New York. The general rule undoubtedly is, that a contract which is valid where it is made and is to be performed is to be treated as valid everywhere; but this rule is subject to certain well-established exceptions, one of which is a contract declared invalid by the law of one state, even where it is valid by the law of the state where it is made or where it is to be performed, will not be treated as valid by the courts of the state in which said contract has been declared by statute invalid. As is said in 2 *Kent's Commentaries*, 458: "It is, however, a necessary exception to the universality of the

rule that no people are bound, or ought to enforce, or hold valid in their courts of justice, any contract which is injurious to their public rights, or offends their morals, or contravenes their policy, or violates a public law": See to same effect, Clark on Contracts, 502, et seq., and 3 American and English Encyclopedia of Law, 554, et seq., where, in a note, it is said: "The enforcement by one nation of contracts made under the laws of another rests on the principle of comity, which cannot be so far extended as to violate the positive legislation of the nation called on to enforce such contracts." In *Flagg v. Baldwin*, 38 N. J. Eq. 219, 48 Am. Rep. 308, we have a case in which the foregoing principles were recognized and applied, and there it was held that a contract for speculating in stocks upon margins made in another state, where they are presumed to be lawful, will not be enforced in New Jersey, where they are unlawful under the statute of that state to prevent gaming. That case presents quite a full review of the authorities upon the subject, and is well worthy of attention. If, therefore, it had appeared (as it does not in this case) that there is no ³⁷⁰ statute in New York similar to ours, declaring contracts like the one set forth in the complaint to be invalid, yet that would not affect the question.

Again, it has been held in this state, in the case of *Allen v. Watson*, 2 Hill (S. C.), 319, that the legality or illegality of a transaction depends on the law of the place where it transpires; but it is incumbent on those who would avail themselves of it to show what that law is; and, until that is done, our courts must decide that question according to the laws of this state. The same doctrine seems to have been held in *Thatcher v. Morris*, 11 N. Y. 437, which is represented in the New Jersey case above cited, as holding that: "Where contracts of a particular kind are forbidden by the law of the state in which they are sought to be enforced, and the party seeking to enforce them relies upon the fact that they were made in a foreign state, and are valid contracts by the *lex loci contractus*, it has been held elsewhere that he is bound to aver and prove those facts." Now, as there is no allegation in the complaint that the law in New York is otherwise than what it is in this state, the plaintiff cannot, in the absence of any such allegation, derive any benefit from the fact that the contract was made and was to be performed in New York.

But, in addition to this, it may now, since the cases of *Rice v. Gist*, 1 Strob. 82, and *Mordecai v. Dawkins*, 9 Rich. 262, be

regarded as settled, in this state at least, that all wagers are unlawful, on account of their immoral tendency; and if contracts for the sale of "futures" are denounced, as we have seen, as gambling contracts, where there is no bona fide intention that the article contracted to be sold shall be actually delivered and received in kind at the time appointed for the contract, it matters nothing what the law of New York may be, as it is quite clear that no principle of comity requires the courts of this state to recognize a contract which is regarded here as *contra bonos mores*.

The circuit judge says, in his decree: "The defendant, ³⁷¹ at most an agent, cannot interpose the defense of dealing in futures. That defense has reference to the parties buying and selling"; and cites 8 American and English Encyclopedia of Law, 1014. It is difficult to perceive the application of the authority cited to the case in hand. The law, as there laid down in the text, simply established the doctrine that where an agent, employed to carry out a gambling transaction receives money accruing from such business really belonging to his principal, is sued for such money, he cannot defend himself from liability to account for such money by showing that the business was unlawful; and the case cited from Ohio decides no more. It is true that the following language is used in that case, "the rule which denies civil remedies in such cases applies only to the parties to the illegal transaction"; but that was nothing more than a mere dictum, not called for by anything in that case—for the only point in that case was, whether an agent sued for certain profits which were in hands belonging to the plaintiff could set up a defense for such action that the contract from which such profits were derived was a gambling transaction, and it was held that he could not; just as in our case of *Tate v. Pegues*, 28 S. C. 463, where the defendant was sued for money received by him for the plaintiffs on sales of fertilizers made by him as agent, and for the value of such of the fertilizers as he had appropriated to his own use, could not relieve himself from liability to account to the plaintiffs for the money and property of the plaintiffs by showing that the sacks containing the fertilizer were not tagged as required by law. This was upon the obvious ground that one who receives the money or property of another must, when called upon, account for the same. As is said in the Ohio case, above referred to, as cited in the American and English Encyclopedia of Law, "it is contrary to public policy

and good morals to permit employés, agents, or servants to seize or retain the property of their principal, although it may be employed in illegal business and under their control. No consideration of public policy can justify a lowering ³⁷² of the standard of moral honesty required by persons in these relations." Indeed, the true theory in such cases is, that the illegal business out of which the money received by the agent arises is no part of the cause of action, and is not necessarily connected therewith—the real cause of action being money had and received by the agent for the use of his principal. This is a principle upon which the cases of *Anderson v. Moncrieff*, 3 Desaus. Eq. 125, and *Owen v. Davis*, 1 Bail. 315, cited in support of the decision in *Tate v. Pegues*, 28 S. C. 463, rest; for, as said by O'Neill, J., in *Owen v. Davis*, 1 Bail. 315; "One who receives money to the use of another on an illegal contract cannot retain it to his own use on the ground of the illegality of the contract." The distinction between those cases and the one now under consideration is obvious. Here the defendant is not sued for any money received by it for the use of the plaintiff, and could not be so sued, for the reason that defendant has not received any money belonging to the plaintiff. The action here is to recover damages alleged to have been sustained by reason of the negligence of the defendant in delivering a telegraphic message relating to a void contract with which the plaintiff was under no obligation to comply; and, as is said in *Armstrong v. Toler*, 11 Wheat, 258: "Where the contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce. *And if the contract be in fact only connected with the illegal transaction and growing immediately out of it, though it be in fact a new contract, it is equally tainted by it*" (italics mine.) Now it is obvious that the contract with the telegraph company, though in fact a new contract, obviously grew out of the illegal transaction in "futures"; indeed, but for that, the plaintiff would have no cause of action whatever, except, possibly, to recover back the sum paid for the transmission of the message. But no such cause of action is stated in the complaint—indeed, it does not appear that anything was paid for the transmission of the message, and certainly ³⁷³ what amount was so paid is not stated, and hence the plaintiff is not entitled to judgment even for that sum.

Under the foregoing views, the other questions presented by

the demurrer cannot arise, and need not, therefore, be considered.

The judgment of this court is, that the judgment of the circuit court be reversed, and that the demurrer be sustained.

Enforcement of Contract Outside of Jurisdiction where Made.*

The general rule, founded on the tacit consent of civilized nations, arising from its general utility and forming a part of the law of nations, is that personal contracts entered into and to be performed in any state, and which are there valid, are to be considered as valid in every other state when sued upon there; *Pearsall v. Dwight*, 2 Mass. 84-89; 3 Am. Dec. 35; *Ivey v. Lalland*, 42 Miss. 444; 97 Am. Dec. 475. This rule is subject to very broad exceptions, namely, that such maxim or rule of comity cannot prevail in cases where it violates the law of our own country, or of the law of nature, or public policy, or of the law of God. "Contracts, therefore, which are in evasion or fraud of the laws of a country, or of the rights of its subjects, or against morals, or against religion, or against public rights, or opposed to the national or state policy or institutions, are deemed nullities in every country or state affected by such considerations, although they may be valid by the laws of the place where they are made": *Kerwin v. Doran*, 29 Mo. App. 397; *Ivey v. Lalland*, 42 Miss. 444; 97 Am. Dec. 475.

The general rule undoubtedly is, that the validity and effect of a contract are to be determined by the law of the place where it was made, and, if it is valid there, it is, under the general law of nations, valid everywhere, by the implied consent of the parties, but this rule is subject to the exception, that no nation or state is bound to recognize or enforce contracts made elsewhere which are injurious to its own citizens or subjects. The enforcement by one nation or state of contracts made under the laws of another rests on a principle of comity which cannot be so far extended as to violate the public policy or positive legislation of the former: *Galliano v. Pierre*, 18 La. Ann. 10; 89 Am. Dec. 643; *Smith v. Godfrey*, 28 N. H. 379; 61 Am. Dec. 617; *Thurston v. Rosenfield*, 42 Mo. 474; 97 Am. Dec. 351; *McLean v. Hardin*, 3 Jones Eq. 294; 69 Am. Dec. 740; *Swann v. Swann*, 21 Fed. Rep. 299.

The only general rule that can be laid down, then, is that contracts and liabilities recognized as valid by the laws of the state or country where made or established may be enforced in the courts

*** REFERENCES TO MONOGRAPHIC NOTES.**

Assignments for benefit of creditors, extra-territorial effect of: Note to *Hanford v. Paine*, 78 Am. Dec. 594-597.

Action in one state to enforce cause of action created by statute in another state: Note to *Atrill v. Huntington*, 14 Am. St. Rep. 350-355.

Sales having in view the subsequent violation of foreign or domestic law: Note to *Graves v. Johnson*, 32 Am. St. Rep. 450-455.

Conflict of laws as to usury: Note to *Bank of Newport v. Cook*, 46 Am. St. Rep. 201-202.

Enforcement of obligations of married women outside the state where made: Note to *Ruhe v. Buck*, 46 Am. St. Rep. 448.

of another state or country where the action is brought, unless contrary to morals, public policy, or the positive law of the latter, in which event they will generally not be enforced: *Midland Co. v. Broat*, 50 Minn. 562; *Forepaugh v. Delaware etc. R. R. Co.*, 128 Pa. St. 217; 15 Am. St. Rep. 672; *Sondheim v. Gillert*, 117 Ind. 71; 10 Am. St. 23, and cases cited 29; *North Pacific Lumber Co. v. Lang*, 52 Am. St. Rep. 780; *Deringer v. Deringer*, 5 Houst. 416; 1 Am. St. Rep. 150; *Knowlton v. Doherty*, 87 Me. 518; 47 Am. St. Rep. 349; *Ex parte Dickinson*, 29 S. C. 453; 13 Am. St. Rep. 749; *Mumford v. Canty*, 50 Ill. 370; 99 Am. Dec. 525; *Kanaga v. Taylor*, 7 Ohio St. 134; 70 Am. Dec. 62; *Parsons v. Trask*, 7 Gray, 473; 66 Am. Dec. 502; *Buckner v. Watt*, 19 La. 216; 36 Am. Dec. 671; *Hinds v. Brazealle*, 2 How. 837; 32 Am. Dec. 307. A contract for a sale of service, amounting to a form of slavery, comes within this rule, and no comity requires it to be enforced, nor will suffer it to be executed: *Parsons v. Trask*, 7 Gray, 473; 66 Am. Dec. 502.

If a person leaves the jurisdiction to perform an act forbidden by the general policy or by the laws of the state, and immediately after the performance returns, his act will be treated as void by the courts of his state, even though it be legal where performed: *Hinds v. Brazealle*, 2 How. 837; 32 Am. Dec. 307.

Contracts which are immoral or against religion, entered into in a foreign state of country where they are considered valid, cannot be enforced in another jurisdiction where they are invalid. This doctrine includes contracts made in a foreign country or in another state for illicit cohabitation or prostitution: *Greenwood v. Curtis*, 6 Mass. 379; 4 Am. Dec. 145; *Commonwealth v. Bassford*, 6 Hill, 526; *De Sobry v. De Laistre*, 2 Har. & J. 191; 3 Am. Dec. 535.

Contracts for speculating in stocks upon margins made in a state where they are presumed to be valid, cannot be enforced in another state where they are unlawful: *Flagg v. Baldwin*, 38 N. J. Eq. 219; 48 Am. Rep. 308. The fact of the validity of a note in the hands of a bona fide holder in the state where the contract was made, notwithstanding its consideration was the settlement of differences under an illegal, option contract, does not require the enforcement of such note by the courts of another state in which the statute makes such note void even in the hands of a bona fide holder: *Pope v. Hanke*, 155 Ill. 617. If a transfer of a certificate of deposit in payment of a gambling debt is made in a state where such gambling is illegal and in which such a transfer is declared void by statute, such transfer must be held void there, although the certificate was made in a state where it and the transfer thereof was valid: *Savings Bank of Kansas v. National Bank*, 38 Fed. Rep. 800. It was, however, held in *Lehman v. Feld*, 37 Fed. Rep. 852, that a contract for the future delivery of cotton made and to be performed in a state where it is valid, will be enforced in the circuit court of the United States in another state where such a transaction is void as against public policy. A stipulation in a bill of lading, made in a foreign country where it is valid, exempting a carrier

from liability for negligence, cannot be enforced in the courts of this country where such a stipulation is regarded as against public policy: *The Glenmaris*, 69 Fed. Rep. 472. The doctrine of state comity cannot be applied in behalf of a foreign corporation seeking to recover upon a claim or contract expressly prohibited by law, or one which is clearly at variance with the settled policy of the state: *Seamans v. Temple Co.*, 105 Mich. 400; ante, p. 457.

Contracts in fraud or evasion of the laws of another country cannot be enforced: Thus, if merchandise is sold in one place, to be delivered in another, where such sale is prohibited, the contract cannot be enforced in the latter country, where the contract is repugnant to its law and public policy: *Armstrong v. Toler*, 11 Wheat, 258; *Hannay v. Eve*, 3 Cranch, 242. Foreign contracts which have for their object an evasion of the revenue laws of the United States cannot be enforced in this country, though valid where made: *Cambioso v. Maffet*, 2 Wash. C. C. 98. But a marriage which is valid by the law of the county where it is entered into is valid in any other country or state, although it appears that the parties went into the foreign state or country to evade the laws of their own country. This rule prevails unless the marriage is incestuous or otherwise immoral: *Medway v. Needham*, 16 Mass. 157; 8 Am. Dec. 131.

Contract rights growing out of a foreign law or the law of another state, if not contrary to the public policy, or to abstract justice, or pure morals, or calculated to injure the state or its citizens, will be recognized and enforced in another state when jurisdiction is had and justice can be done between the parties: *Higgins v. Central etc. R. R. Co.*, 155 Mass. 176; 31 Am. St. Rep. 544; *North Pacific Lumber Co. v. Lang*, 28 Or. 246; 52 Am. St. Rep. 780. But no state is bound to give effect to contract rights growing out of a foreign law when to do so will prejudice the rights of its citizens or the interests of the state: *State Bank v. First Nat. Bank*, 34 N. J. Eq. 450; *Smith v. Godfrey*, 28 N. H. 379; 61 Am. Dec. 617; *Kanaga v. Taylor*, 7 Ohio St. 134; 70 Am. Dec. 62.

A contract made in a foreign country or state, valid by its laws, and to be there executed, may be enforced in another state where it is not valid or is prohibited to its citizens, whenever the state or its citizens do not suffer any injury from enforcing it, and it does not have the effect of a pernicious and detestable example: *Greenwood v. Curtis*, 6 Mass. 358; 4 Am. Dec. 145; *Baltimore etc. R. R. Co. v. Glenn*, 28 Md. 287; 92 Am. Dec. 688; *Hill v. Spear*, 50 N. H. 253; 9 Am. Rep. 205. Under this rule, it has been held that a written obligation for the purchase price of a slave, made in a state where slavery is legal, may be recovered upon in another state where slavery is illegal, and the subsequent abolition of slavery does not affect the validity of the obligation: *Roundtree v. Baker*, 52 Ill. 241; 4 Am. Rep. 597. A contract made on Sunday, and valid by the law of the state where made, will be enforced by the courts of another state, by the laws of which such contract would be void:

Swann v. Swann, 21 Fed. Rep. 299; Brown v. Browning, 15 R. I. 422; 2 Am. St. Rep. 908; Adams v. Gay, 19 Vt. 358.

It has been held that a special contract limiting the liability of a common carrier in case of loss or damage, being legal according to the laws of the state where it was made, will be enforced by the courts of another state, where such contract would be illegal if made there: Hazel v. Chicago etc. Ry. Co., 82 Iowa, 477; Note to McGarry v. Nicklin, ante, p. 53. Again, it has been held that the sale of a lottery ticket in a state where such sale is not prohibited, to a resident of a state where such sale is illegal, is not invalid, and the contract will be enforced in the latter state: McIntyre v. Parks, 3 Met. 207; Jameson v. Gregory, 4 Met. Ky. 363; Hatch v. Hanson, 46 Mo. App. 323.

A contract void for any reason where it is made and to be performed is void everywhere, and will not be enforced in the courts of another state or country, although it would have been valid if made in the latter. This rule is of universal application, and has been applied to an almost infinite variety of contracts concerning numberless subjects: McAllister v. Smith, 17 Ill. 328; 65 Am. Dec. 651; Moore v. Clopton, 22 Ark. 125; Ivey v. Lalland, 42 Miss. 444; 97 Am. Dec. 475; Satterthwaite v. Doughty, Busb. 314; 59 Am. Dec. 554; Forepaugh v. Delaware etc. R. R. Co., 128 Pa. St. 217; 15 Am. St. Rep. 672; Chambers v. Church, 14 R. I. 398; 51 Am. Rep. 410; Kerwin v. Doran, 29 Mo. App. 397; McGarry v. Nicklin, 110 Ala. 559; ante, p. 40; Tredway v. Riley, 32 Neb. 495; 29 Am. St. Rep. 441; Rue v. Missouri etc. Ry. Co., 74 Tex. 474; 15 Am. St. Rep. 852; Andrews v. Pond, 13 Pet. 65; Blackwell v. Webster, 23 Blatch. 537.

As examples of this rule, it may be mentioned that a note made in another state, and void at the place of its execution and under the law of the contract evidenced thereby, is void in another state, and cannot be enforced in the courts of the latter, notwithstanding the fact that had the contract been made in the latter state, it would have been valid and enforceable: McGarry v. Nicklin, 110 Ala. 559; ante p. 40.

A note given in one state for the purchase of slaves, and void under the decisions of the appellate court of that state, must be held void when sued upon in another state: Moore v. Clopton, 22 Ark. 125; Pearl v. Hansborough, 9 Humph. 426. A contract founded on a consideration of confederate money, if illegal and unenforceable in the state where made, will not be enforced by the courts of another state: Ivey v. Lalland, 42 Miss. 444; 97 Am. Dec. 475. A contract made in violation of the statutes of a state, and to be wholly performed therein, cannot be enforced in the courts of another state: Chambers v. Church, 14 R. I. 398; 51 Am. Rep. 410; Kennedy v. Cochran, 65 Me. 594. If a contract or promise is void under the statute of frauds in the state where it is made, it will not be enforced elsewhere: Allshouse v. Ramsey, 6 Whart. 331; 37 Am. Dec. 417. A contract of insurance, made by a foreign insurance company, in violation of the laws of a state, and not enforceable there, will

not be enforced in another state: *Ford v. Buckeye Ins. Co.*, 6 Bush. 133; 99 Am. Dec. 663. A bond void by the law of the state where made and to be performed cannot be enforced elsewhere: *Titus v. Scantling*, 4 Blackf. 89. A contract for the carriage of livestock, void in the state where made, is void in another state where it is to be partly performed: *McDaniel v. Chicago etc. Ry. Co.*, 24 Iowa, 412.

The statement may often be found in text-books and in the opinions of judges that a contract void where it is made is void everywhere, and will, therefore, not be enforced by the courts of any state or nation. We have referred to dicta to this effect in our note to *Graves v. Johnson*, 32 Am. St. Rep. 450. If a contract is to be performed in the state or country where it is made, or, perhaps, if the parties do not have in mind at the time of its execution the place where it is to be performed, it must be regarded as invalid everywhere, if invalid where made, but, on the other hand, a contract, though made in one state or country, may expressly provide that it is to be performed in another, and its provisions, though invalid by the laws of the former, may be regarded as valid, and even meritorious, by the laws of the other. We have already, in a note to this volume, ante, p. 48, expressed our opinion that it is the place of performance of a contract which is the essential thing. The place where it happens to be executed may be, and usually is, accidental. The place where the contract is to be performed should be regarded as the place of the contract. There is no doubt that, so far as the interpretation of the contract is concerned, the place of performance must control. We believe the same rule must be applied to the determination of its validity: *Don v. Lipmann*, 6 Clark & F. 1; *Andrews v. Pond*, 13 Pet. 65; *Wharton on Conflict of Laws*, secs. 399-404; *Story on Conflict of Laws*, sec. 280; *Railroad v. Bank of Ashland*, 12 Wall. 230; though we admit we have not been able to discover a single decision necessarily presenting the question whether or not a contract shall be regarded as valid in the place where it was to be performed when invalid at the place of its execution, except decisions construing the law respecting usury. As to them, the rule sustained by the weight of authority is, undoubtedly, that the parties may adopt the law of the place of performance, and validly stipulate for any rate of interest sanctioned by that law, though condemned by the law of the state or country in which the contract was actually executed: *Bennett v. Eastern etc. Assn.*, 177 Pa. St. 233, ante, p. 723; note to *Bank of Newport v. Cook*, 46 Am. St. Rep. 201.

BROWN v. WILSON.

[45 SOUTH CAROLINA, 519.]

NEGOTIABLE INSTRUMENTS.—INDORSEMENT of a note made after its delivery in pursuance of a prior agreement is binding upon the indorser.

NEGOTIABLE INSTRUMENTS—INDORSEMENT.—If a note payable to order is delivered for value without indorsement, the holder, by proper proceedings, may compel the proper indorsements to be made according to the agreement of the parties.

NEGOTIABLE INSTRUMENTS — INDORSEMENT BY AGENT — RATIFICATION.—If a party agrees to indorse a note, and, after his agent has indorsed it without authority, he ratifies the act of the agent, he is bound by the indorsement.

AGENCY—RATIFICATION OF AGENT'S ACT.—If an agent performs an act according to his usual course of dealing, and, the act is thereafter ratified by his principal, it is binding upon the latter.

NEW TRIAL—WANT OF SERVICE OF PROCESS.—If only one of several defendants is served with process, and a verdict is rendered against all of them, the one served is not entitled to a new trial on the ground that the judgment is void as to the others.

APPELLATE PRACTICE.—APPELLANT CANNOT ASSIGN FOR ERROR matters that do not prejudice him, but affect other parties not before the court.

VERDICT—DISREGARD OF INSTRUCTIONS.—If a jury wholly disregards the instructions of the court, the verdict should be set aside, although the instructions are clearly erroneous; but, to justify setting aside the verdict, it must clearly appear that it is not responsive to the charge as given by the court.

NEGOTIABLE INSTRUMENTS—NECESSITY FOR PROTEST.—Demand and notice are sufficient, and protest is not necessary to make an indorser liable on a promissory note, unless the note is made by a person residing in one state, and payable to a person residing in another. In the latter case, protest is required.

Graydon & Graydon, for the appellant.

F. B. Gary and M. P. DeBruhl, for the appellee.

527 **EARLE, A. A. J.** This is an action on a promissory note made by Abbeville Manufacturing Company to Wilson & McNeill, the defendants above named, and indorsed by them to the plaintiff. George S. Wilson and John McNeill were partners, trading under said firm name of Wilson & McNeill. George S. Wilson was alone served with the summons and complaint herein.

The cause was heard by his honor, Judge Buchanan, and a jury, and a general verdict was rendered against the defendants for the amount due upon said note, and judgment has been entered thereon against the said George S. Wilson.

From this judgment he appeals to this court upon exceptions to his honor's charge to the jury, and upon his refusal to charge certain requests submitted by appellant, which will not be set forth in this opinion; but the exceptions, and also the report and charge of his honor, the circuit judge, will appear in the report of this case.

As to the first exception: His honor refused the second request to charge, as submitted by the appellant; but charged the jury: "If the agreement was part and parcel of the transaction leading up to the indorsement, that the indorsement should be signed, then the indorsement is as much a part of the transaction as anything else." We find no error here. If the note payable to order is delivered for value without indorsement, the holder would have the equitable title to the note, and by proper proceedings could compel the proper indorsement to be made according to the agreement of the parties: Story on Bills, sec. 201. If the indorsement should be made after delivery, in pursuance of a prior arrangement, this is no reason why such indorsement would not be binding upon the indorsers. This exception is, therefore, overruled.

The second exception is overruled upon the same ground. If Wilson omitted to indorse the note when it was delivered ⁵²⁸ to Brown for value, then he was in duty bound to indorse it upon demand; and if such demand was made upon his clerk, who indorsed it without authority, and, upon being notified of the same by Brown, he replied, "It is all right," this was a ratification of the indorsement made by his agent.

The third exception is also overruled. His honor, in his charge to the jury, stated in substance the sound proposition of law, that if an agent performs an act according to his usual course of dealing, and the act is thereafter ratified by the principal, it will be binding upon the principal.

The fourth exception makes the point that a new trial should have been granted upon the ground that the verdict was against all of the defendants named upon the record, whereas only the appellant was served with the summons and complaint. This exception will not avail the party who was duly served, although the judgment would have been void against the defendants who were not served. It is a good judgment against the appellant, and, even though it would have been void against the other defendants, if it had been entered up in conformity with the verdict, the appellant cannot assign for error matters that do not

prejudice him, but affect other parties who are not before the court. Besides, the Code of Procedure, section 286, provides that: "Upon receiving a verdict, the clerk shall make an entry in his minutes specifying the time and place of the trial, etc. . . . If a different direction be not given by the court, the clerk must enter judgment in conformity with the verdict." But we find from the report of his honor, that when it was brought to his attention by counsel for the appellant that although only the appellant was served, the verdict was against the defendants, and judgment would be entered against all, the counsel for the plaintiff stated, "that so far as the entry of judgment against all was concerned, he would not enter up judgment against all," and in this his honor seems to have acquiesced. ⁵²⁹ There seems, then, to have been a tacit understanding that the judgment should be entered up only against the appellant; and we think that while there was no formal order signed by the judge to that effect, what did occur was sufficient direction to the clerk to enter judgment as proposed by the plaintiff's attorney.

The fifth exception complains of error on the part of the circuit judge in refusing to set aside the verdict, upon the ground that the jury refused to follow his directions. It is true that when a jury disregards the instructions of the court, the verdict should be set aside, even if the instructions were clearly erroneous: *Dent v. Bryce*, 16 S. C. 1; but it does not appear to our satisfaction that the verdict is not responsive to the charge of his honor, the presiding judge. All of the testimony is not before us, and his honor says, in his report, that the verdict "was responsive to the evidence, which was sufficient to sustain it. . . . I believed then, as I do now, that the verdict of the jury was substantially right and proper. Believing this, I could not set it aside and grant a new trial upon the ground that the verdict was not responsive to the charge." Besides, it is not our province to review the facts or to decide upon the sufficiency of testimony in a law case. This exception is, therefore, overruled.

The seventh exception is overruled for the reasons stated as to the first and second exceptions.

As to the sixth exception, it does not appear in the "case" that any "demurrer and motion to dismiss the complaint" was made by the appellant, and, under the well-established rule, it is not incumbent upon this court to consider matters which appear only in the exceptions. But as it has been earnestly requested by counsel that we intimate an opinion as to whether or not it is

necessary to protest a promissory note, in order to bind an indorser, we will not decline to do so, especially as this may be a matter of some public interest.

It is clear that, at common law, it was never deemed ⁵³⁰ necessary to protest a promissory note. Judge Story, in his work on Promissory Notes, section 297, says: "But in cases of promissory notes, by the English and American commercial law, no protest is required to be made upon the dishonor thereof." In *Burke v. McKay*, 2 How. 71, Mr. Justice Story, as the organ of the court, said: "In the first place, by the general law merchant, no protest is required to be made upon the dishonor of any promissory note, but it is expressly confined to foreign bills of exchange. This is so well known that nothing more need be said upon the subject than to cite *Young v. Bryan*, 6 Wheat. 146, where the very point is decided." In *Young v. Bryan*, Chief Justice Marshall, in delivering the opinion of the court, says that all that was incumbent upon the holder of a promissory note was to give due notice to the indorser; that no protest of a promissory note or inland bill of exchange was necessary. Is such protest necessary under the statute? The statute of 3 & 4 Anne, chapter 9, was made of force in this state in A. D. 1712, and is now incorporated in the General Statutes of 1882, sections 1290-1295 (Rev. Stats., secs. 1393-1396); and it is contended by counsel that such protest is necessary under the terms of this statute. Let us inquire, in the first place, what interpretation was given to this statute by the English courts, and, in the second place, how it has been construed in this country.

Mr. Chitty, in his work on Bills, page 500, says: "The act only gives an additional remedy, and does not take away the common-law one; and, therefore, it is not necessary to protest, it being in all cases of inland bills sufficient to give notice of nonpayment; and the holder can claim interest from the drawer, although there is no protest." And the same author says, at pages 364, 365: "At common law, no inland bill could be protested for nonacceptance, but by Statute 3 & 4 Anne, chapter 9, section 4, a protest was given, in case of refusing to accept in writing any inland bill amounting to the sum of five pounds, expressed to be given for value ⁵³¹ received, and payable at days, weeks, or months after date, in the same manner as in the case of foreign bills of exchange, and for which protest there shall be paid two shillings and no more. It has been supposed that this protest must be made, in order to entitle the

holder to demand of the drawer or indorser costs, damages, and interest; but in practice the plaintiff recovers interest against the drawer or indorser of an inland bill, on proof of due notice, without proving protest; and it has been recently decided that a protest is not essential to the recovery of interest. If the bill be of the above description, and under the amount of twenty pounds, the holder is certainly entitled to the above accumulative remedy, though no protest was made." *Winkle v. Andrews*, 2 Barn. & Ald. 696, was an action against a drawer of an inland bill, and a rule nisi was obtained to strike out the interest from the verdict, on the ground that there had been no protest; but, upon showing cause, the court held that the want of a protest afforded no ground for disallowing interest, where notice of dishonor of the bill had been duly given; that the object of the Statutes 9 and 10 William III, and 3 & 4 Anne, chapter 9, section 4, was to give interest, damages, and costs in cases in which it was supposed that they were not recoverable at common law, not to deprive a plaintiff of them in any case in which the common law would give them; that the fifth section, containing the words of deprivation, was by way of proviso only, to qualify the additional benefit that the Statutes of Anne and William III were supposed for the first time to give; that the proviso in the eighth section contained words to secure the plaintiff all his common-law rights, and that the right to damage was a common-law right; that it was upon this principle only that the constant allowance of interest, when there had been no protest, could be explained; that the fifth section contained words to annul parol acceptances. And in *Rex v. Meggott*, Eyre, circuit judge of king's bench, held that they had that effect; that that notice was corrected in *Lumly v. Palmer*, 2 Strange, 1000, upon the principle now adopted by the ⁵³² court; that the fifth section of 3 & 4 Anne, chapter 9, deprived a party of no remedy he had at common law; that that case must be considered as having virtually overruled *Harris v. Benson*, 2 Strange, 910, Trinity term, 5 George II; and from that time, from anything which appears to the contrary, parol acceptances had been held binding, and interest had been allowed against the drawers and indorsers of all inland bills; but no instance could be shown in which any such bills had been protested: *Bayley on Bills*, 5th ed., 263, note 9.

Upon this subject Chancellor Kent, in his Commentaries, third volume, page 93, says: "On inland bills, no protest was

required by the common law, and it was made necessary in England in certain cases by the Statutes 9 & 10 William III and 3 & 4 Anne; and yet, notwithstanding the language of the statutes, it had long been the settled rule and practice not to consider the protest of an inland bill as necessary or material." To the same effect is 2 Daniell on Negotiable Instruments, 1, 2. The statute of Mississippi is similar to ours, and concerning that statute the supreme court of the United States, in the case of Bailey v. Dozier, 6 How. 29, said: "The statute of Mississippi is taken, substantially, from 9 & 10 William III, chapter 17, amended by the 3 & 4 Anne, chapter 9, under which it has always been held by the courts of England that the action at common law was not thereby taken away, but that an additional remedy was given, by which the holder could recover interest and damages on an inland bill, in cases where he was not entitled to them at common law; and, if he chose to waive the benefit of the statute, he might still recover the amount due on the bill, by giving the customary proof of default and notice: Brough v. Parkins, 2 Ld. Raym. 992; 1 Salk. 131; 6 Mod. 80; Winkle v. Andrews, 2 Barn. & Ald. 696; Chitty on Bills, 466." In Fleming v. McClure, 1 Brev. 433, 2 Am. Dec. 671, the court said: "The custom among merchants with us, in regard to bills of exchange, is the same which exists in England, as to protests and notices of nonacceptance and nonpayment, and must ⁵³³ be governed by the same rules. . . . In the case of foreign bills, a protest is universally necessary, whether for nonacceptance or nonpayment. It is an essential part of the custom of merchants, and is requisite, not merely on account of damages and interest, but also on account of the principal sum. In respect to inland bills, it is only necessary on account of damages and interest, and is founded on the statutes of 9 & 10 William III, chapter 17, and 3 & 4 Anne, chapter 9."

In the case of Payne v. Winn, 2 Bay, 374, it was held that "the want of a formal protest by a notary, in this case, was no bar to the plaintiff's recovery against the indorser. A protest does not raise any new debt or create any further responsibility on the parties to a bill or note, but only serves to give formal notice that a bill or note is not accepted or paid. This protest, by common law, is absolutely necessary on every foreign bill of exchange, but it is not necessary on any inland bill of exchange, either by the common law or by any statute of force in this country, except to entitle a party to interest and damages." In

Thompson v. Bank, Riley, 81, the court said: "The question here arises on a promissory note; protest for nonpayment is not necessary; it is altogether superfluous. A demand of payment was necessary, and to enable it to be proved it is necessary to employ some one to make it, but a notary was not requisite; any other individual would have sufficed to make the demand, or to make the inquiries necessary to giving notice."

We, therefore, hold that it is not necessary to protest a promissory note in order to make the indorsers liable, unless the note is made by a person residing in one state and payable to a person residing in another state. In that case, it is considered in the light of a foreign bill of exchange, requiring protest: *Cape Fear Bank v. Stinemets*, 1 Hill (S. C.), 44.

It is the judgment of this court that the judgment of the circuit court be affirmed.

NEGOTIABLE INSTRUMENTS—NECESSITY FOR PROTEST. Protest is essential to a recovery on a foreign bill of exchange: *Read v. Bank*, 1 T. B. Mon. 91; 15 Am. Dec. 86; *Cullum v. Casey*, 9 Port. 131; 33 Am. Dec. 304, and note; *Chenowith v. Chamberlin*, 6 B. Mon. 60; 43 Am. Dec. 145, and note; but the protest of an inland bill is unnecessary: *Strawbridge v. Robinson*, 5 Gilm. 470; 50 Am. Dec. 420. This subject is discussed at length in the extended note to *Tate v. Sullivan*, 96 Am. Dec. 603.

NEGOTIABLE INSTRUMENTS.—INDORSEMENT BY AGENT and its effect is discussed in the extended note to *Mott v. Hicks*, 13 Am. Dec. 562.

AGENCY.—RATIFICATION OF ACTS OF AGENTS and the effect of the same is the subject of the notes to *St. Louis etc. Ry. Co. v. Bennett*, 22 Am. St. Rep. 189, and the extended note to *Atlee v. Bartholomew*, 5 Am. St. Rep. 109-114.

EX PARTE KEELER.

[45 SOUTH CAROLINA, 587.]

HABEAS CORPUS—CONTEMPT.—One adjudged guilty of contempt and imprisoned is not entitled to release upon habeas corpus, unless the proceedings under which he is imprisoned are void, in whole or in part.

CONSTITUTIONAL LAW—POLICE POWER—NUISANCE. The legislature has power to declare places where liquor is sold contrary to law to be common nuisances and to provide remedies for their abatement by summary proceedings, and such remedies are not rendered unconstitutional by reason of the fact that they deprive the defendant of those rights under the constitution to which he is ordinarily entitled.

NUISANCES—ABATEMENT BY SUMMARY PROCEEDINGS.—To justify the abatement of a nuisance by summary pro-

ceedings, it must appear that the interest of the public requires a stringent remedy, and that such remedy is reasonably necessary to accomplish the purpose, and, in determining whether it is reasonable, consideration must be given to the value and nature of the property involved in the nuisance and the difficulty of its suppression.

NUISANCE—ABATEMENT BY SUMMARY PROCEEDINGS
—JURY TRIAL.—In summary proceedings to abate a nuisance, the defendant has no right to a jury trial.

Section 22 of the South Carolina statute of 1894, involved in this controversy, is as follows: "All places where alcoholic liquors are sold, bartered, or given away, in violation of this act, or where persons are permitted to resort for the purpose of drinking alcoholic liquors as a beverage, or where alcoholic liquors are kept for sale, barter, or delivery in violation of this act, are hereby declared to be common nuisances, and any person may go before any trial justice in the county and swear out an arrest warrant on personal knowledge or on information and belief, charging said nuisance, giving the names of witnesses against the keeper or manager of such place, and his aids and assistants, if any; and such trial justice shall direct such arrest warrant either to the sheriff of the county or to any special constable, commanding said defendant to be arrested and brought before him, to be dealt with according to law, and at the same time shall issue a search warrant, in which the premises in question shall be particularly described, commanding such sheriff or constable to thoroughly search the premises in question and to seize all alcoholic liquors found thereon, and dispose of them as provided in section 33, and to seize all vessels, bar fixtures, screens, bottles, glasses, and appurtenances apparently used or suitable for use in retailing liquors, to make a complete inventory thereof, and deposit the same with the sheriff. That under the arrest warrant the defendant shall be arrested and brought before such trial justice, and the case shall be disposed of as in case of other crimes beyond his jurisdiction, except that when he commits or binds over the parties for trial to the next term of court of general sessions for the county, he shall make out every paper in the case in duplicate, and file one with the clerk of the court for the county and immediately transmit the other to the solicitor of the circuit, whereupon said solicitor shall at once apply to the circuit judge at chambers within that circuit for an order restraining the defendants, their servants or agents, from keeping, receiving, bartering, selling, or giving away any alcoholic liquors until the further order of the court. Such circuit

judge is hereby authorized, empowered, and required to grant the said restraining order without requiring a bond or undertaking, upon the hearing or receipt by him of said papers from the court of the said trial justice by the hands of the solicitor; and any violation of said restraining order before the trial of the case shall be deemed a contempt of court and punished as such by said judge or court, or any other circuit judge, as for the violation of an order of injunction. Upon conviction of said defendants of maintaining said nuisance at the trial, they or any of them shall be deemed guilty of a misdemeanor, punishable by imprisonment in the state penitentiary for a term of not less than three months, or a fine or not less than two hundred dollars, or by both, in the discretion of the court, and the restraining order shall be made perpetual. The articles covered by the inventory, which were retained by the sheriff, shall be forfeited to the state and sold, and the net proceeds sent to the state commissioner, and the sheriff shall forthwith proceed to dispose of the alcoholic liquors covered by said inventory as provided for in this act as when other liquors are seized. The finding of such alcoholic liquors on such premises, with satisfactory evidence that the same was being disposed of contrary to this act, shall be prima facie evidence of the nuisance complained of. Liquors seized as hereinbefore provided, and the vessels containing them, shall not be taken from the custody of the officers in possession of the same by any writ of replevin or other process while the proceedings herein provided are pending. No suit shall lie for damages alleged to arise by seizure and detention of liquors under this act. Any person violating the terms of any restraining order granted in such proceedings shall be punished for contempt by a fine of not less than two hundred dollars nor more than one thousand dollars, and by imprisonment in the state penitentiary not less than ninety days nor more than one year. In contempt proceedings arising out of the violation of any injunction granted under the provisions of this act, the court, or in vacation, the judge thereof, shall have power to try summarily and punish the party or parties guilty, as required by law. The affidavits upon which the attachment for contempt issues shall make a prima facie case for the state. The accused may plead in the same manner as to an indictment in so far as the same is applicable. Evidence may be oral or in the form of affidavits, or both. The defendant shall not necessarily be dis-

charged upon his denial of the fact stated in the moving papers. The clerk of the court shall, upon the application of either party, issue subpoenas for witnesses, and, except as above set forth, the practice in such contempt proceedings shall conform as nearly as may to the practice in the court of common pleas. That when any solicitor neglects or refuses to perform any duty or to take any steps required of him by any of the provisions of the preceding section or by any of the provisions of this act, the attorney general, on his own motion, or by the request of the governor, shall, in person or by his assistant, proceed to the locality and perform such neglected duty, and take such steps as are necessary in the place instead of such solicitor, and at his discretion to cause a prosecution to be instituted, not only in the matter so neglected, but also a prosecution against the solicitor for malfeasance or misfeasance in office, or for official misconduct, or for other charges justified by facts, and to pursue the prosecution to the extent of a conviction and dismissal from office of any such solicitor. And in such event the attorney general shall be and is hereby authorized and empowered to appoint one or more additional assistants, who shall each have, while actually employed, the same compensation, to be paid from the litigation fund of the attorney general."

J. E. Davis, for the petitioner.

W. A. Barber, attorney general, for the respondent.

541 GARY, J. This is a proceeding in habeas corpus, in which Martin Keeler petitions this court to be discharged from imprisonment in the state penitentiary. He was arrested under a warrant charging him with violation of what is called the dispensary act. He waived preliminary examination, and gave bond for his appearance at court. A search warrant was issued against the said Martin Keeler, and certain intoxicating liquors were found, whereupon Mr. Solicitor Bellenger made application, in writing, for a restraining order against said Martin Keeler, which was granted by his honor, Judge Watts. Thereafter, a rule was issued against said defendant, to show cause why he should not be attached for contempt of court in violating said restraining order, but this rule was discharged by his honor, Judge Watts. Subsequently, however, his honor, Judge Buchanan, after hearing affidavits and argument of counsel for the state and the defendant, adjudged the said defendant guilty of

contempt of court, in violating the restraining order aforesaid, and sentenced the defendant to pay a fine of two hundred dollars and to imprisonment in the state penitentiary for ninety days.

⁵⁴² The proceedings under which the defendant was fined and imprisoned arose under section 22 of the dispensary act, which section will be set out in the report of the case. The defendant, in his petition, presents to this court several grounds for his discharge from imprisonment, some of which the court has not the power to consider in habeas corpus proceedings.

The defendant has been adjudged guilty of contempt of court, and imprisoned therefor; this court will, therefore, not release the defendant from imprisonment unless the proceedings in which he was adjudged guilty of contempt of court are null and void, in whole or in part. The proceedings by habeas corpus is not a substitute for the right of appeal, and there are questions which, although they could properly be reviewed on appeal, cannot be considered in habeas corpus proceedings. This limitation upon the power of the court, in habeas corpus proceedings, is clearly expressed by Mr. Justice Harlan in *Andrews v. Swartz*, 156 U. S. 272, where he speaks of "the well-established rule, that a prisoner, under conviction and sentence of another court, will not be discharged on habeas corpus, unless the court that passed the sentence was so far without jurisdiction that its proceedings must be regarded as void": Citing *Ex parte Seibold*, 100 U. S. 375; *In re Wood*, 140 U. S. 287; *In re Shibuya Jugiro*, 140 U. S. 297; *Pepke v. Cronan*, 155 U. S. 100.

We will now consider the question whether the proceedings under which the petitioner was imprisoned are null and void, either in whole or in part. The authorities sustain the following propositions of law: 1. That the legislature has the power to declare places where liquor is sold contrary to law to be common nuisances, and to provide for their abatement: *Mugler v. Kansas*, 123 U. S. 623; *Kidd v. Pearson*, 128 U. S. 1; *Lawton v. Steele*, 152 U. S. 133; 2. That the legislature has the right to provide remedies, summary in ⁵⁴³ their nature, to prevent and abate such nuisances; 3. That these summary remedies are not rendered unconstitutional by reason of the fact that they deprive the defendant of those rights under the constitution to which ordinarily he is entitled; 4. That to justify such summary proceedings it must appear: 1. That the interests of the public generally require these stringent remedies; and 2. That they are reasonably necessary to accomplish the purposes for

which they were enacted; 5. That in determining if such remedies are reasonable, the court will consider the value and nature of the property involved in the nuisance, and the difficulty of its suppression. The granting of the restraining order to prevent the defendant from carrying on a business, which the legislature has declared a common nuisance, is a part of the summary proceedings provided by the legislature against such nuisances. The defendant is, therefore, not entitled to invoke the provisions of the constitution as to the right of trial by jury in a case of this nature. In the case of *Eilenberker v. District Court*, 134 U. S. 31, Mr. Justice Miller, for the court, says: "If the objection to the statute is that it authorizes a proceeding in the nature of a suit in equity to suppress the manufacture and sale of intoxicating liquors, which are by law prohibited, and to abate the nuisance which the statute declares such acts to be, wherever carried on, we respond that, so far as at present advised, it appears to us that all the powers of a court, whether at common law or in chancery, may be called into operation by a legislative body for the purpose of suppressing this objectionable traffic; and we know of no hindrance in the constitution of the United States to this form of proceeding, or to the court in which this remedy shall be had. Certainly, it seems to us to be quite as wise to use the processes of the law and the powers of the court to prevent the evil as to punish the offense as a crime after it has been committed. We think it was within the power of the court of Plymouth county to issue the ⁵⁴⁴ writs of injunction in these cases, and that the disobedience to them by the plaintiffs in error subjected them to the proceedings for contempt, which were had before that court." Mr. Justice Brown, speaking for the court, in *Lawton v. Steele*, 152 U. S. 133, says: "It [the police power] is universally conceded to include every thing essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that a state may order . . . the prohibition of gambling houses, and places where intoxicating liquors are sold. Beyond this, however, the state may interfere, whenever the public interests demand it, and, in this particular, a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests: *Barbier v. Connolly*, 113 U. S. 27; *Kidd v. Pearson*, 128 U. S. 1.

To justify the state in thus interposing its authority in behalf of the public, it must appear: 1. That the interests of the public generally, as distinguished from those of a particular class, require such interference; and 2. That the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." Again, "While the legislature has no right, arbitrarily, to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard; and, if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed," citing numerous authorities. Again, "The object of the law is undoubtedly a beneficent one, and the state ought not to be hampered in its enforcement by the application of constitutional provisions, which are intended for the protection of substantial rights of property. It is evident that the efficiency of this statute would be very seriously impaired by requiring every net illegally used to be carefully taken from the water, carried ⁵⁴⁵ before a court or magistrate, notice of the seizure to be given by publication, and regular judicial proceedings to be instituted for its condemnation. There is not a state in the Union which has not a constitutional provision entitling persons charged with crime to a trial by jury, and yet, from time immemorial, the practice has been to try persons charged with petty offenses before a police magistrate, who not only passed upon the question of guilt, but metes out the proper punishment. This has never been treated as an infraction of the constitution, though, technically, a person may, in this way, be deprived of his liberty without the intervention of a jury: *Callan v. Wilson*, 127 U. S. 540, and cases cited. So, the summary abatement of nuisances, without judicial process or proceeding, was well known to the common law long prior to the adoption of the constitution, and it has never been supposed that the constitutional provision in question in this case was intended to interfere with established principles in that regard. Nor is a person, whose property is seized under the act in question, without his legal remedy. If, in fact, his property has been used in violation of the act, he has no just reason to complain; if not, he may replevy his nets from the officer seizing them, or, if they have been destroyed, may have his action for their value. In such cases, the burden would be upon the defendant to prove a justification under the statute. As was said by the supreme court of New Jersey, in a similar case (*American Print Works v. Lawrence*,

21 N. J. L. 248-259): "The party is not, in point of fact, deprived of a trial by jury. The evidence necessary to sustain the defense is changed. Even if the party were deprived of a trial by jury, the statute is not, therefore, necessarily unconstitutional.'" The dispensary act is not violative of any of the requirements hereinbefore mentioned.

It is also contended that the sentence is obnoxious to section 38 of article 1 of the constitution of 1868. The punishment provided in section 22 of the dispensary ⁵⁴⁶ act, for violation of the restraining order therein mentioned, is a fine of not less than two hundred dollars nor more than one thousand dollars, and by imprisonment in the state penitentiary not less than ninety days nor more than one year. Section 38, article 1, of the constitution of 1868 provides that: "Excessive fines shall not be imposed, nor cruel and unusual punishment inflicted," etc. In our opinion, the fine imposed on the defendant was not excessive, nor the punishment inflicted cruel and unusual.

It is the judgment of this court, that the petition be dismissed.

MR. CHIEF JUSTICE McIVER dissented and said: "It is conceded that these proceedings were taken under the authority of the twenty-second section of an act entitled 'An act to further declare the law in reference thereto, and further regulate the use, sale, consumption, transportation, and disposition of alcoholic liquids or liquors within the state of South Carolina, and to police the same,' approved January 2, 1895. As this section is very long, it will not be inserted here, especially as Mr. Justice Gary, in his opinion, has very properly directed that the section shall be set out in full in the report of this case. Inasmuch as it is too well settled to require the citation of any authority that a writ of habeas corpus cannot be used as a substitute for a writ of error or for an appeal, the only inquiry is, whether the court, or judge below, had any jurisdiction to grant the order committing the prisoner to the custody of the superintendent of the state penitentiary, for a contempt in disobeying the restraining order of Judge Watts above referred to. This inquiry involves two general questions: 1. Whether the proper steps were taken by which his Honor, Judge Watts, could acquire jurisdiction to grant the restraining order, under the provisions of the twenty-second section of the act above referred to, which, for convenience, may be designated as the dispensary act; 2. Whether said section is unconstitutional. For in this case no question was raised—if, indeed, it could be successfully raised—as to the power of Judge Watts, who is the judge of the fourth and not of the second judicial circuit, to grant such restraining order, inasmuch as it is conceded that Judge Watts, by lawful authority, was at the time holding a court within the second circuit.

"The first question above stated renders it necessary that a careful analysis of the provisions of the twenty-second section of the dispensary act should be made. Without undertaking to state in detail all the provisions of that section, some of which are not pertinent to the present inquiry, it will be sufficient to say that, according to my understanding of that section, its scheme is, that certain steps are required to be taken, in the order therein prescribed, before either the court or a judge thereof can acquire jurisdiction to issue an order restraining any person 'from keeping, receiving, bartering, selling, or giving away any alcoholic liquors,' to wit: 1. That some person 'may go before any trial justice and swear out an arrest warrant charging said nuisance,' and the person so charged shall be brought before the trial justice to be dealt with according to law; 2. The trial justice shall at the same time issue a search warrant, requiring the officer to whom it is directed to search the premises charged to be a nuisance, and seize all alcoholic liquors found thereon; 3. That when the defendant is brought before the trial justice 'under the arrest warrant,' the case shall be disposed of as in other cases beyond his jurisdiction, except that when he binds over the party for trial at the next term of the court of sessions, the trial justice 'shall make out every paper in the case in duplicate,' and file one with the clerk of the court and transmit the other to the solicitor of the circuit; 4. The solicitor is then required to apply at once to the circuit judge within that circuit for an order restraining the defendant from keeping, receiving, bartering, selling, or giving away any alcoholic liquors until the further order of the court. Such circuit judge is empowered and required to grant the restraining order without 'requiring a bond or undertaking upon the hearing or receipt by him of said papers from the court of the said trial justice by the hands of the solicitor, and any violation of said restraining order before the trial of the case shall be deemed a contempt of court, and punished as such by said judge or court, or any other circuit judge, 'as for the violation of an order of injunction'; 5. The act next provides that, upon the conviction of the defendant of maintaining said nuisance at the trial, he shall suffer the punishment prescribed, 'and the restraining order shall be made perpetual'; 6. The act again provides that a person violating the restraining order may be punished for a contempt, and prescribes the punishment that may be imposed. The act then proceeds to declare that in such contempt proceedings 'the court, or in vacation the judge thereof, shall have power to try summarily and punish the party or parties guilty as required by law,' and, after making some provisions as to the mode of pleading and adducing evidence, and securing the attendance of witnesses, declares that 'the practice in such contempt proceedings shall conform as nearly as may to the practice in the court of common pleas.' From this brief review of the provisions of the twenty-second section of the dispensary act, it is very obvious that the unusually stringent remedy therein provided cannot be successfully resorted to unless the

several conditions prescribed are strictly complied with. Even in cases involving mere property rights, the rule is well settled that a person is not entitled to the stringent remedy of attachment and seizure of his alleged debtor's property without strictly complying with the conditions prescribed upon which such remedy may be resorted to. As was said in *Bank v. Stelling*, 31 S. C. 369, 'as the remedy by attachment is a summary and somewhat harsh proceeding, whereby a person may be deprived of the possession or control of his property before the claim upon which it was based has been adjudicated, the rule is well settled that one who seeks to avail himself of such a remedy must be careful to comply strictly with the conditions upon which it is allowed.' To same effect see *Wagner v. Booker*, 31 S. C. 375, and *Booker v. Smith*, 38 S. C. 228. Now, if this be the settled rule in reference to cases involving merely rights of property, with how much greater force should it apply to cases involving the liberty of the citizen.

"Guided by this well-settled rule, let us examine the various steps taken in this case, as disclosed by the certified copy of the record, which has been sent up by the clerk of the circuit court, now before us. Without going into unnecessary details, that record discloses the following facts: 1. A search warrant was issued by a trial justice on the 25th of April, 1895, reciting that, upon information of J. B. Ross, 'contraband intoxicating liquors are now unlawfully in the possession, storage, and keeping of, and on the premises occupied by, Martin Keeler,' in the town of Blackville, and directing the officer to whom such warrant was directed to search for and seize such contraband liquors. There is no return indorsed upon this warrant, and nothing to show whether any, and if so what, action was taken under it. 2. Next we find an affidavit of J. B. Ross, bearing date the 26th of April, 1895, stating that Martin Keeler, on the 25th of April, 1895, and at other times, 'did violate the laws and statutes of the state by selling, without permission or license, whiskey and other intoxicating liquors,' to which is appended an order, signed by the trial justice, dated the 26th of April, 1895, to 'arrest and bring before me Martin Keeler, charged with violating the dispensary law.' 3. A recognizance of Martin Keeler to appear before the court of general sessions, on the second Monday in November, 1895, 'to answer to a bill of indictment to be preferred against the said Martin Keeler,' for what offense is not stated. This recognizance bears date the 27th of April, 1895. 4. A search warrant, issued by a trial justice on the 1st of June, 1895, requiring the officer to whom it was directed to search the premises of Martin Keeler, and seize any contraband liquors found thereon. This warrant is based upon the affidavit of J. B. Ross, bearing date the 1st day of June, 1895, 'that he is informed by my own observations, and verily believes from such information and his own observation, that in the house of Martin Keeler there is now deposited, stored, and kept contraband liquors, in violation of law, to wit: whiskey and other intoxicating (liquors), and that said intoxicating and con-

traband liquors are there kept, stored, and deposited by Martin Keeler, his aiders and abettors, without a permit, in violation of the laws of the state.' Upon this search warrant there is no return, and nothing to show whether any action, and if so what, was taken under it. 5. Next comes the application of the solicitor (without date) for the restraining order, which was made out on a printed blank, and which, after the blanks were filled, as appears in the record, reads as follows: " 'South Carolina, Barnwell county. And now comes G. Duncan Bellinger, solicitor for the second circuit, in which has been obtained an arrest and search warrant against Martin Keeler, issued by Trial Justice A. P. Woodward, of the county and state above named, and upon the return of which search warrant certain contraband and intoxicating liquors were found, being so kept without a permit, as a reference to the trial justice papers, hereto attached, will more fully appear, and show to this honorable court, that the circumstances and conditions contemplated by the dispensary act having arisen in the enforcement of the provisions of the same, and the papers hereto attached, charging as a nuisance the place therein mentioned, it becomes my duty to pray the issuance of an order restraining the said Martin Keeler, his agents, servants, and employés, from keeping, receiving, bartering, selling, or giving away any alcoholic liquors until the further order of the court." Appended to this application is the order of Judge Watts, bearing date the 20th of June, 1895, restraining the said Martin Keeler from keeping, receiving, bartering, selling, or giving away any alcoholic liquors until the further order of the court. 6. An order of Judge Watts, bearing date the 19th of August, 1895, requiring Martin Keeler to show cause before him, on the 21st of August, 1895, why he should not be attached for a contempt in disobeying the restraining order of the 20th of June, 1895. This rule to show cause was based upon an affidavit dated the 16th of August, 1895, stating that said Keeler sold liquors on the 3d of August, 1895, and on divers other days before and after that date, and subsequent to the date of the restraining order. Upon the return to this rule, and after hearing the affidavits submitted, his honor, Judge Watts, granted an order (without date) discharging said rule. 7. On the 9th of November, 1895, the trial justice issued a warrant, reciting: 'Whereas, complaint has been made unto me by H. J. Croft that Martin Keeler has unlawfully violated the dispensary act in keeping, selling, or storing contraband intoxicating liquors, and without any permit, certificate, or state license. These are, therefore, to command you to apprehend the said Martin Keeler and bring him before me, to be dealt with according to the law.' Upon this warrant the following indorsement appears: 'The defendant was arrested and brought up for a preliminary hearing. The evidence being deemed sufficient, he was bound over to appear for trial at the court of general sessions, on the second Monday in November, 1895,' signed by the trial justice. Accordingly, we find in the record the recognizance of the said Mar-

tin Keeler to appear and answer to a bill of indictment 'for a violation of dispensary act,' bearing date the 9th of November, 1895.

8. Next we find an order of his honor, Judge Buchanan, bearing date the 12th of November, 1895, requiring Martin Keeler to show cause before him, on the 16th of November, 1895, 'why he should not be adjudged guilty of contempt for violating the restraining order made herein by the Hon. R. C. Watts, presiding judge in the second circuit, on the twentieth day of June, 1895.' This rule to show cause was based upon affidavits stating that said Keeler had sold whiskey to a negro on the night of the 8th of November, 1895.

9. Upon hearing the returns to said rule, with the affidavits submitted, Judge Buchanan, on the 25th of November, 1895, granted an order adjudging the said Martin Keeler guilty of contempt in disobeying the restraining order of Judge Watts, hereinbefore referred to, and sentenced him to pay a fine of two hundred dollars, and to be confined to the state penitentiary for ninety days. From this statement of the proceeding, which culminated in the order of Judge Buchanan, adjudging the petitioner in contempt, in disobeying the restraining order of Judge Watts, and imprisoning him in the state penitentiary as a punishment for such contempt, it seems to me clear that such proceedings are fundamentally defective in at least two respects, and hence neither the court, nor any judge thereof, ever acquired jurisdiction either to grant the restraining order or the order punishing the petitioner for a contempt in disobeying such restraining order. In the first place, the very first step required by the statute to be taken, in order to initiate proceedings for contempt, does not appear to have been taken. The first provision in the section is, that some person shall obtain from a trial justice a warrant charging the person accused with committing the nuisance created by that section; and the record will be searched in vain for any evidence that any such warrant was ever obtained or applied for. As we have seen, from the abstract of the record above set forth, the first step which was taken was procuring a search warrant—not an 'arrest warrant,' as it is termed in the statute—which was obtained on the 25th of April, 1895, and the warrant for the arrest of the petitioner, issued on the next day—the 26th of April, 1895—so far from charging the petitioner with keeping or maintaining the nuisances denounced by the statute, simply charged the petitioner, in the most general terms, with 'violating the dispensary law,' without stating or even intimating what provision of the dispensary law he had violated; and it is very obvious that the dispensary act creates several distinct and different offenses, with distinct and different penalties attached. And if we turn to the affidavit upon which this warrant was based, we find that it is there stated that the petitioner 'did violate the laws and statutes of the state by selling, without permit or license, whiskey and other intoxicating liquors.' It is clear, therefore, that this warrant did not charge the offense of keeping and maintaining a nuisance, denounced by the twenty-second section of the dispensary

act, but, on the contrary, did charge an offense denounced by another section of that act. So, also, the warrant issued on the 1st of June, 1895, was a search warrant, and not an 'arrest warrant,' and neither that warrant nor the affidavit upon which it was based contains any charge of nuisance. While it is true that the recitals contained in the application of the solicitor for the restraining order do seem to imply that the petitioner was charged with keeping and maintaining a nuisance, and that the return on the search warrant showed that 'certain contraband and intoxicating liquors' were found on the premises of the petitioner, yet these recitals are based expressly upon the several papers issued by the trial justice, and, as we have seen, these papers utterly fail to sustain such recitals, and do not show that there ever was any return made upon either of the search warrants, nor do they show that any intoxicating liquors were found upon the premises of the petitioner, and do not show that any action whatever was taken under either of the search warrants. So that it is plain that the record before us fails to show that the necessary steps prescribed by the statute were ever taken in order to confer jurisdiction to issue the restraining order; and, if so, then it necessarily follows that the proceedings for contempt of any order issued without jurisdiction, are also void for want of jurisdiction.

"If it should be said that the admission, signed by the attorney for petitioner and the assistant attorney general, 'That all the proceedings taken by Solicitor Bellinger before Judge Buchanan were regular, so far as petition, affidavits, etc., are concerned,' concludes the question of jurisdiction, the answer would be that consent cannot confer jurisdiction; and, if the consent of the parties themselves cannot confer jurisdiction, surely no admissions of their attorneys could have that effect, when, as we have seen, the record before the court shows a lack of jurisdiction. Besides, there is no admission that the proceedings before Judge Watts to obtain the restraining order 'were regular,' and this constitutes the fundamental jurisdictional objection. It is scarcely necessary to notice the warrant issued by the trial justice on the 9th of November, 1895, for neither that warrant nor the affidavit upon which it is based purports to charge the petitioner with keeping or maintaining a nuisance, as forbidden by the twenty-second section of the dispensary act; and, on the contrary, the offense then charged was under another section of the dispensary act. Besides, Judge Buchanan did not, and could not, base his order for a rule to show cause, and his final order adjudging the petitioner to be guilty of contempt upon that prosecution, for the obvious reason that it was not followed up by any application for a restraining order. On the contrary, his action was based entirely upon the original prosecution, followed up by the restraining order of Judge Watts, granted on the 20th of June, 1895. I may add here, that there is nothing in the position taken by counsel for petitioner, that Judge Watts had previously discharged a rule to show cause why the petitioner should not be

adjudged guilty of a contempt in disobeying his restraining order of the 20th of June, 1895, and therefore, that the matter was *res adjudicata*; for the papers show that the proceedings for contempt before Judge Watts were based upon the charge of selling liquor, on or about the 3d of August, 1895, while the similar proceeding before Judge Buchanan was based upon a charge of selling liquor on the 8th of November, 1895, some time afterward; and while it might have been entirely true that the evidence was not sufficient to restrain the charge of selling liquor on the 3d of August, 1895, as, no doubt, was the fact, yet that did not even tend to show that the charge of selling liquor on the 8th of November, 1895, was not sustained by the evidence.

"In the second place, it does not appear from the record before us that any action was ever instituted against the petitioner under which an application for a restraining order, or for an injunction, as is ~~is~~ indifferently spoken of in the act, could be made. While it is true that there is no provision in the twenty-second section of the dispensary act requiring that the application for a restraining order must be made in an action instituted for that purpose, yet is it equally true that there is no provision in that section, or any other section of the dispensary act, providing for any other mode by which an application for an injunction or a restraining order may be made; and hence, in the absence of any such provision, it follows, necessarily, that the only mode provided by the general law for obtaining an injunction, to wit: by an action, must be pursued. The provision in the section, that the solicitor shall, upon the papers furnished him by the trial justice, apply to the circuit judge for a restraining order, certainly does not prescribe any mode of proceeding by which such an application shall be made. It simply provides the basis or evidence upon which the application may be made. Besides all this, it seems to me, from an attentive and careful examination of the provisions of section twenty-two of the dispensary act, that it is more than doubtful, to say the least of it, whether the legislature ever intended that a citizen should be deprived of his liberty and subjected to the degrading punishment of confinement in the penitentiary, for disobeying an order forbidding him to keep or maintain an alleged nuisance, before it had been ascertained by the verdict of a jury that he has ever kept or maintained a nuisance. Otherwise, whence the necessity of requiring, as the very first step in the proceedings, that a warrant shall be issued charging the accused with keeping and maintaining a nuisance, under which he shall be arrested and bound over to answer, in the court of sessions, to a bill of indictment for such offense, where of course he would be entitled to a trial by jury? On the contrary, it seems to me that the more reasonable construction of the section is, that the intention of the legislature was, that the person charged with keeping and maintaining the nuisance created by the section in question should be indicted and tried in the regular way for that offense; and for the purpose of preventing the continuance of the

alleged nuisance, pending the prosecution, an order may be granted enjoining and restraining the accused from continuing such nuisance, for disobedience of which, as in any other case of injunction, he may be punished as for a contempt, after the fact of nuisance has been judicially ascertained by the verdict of the jury. Suppose it should be ascertained, judicially, upon the trial of the indictment for nuisance, that the accused had never been guilty of keeping and maintaining a nuisance, then, if, in the meantime, he shall be punished for a contempt in disobeying an order restraining him from keeping and maintaining a nuisance, under summary proceedings for contempt, he will have been punished, by confinement in the penitentiary, for doing an act which it has been judicially ascertained, by the verdict of jury, he never did do. Surely the legislature never intended any such result, and I would be very unwilling to attribute to them any such intention, unless it was plainly expressed in much more explicit terms than those found in section twenty-two of dispensary act.

"Under this view, the second general question, as to the constitutionality of the twenty-second section of the dispensary act, does not necessarily arise, and, therefore, under well-settled principles, should not be considered.

"I am, therefore, of the opinion that the petitioner, Martin Keeler, has been deprived of his liberty, without due warrant of law, and is, therefore, entitled to a discharge."

MR. JUSTICE POPE concurred with Mr. Justice Gary, and dissented from the dissenting opinion of Mr. Chief Justice McIver, Justice Pope contended that, as the petitioner had personally appeared before the court below he thereby waived all irregularities and was in no position to successfully contend that that court did not acquire jurisdiction of his person. The following cases were cited in support of this view: *Gravely v. Gravely*, 20 S. C. 104; *Oliver v. Fowler*, 22 S. C. 540; *Chafee v. Postal Tel. Co.*, 35 S. C. 378; *Meinhard v. Youngblood*, 37 S. C. 223; *State v. Hatcher*, 11 Rich. 525; *State v. Sarratt*, 14 Rich. 29; *Toland v. Sprague*, 12 Pet. 330.

HABEAS CORPUS—REVIEW OF CONTEMPT PROCEEDINGS ON.—Habeas corpus cannot be used as a writ of error to review proceedings under which a party is imprisoned for contempt of court: *In re Copenhagen*, 118 Mo. 377; 40 Am. St. Rep. 382, and note. See, further on this subject the notes to *Ex parte Sternes*, 11 Am. St. Rep. 256, and *Ex parte Grace*, 79 Am. Dec. 536.

NUISANCE—POWER OF LEGISLATURE TO DECLARE WHAT IS.—The legislature has the power to enlarge the category of public nuisances by declaring places or property used to the detriment of public interests, or to the injury of the health, morals, or welfare of the community, to be nuisances, although not such at common law: *Lawton v. Steele*, 119 N. Y. 226; 16 Am. St. Rep. 813. See, also, the notes to *Janesville v. Carpenter*, 20 Am. St. Rep. 135, and *Hutton v. Camden*, 23 Am. Rep. 212.

NUISANCE—ABATEMENT BY SUMMARY PROCESS.—The legislature may, where a public nuisance is physical and tangible, di-

rect its summary abatement by executive officers without the intervention of judicial proceedings, in cases analogous to those where that remedy existed at common law: *Lawton v. Steele*, 119 N. Y. 226; 16 Am. St. Rep. 813.

LEAPHART v. COMMERCIAL BANK.

[45 SOUTH CAROLINA, 563.]

CONTRACTS IN WRITING ARE TO BE CONSTRUED by the court and not by the jury.

BANKS AND BANKING—RELATION BETWEEN BANK AND DEPOSITOR.—A deposit of money made with a bank corporation, or association, to be used by it for the purpose of making profit therefrom, with an agreement on its part to repay the amount with interest, becomes at once the property of the depositor, and creates the ordinary relation of debtor and creditor between the depositor and the depositor, with nothing in the nature of a trust or fiduciary character in or growing out of the transaction.

BANKS AND BANKING—RELATION BETWEEN BANK AND DEPOSITOR.—In the absence of stipulations to the contrary, ordinary deposits, when received, by a bank, corporation, or other association, for the purpose of deriving profit therefrom, become at once the property of the depositor, and a part of its general funds that can be loaned by it as other moneys. The liability on the part of the depositor in regard to such deposits is as a debtor, not as a trustee.

BANKS AND BANKING—RELATION BETWEEN BANK AND DEPOSITOR arising from an ordinary deposit is that of debtor and creditor and in case of special deposit, the relation of bailor and bailee, unless by special stipulations these relations are altered or modified in either case.

Perry & Heyward and A. Crawford, for the appellant.

Lyles & Muller, for the appellee.

563 McIVER, C. J. The plaintiff brought this action to recover from the defendant bank a certain sum of money alleged to have been deposited with said bank by one C. J. Iredell in breach of an alleged trust reposed in him by the plaintiff. Passing by the first, second, and third paragraphs of the complaint, in which the representative character of the plaintiff, and the corporate character of the defendant, are alleged, the material allegations of the complaint are to be found in the fourth, fifth, and sixth paragraphs thereof, and may be stated substantially as follows: 4. That on the first day of November, 1890, one C. J. Iredell, who was then president of the defendant bank, received from the plaintiff the sum of two thousand dollars, "in trust,
564 to be invested for the plaintiff and to be returned to the plaintiff, with interest, when called for"; 5. That instead of in-

vesting said amount, as required by the terms of said trust, the said Iredell, being then president of the defendant bank, in breach of his said trust, deposited the same in said bank, and allowed the same to be used by said bank, which still has possession of the same; 6. That defendant bank had full notice of the said trust and of the breach of the same, and has refused to comply with the plaintiff's demand for the payment of the money so deposited.

The defendant, in its answer, denies all of the allegations contained in the fourth, fifth, and sixth paragraphs of the complaint.

The case came on for trial before his honor, Judge Earle, and a jury, who were instructed to find a verdict for defendant, upon the ground that no trust relation had been shown to exist between the plaintiff and Iredell, by the contract between them, which was reduced to writing, and which, of course, was to be construed by the court.

The plaintiff appeals upon the several grounds set out in the record, which need not be repeated here, as I do not propose to consider them seriatim, but propose to take up the three points into which the several grounds of appeal have been condensed in the argument of counsel for appellant.

The undisputed facts are, that C. J. Iredell issued a circular, of which the following is a copy:

"Depositors' Co-operative Association. Six per cent interest. This association has been suggested and formed for the benefit of those having money for which they have no immediate use, or while waiting for other investments, and upon which, while idle, a good rate of interest will be obtained. Or the certificate can be held as an investment. The terms are: Money to be deposited for one year or longer. A certificate to be given, bearing interest at the rate of six per cent per annum from date thereof. Interest ⁵⁶⁵ to be paid semi-annually. Principal, if needed, can be drawn at any time after notice, agreed on with the manager, but no interest allowed unless money has been on deposit for six months from each semi-annual payment of interest. The certificate can be used at any time as collateral security. Address letters and send money to C. J. Iredell, manager, Columbia, S. C.; office at the Commercial Bank."

In response to the proposals contained in the foregoing circular, the plaintiff deposited with C. J. Iredell, manager, the sum

of two thousand dollars, and received from him a certificate, of which the following is a copy:

"No. 2. Depositors' Co-operative Association. \$2,000.

"Columbia, S. C., November 1st, 1890.

"I hereby certify that Martha V. Leaphart, executrix, has deposited with C. J. Iredell, manager, \$2,000, payable to her order, upon the return of this certificate, properly indorsed. And it is agreed between said C. J. Iredell, manager, and any or all indorsers of this certificate, that the sum of money above mentioned shall remain on deposit with said C. J. Iredell, manager, for one year from date hereof. And it is further agreed between said parties that the amount named in said certificate shall draw interest at the rate of six per cent per annum, payable semi-annually. Said amount can be drawn at any time after thirty days' notice, but no interest be allowed unless money is on deposit six months. (Signed) C. J. IREDELL, Manager."

It further appears that the money thus received from the plaintiff by C. J. Iredell, manager, was deposited in the defendant bank by him, to the credit of an account then standing upon the books of the bank in the name of "C. J. Iredell, manager," and was, from time to time, checked against by said C. J. Iredell, as manager. It also appears, that while there was but a single account upon the books of the bank in the name of "C. J. Iredell, manager," yet that Iredell, regarding that account as representing two funds, required the teller of the bank to give him an additional pass book marked "special," "Depositors' Co-operative Association," 566 upon which deposits of money received for that association were also entered, though there was nothing on the books of the bank to indicate that such account represented two funds. From this statement of the facts, as developed in the trial below, it is very clear that the controlling question in the case was, whether there was any trust relation created between the plaintiff and Iredell by the contract which they made; and, as that contract was in writing, it was equally clear that the true construction and effect of such contract was for the court and not for the jury, presenting a question of law and not of fact, and, therefore, it is difficult to discover any issue of fact to be left to the jury. If the circuit judge was right in holding that the contract created no trust relation between the parties, that

was an end of the case, and hence appellant's first point, "that the circuit judge erred in not allowing the jury to pass upon the questions of fact involved in the causes," cannot be sustained.

The appellant's second point, as stated in the argument, is, "that the title, the right of property, in the fund never passed out of the executrix of Leaphart, and that, consequently, she has a right to recover it wherever found." That proposition is based upon the assumption that a trust relation existed between the parties, and hence the inquiry first arising is, whether, by the terms of the contract, any such relation was created. Looking either to the terms of the circular inviting deposits or to the terms of the certificate given to the plaintiff when she actually deposited her money, it is quite certain that not a word will be found indicating an intention that any trust relation between the depositor and deposittee should be created. On the contrary, those terms necessarily imply that the money deposited should at once become the money of the deposittee, to be used as its own for the purpose of making profit therefrom. How else can the provision that the amount deposited should bear interest at a specified rate of interest be accounted for? Surely it cannot be supposed, ⁵⁶⁷ for a moment, that any person, corporation, or association would receive money on deposit, giving an obligation to repay the same, with interest, with an understanding that the money deposited was to remain the property of the depositor, subject to his control. Such a view would be absolutely destructive of the very end and object of such a transaction. On the contrary, the true view is, that so soon as the money is deposited, it becomes the property of the deposittee, to be used by him as his own for the purpose of making profit therefrom, out of which he expects to pay the stipulated interest, and leave a profit to himself. Such a transaction is, in legal contemplation, practically a loan by the depositor of the amount deposited, to be repaid at a stipulated time, with a stipulated rate of interest, and the real relation between the depositor and the deposittee is the ordinary relation of debtor and creditor. The certificate of deposit, which constitutes the basis of plaintiff's claim, has none of the elements of a receipt, but is more like an ordinary promissory note: *Bickley v. Commercial Bank*, 39 S. C. 291; 39 Am. St. Rep. 721; *Miller v. Austen*, 13 How. 218. As is said by Mr. Justice Davis, in delivering the opinion of the court, in *Bank of the Republic v. Millard*, 10 Wall. 155: "It is no longer an open question in this court, since the decision in

the cases of *Marine Bank v. Fulton Bank*, 2 Wall. 252, and of *Thompson v. Riggs*, 5 Wall. 663, that the relation of banker and customer, in their pecuniary dealings, is that of debtor and creditor. It is an important part of the business of banking to receive deposits, but when they are received, unless there are stipulations to the contrary, they belong to the bank, become a part of its general funds, and can be loaned by it as other moneys. The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositors shall, from time to time, draw on him. The contract between the parties is purely a legal one, and has nothing of the nature of a trust in it. This subject was fully discussed by Lords Cottenham, Brougham, 568 Lyndhurst, and Campbell, in the house of lords in the case of *Foley v. Hill*, 2 Clarke & F. 28, and they all concurred in the opinion that the relation between a banker and customer who pays money into the bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor, and does not partake of a fiduciary character, and the great weight of American authority is to the same effect." If it should be said, as has been urged in the argument of a similar case at the present term, that this is a rule peculiar to deposits with a banker or banking institution, and does not apply to deposits with other persons, the answer would be, that the rule does not grow out of the name by which the depositee may be designated, but out of the nature of the transaction. The reason of the rule applies just as well to the deposit of money with a third person, by whatever name he may be called, to be used by such person in making profit thereon, with an obligation to repay the amount deposited, with interest thereon—not to return the specific money deposited. The law respects things, not names merely. Even a bank may receive what is called a special deposit—for example, a sealed bag of coin, or a sealed package of bank bills—where the obligation is to return the identical thing deposited, without interest, in which case the bank would have no authority to use the deposit. But that would be a transaction of a wholly different nature from that of an ordinary deposit of money to be used in making profit thereon, with an obligation—not to return the specific money deposited, but to repay the amount thereof, with interest, when called for by the terms of the contract of deposit. In the one case—special deposit—usually made for safekeeping merely, the relation created would

be that of bailor and bailee; but in the other—ordinary deposit—the relation would be simply that of debtor and creditor. It may be, also, that, by special stipulations, these relations might be altered or modified.

In this case, however, it is quite clear that there are no such stipulations in the contract of deposit between the ⁵⁶⁹ plaintiff and C. J. Iredell, manager, for that contract is in writing and contains nothing whatever indicating an intention to take this transaction out of the class of ordinary deposits. On the contrary, by the express terms of the circular, just such deposits as are ordinarily made in a bank were invited, upon terms plainly showing that the money deposited was to be used for the purpose of making profit thereon, and utterly negating the idea of any trust; and the certificate of deposit, delivered to and accepted by the plaintiff, plainly shows that such was the nature of the contract between the parties. But again, when this money was deposited in the defendant bank to the credit of C. J. Iredell, manager, it at once became subject to his checks as such; and if C. J. Iredell, manager, had drawn a check on the defendant bank for the whole or any part of the amount so deposited, the defendant bank could not refuse to honor such check, and, if it did, would have been liable to the holder of such check, even though it may have known that the money so deposited by C. J. Iredell, manager, had been originally obtained from the plaintiff; for when she deposited the money with C. J. Iredell, manager, it at once became his money, and when he, in turn, deposited the same in the defendant bank, it at once became liable to the payment of any check drawn thereon by C. J. Iredell, manager, until the fund was exhausted; and, if defendant bank had refused to pay such check, it would have been liable to an action by the holder of such check for the amount thereof: *Forgarties v. State Bank*, 12 Rich. 518; 78 Am. Dec. 468; recognized and followed in *Simmons v. Bank of Greenwood*, 41 S. C. 188; 44 Am. St. Rep. 700.

Holding, then, that there was no trust relation between the plaintiff and C. J. Iredell, manager, of course, the questions, whether there was any breach of trust and whether the defendant bank had notice thereof, cannot arise, and need not, therefore, be considered.

The judgment of this court is, that the judgment of the circuit court be affirmed.

CONTRACTS—CONSTRUCTION OF, WHEN A QUESTION OF LAW.—Whether or not a writing upon its face is a complete expression of the agreement of the parties is one of law: *Harrison v. McCormick*, 89 Cal. 327; 23 Am. St. Rep. 469, and note. The construction of a written contract is a question for the court: *Fox v. Tay*, 89 Cal. 339; 23 Am. St. Rep. 474. See, especially, the note to *Palmer v. Farrell*, 15 Am. St. Rep. 713, and the extended note to *Fagin v. Conolly*, 69 Am. Dec. 454.

BANKS—RELATION WITH DEPOSITOR.—Moneys received on general deposit and commingled with other moneys of the bank become its property, and the relation between it and the depositor is essentially that of debtor and creditor: *Bank v. Windisch-Muhlhauser Brewing Co.*, 50 Ohio St. 151; 40 Am. St. Rep. 660, and note. When money is deposited in a bank without any understanding that the identical money shall be returned, but only that a like sum of lawful money shall be repaid, the deposit is general, and the bank is permitted to use the money in its business, and the relation of debtor and creditor is established by the transaction: *Mutual Acc. Assn. v. Jacobs*, 141 Ill. 261; 33 Am. St. Rep. 302, and note.

STATE v. SARVIS.

[45 SOUTH CAROLINA, 668.]

ARSON—BURNING ONE'S OWN HOUSE.—A person who has burned his own dwellinghouse, with intent to defraud an insurer thereof, is not subject to an indictment for arson or any other felony, unless expressly made so by statute.

ARSON—BURNING ONE'S OWN HOUSE—ACCESSORY.—It is not arson for a man to burn his own dwellinghouse or to procure or demand it to be done by another, for the purpose of defrauding an insurer thereof, unless expressly made so by statute.

W. D. & J. W. Johnson & Quattlebaum, for the appellant.

J. M. Johnson, for the state.

660 McIVER, C. J. The indictment in this case contained two counts—the first charging that the defendant “did feloniously, willfully, and maliciously set fire to, and caused fire to be set to, a certain house, to wit, a dwelling-house there situate of one John D. Sarvis, in which the Farmers’ Mutual Fire Association then and there had an interest, to wit, a policy of insurance, and, by the kindling of such fire, the aforesaid dwelling-house was then and there feloniously, willfully, and maliciously burned and consumed, against the form of the statute in such case made and provided, and against the peace and dignity of the state. The second count of the indictment charged that the said John D. Sarvis, “with intent to defraud the Farmers’ Mutual Fire Association, a corporation under the laws of said state,

which then has [had?] issued a policy of insurance on the dwelling-house hereinafter named, did feloniously, willfully, and maliciously counsel, hire, procure, and command one Alva Sarvis to feloniously, willfully, and maliciously set fire to a certain dwelling-house of the said John D. Sarvis there situate, and by the kindling of said fire aforesaid, so set as aforesaid by the said Alva Sarvis, upon the hiring, commanding, and procurement of the said John D. Sarvis, as aforesaid, the aforesaid dwelling-house was then and there feloniously, willfully, and maliciously burned and consumed; and said policy of insurance being then and there of force, outstanding in favor of the said John D. Sarvis for a large sum of money, to wit: for the sum of five hundred and fifty dollars; and so the jurors aforesaid, on their oath aforesaid, do say that the said John D. Sarvis then and there, in the manner and by the means aforesaid, feloniously, willfully, and maliciously did commit the crime of arson, against the form of the statute in such case made and provided, and against the peace and dignity of the state." A motion was made before his honor, Judge Ernest ⁶⁷⁰ Gary, to quash the indictment, when his honor ruled that the motion must be granted as to the first count in the indictment, but must be refused as to the second count. From this ruling both parties have appealed—the state alleging error in holding the first count bad, and the defendant alleging error in holding the second count good.

I propose first to consider the appeal on behalf of the state, which raises the question as to the validity of the first count in the indictment, in which the defendant is charged with arson, in "feloniously, willfully, and maliciously" burning his own dwelling-house. There can be no doubt that a person cannot be convicted at common law of the crime of arson in burning his own dwelling-house; and this I understand to be conceded. For the definition of that offense, as given in 2 Bishop on Criminal Law, section 8, is "the malicious burning of another's house"; and this is sustained by citations in the notes from standard authorities; and as is said by the same author in section 12: "Arson is an offense against the security of the habitation rather than the property. When, therefore, we say that the house burned must be another's, the meaning is, that it must be another's to occupy. Consequently, at common law, a man cannot commit arson of his own house, even when it is insured": Citing *Rex v. Spalding*, 1 Leach, 218; 2 East P. C. 1025; *Rex v. Proberts*, 2 East P. C. 1030; with other cases, to which may be

added Breeme's case, 2 East P. C. 1026; Isaacs' case, 2 East P. C. 1031. See, also, Snyder v. People, 26 Mich. 106, 12 Am. Rep. 302, where Judge Cooley used this language: "Arson is an offense against the habitation, and regards the possession rather than the property. The house, therefore, must not be described as the house of the owner of the fee, if, in fact, at the time, another has the actual occupancy, but it must be described as the dwelling-house of him whose dwelling it then is." In that case, the indictment charged the defendant with burning the dwelling-house of Mary A. Snyder, who was, at the time, the wife of the defendant ⁶⁷¹ and the syllabus of the case, which is fully sustained by the opinion of the court, reads as follows: "A husband living with his wife, and having a rightful possession jointly with her of a dwelling-house which she owns, and they both occupy, is not guilty of arson, by the common law, in burning such dwelling-house; and the rule is not changed by a statute securing to the wife the separate property." From these authorities, as well as others that might be cited, it is very obvious that the gist of the common-law offense of arson is the injury of the habitation, and not to the property constituting the habitation; and if a person voluntarily chooses to destroy his own habitation, either by fire or otherwise, he does no such unlawful act as would constitute arson. Indeed, if the building burned is only his own habitation, I do not see that, in any sense, his act can be regarded as unlawful, inasmuch as a person may do with his own as he pleases, provided in so doing he does not injure the property of his neighbor. If, however, a person sets fire to his own dwelling-house, with intent to burn the dwelling of his neighbor, and the house of his neighbor takes fire and is burned, it is quite possible that he may be convicted of arson. But as there is no such allegation in this indictment, it is unnecessary to consider further such a hypothesis. But if a person sets fire to his own dwelling-house, with an intent simply to injure or destroy his neighbor's property—not his habitation—he certainly could not be convicted of arson, although he might be responsible for the damages done to his neighbor's property. It is contended, however, that the common law in respect to arson has been changed by statute; and now a person may be indicted for arson, in willfully and maliciously burning his own dwelling-house. The statute relied on for this purpose is incorporated in section 140 of the Criminal Statutes (2 Rev. Stats. 311), which reads as follows: "The willful and malicious setting fire to or

burning any house, of whatever name or kind, within the curtilage or common inclosure of any house or room wherein persons habitually sleep, whereby any such dwelling ⁶⁷² house or sleeping apartment shall be endangered; also the willful and malicious setting fire to or burning any courthouse or other public building, whether owned by the state or a corporation, or a building owned by an individual or individuals, and kept or left for public meetings or exhibitions, barn, stable, coachhouse, storehouse, ginhouse, warehouse, grist or sawmill, railroad depot, coach, or cotton factory, or other house used for manufacturing purposes, of whatever name or kind, or setting fire to or burning any house habitually used for public religious worship, shall be deemed arson, whether the setting fire to or burning be in the day or night-time," the section proceeding to prescribe the punishment for such offense. It seems to me that the sole object of the statutory provision above quoted, which was originally enacted in 1861 (12 Stats., 862), was simply to enlarge the character of the houses which could be subjects of arson, and not to make any other change in the recognized definition of that offense. At common law, the only buildings which could be the subjects of arson were dwelling-houses, or other structures appurtenant thereto and within the curtilage thereof. The language used in the statute—"any house, of whatever name or kind"—clearly implies that such was the purpose of the statute. At common law, the character of the houses which could be the subjects of arson were limited to dwelling-houses, or houses appurtenant thereto and within the curtilage; but, by statute, the class of houses which could be the subject of arson are enlarged, so as to embrace "any house, of whatever name or kind, within the curtilage or common inclosure of a dwelling-house, or within the curtilage or common inclosure of any house or room wherein persons habitually sleep, whereby any such dwelling-house or sleeping apartment shall be endangered," whether the same be appurtenant to such dwelling-house or sleeping apartment or not. So that the burning of a store or livery stable, which was in no wise appurtenant to the dwelling-house or sleeping apartment, if within the common inclosure, whereby such dwelling-house ⁶⁷³ or sleeping apartment would be endangered, would constitute the crime of arson. And then the statute proceeds to enlarge still further the class of houses which would be the subjects of arson, so as to embrace courthouses, or any other public buildings, railroad depots, and the various other

houses designated in the statute. The words, "any house," relied on in the argument, especially when followed by the words, "of whatever name or kind," certainly cannot be construed as designed to so totally change the definition of the crime of arson, as to subject a person, who burns his own house, located in the center of a field, too far distant from the houses of another to endanger them in the slightest degree, to the punishment of arson, no matter what may be the motive of such person for destroying his own property. As to the allegation in the first count of the indictment, with respect to the so-called interest of the Farmers' Mutual Fire Insurance Association in the dwelling-house alleged to have been burned by the defendant, I am at a loss to conceive what effect it could possibly have upon the validity of this count of the indictment. After alleging that the defendant did set fire to a certain house, to wit, "a dwelling-house there situate, of one John D. Sarvis," these words follow: "In which the Farmers' Mutual Fire Insurance Association then and there had an interest, to wit, a policy of insurance." This certainly does not amount to an allegation that the building which was burned was the dwelling-house or habitation of the insurance company, for, on the contrary, the distinct allegation is, that such building was the dwelling-house of the defendant; and the further allegation, that the insurance company had an interest therein, even if not contradicted by the explanation of such interest, would amount to nothing; for even if the insurance company did have an interest in the property (which I don't think it had), that would not affect the question, as it was held in Spalding's case, 1 Leach, 258—extracted from 2 East P. C. 1025—that a mortgagor in possession, burning his own house, could not be convicted of arson, either at ⁶⁷⁴ common law or under the statute, 9 George 1, chapter 22, which is not of force here. Besides, there is no allegation in the first count of the indictment that the defendant burnt his own house with intent to defraud the insurance company. But even if there was such an allegation in this count, I do not see how, in the absence of any statute upon the subject, it could affect the present inquiry. In England, there is a statute making it felony without benefit of clergy for a person to burn his own house, with intent to defraud "his majesty or any of his majesty's subjects, or any body corporate," and the case of *Rex v. Gilson*, Russ & R. C. C. 102, was a prosecution under that statute, in which defendant was charged with burning his own house, with intent to defraud an

insurance company. Similar statutes have been enacted in several of the states of this Union; but, so far as I am informed, we have no such statute in this state, and in the absence of any such statute, I am unable to see how the fact that a person has burned his own house, with intent to defraud an insurance company, renders him liable to an indictment for arson or any other felony. The fact that it has been found necessary in England, and several of the states of this Union, to enact special statutes to cover a case of this kind, affords an additional reason for the correctness of my view. I agree, therefore, with the circuit judge in holding that the defendant could not be convicted of arson under the first count in the indictment.

Coming, then, to the question presented by the appeal on behalf of the defendant, it seems to me that it follows necessarily from what has already been said that the second count in the indictment is also fatally defective. Without going over the argument already presented to show that it is no offense against the criminal law for one to burn his own dwelling-house, even for the purpose of defrauding an insurance company which has issued a policy thereon, it will be sufficient to cite the case of the *State v. Haynes*, 66 Me. 307, 22 Am. Rep. 675 569, which in principle is so much like the case in hand as to justify liberal quotations therefrom. In that case the defendant, who was a servant of Mrs. Ingraham, was indicted for arson, under Revised Statutes, chapter 119, section 1, in feloniously, willfully, and maliciously burning, in the night-time, the dwelling-house of Mrs. Ingraham. "The evidence tended to prove, and the jury must have found, that the dwelling-house of Mrs. Ingraham was burned in the night, under the following circumstances: The house was insured by Mrs. Ingraham. Being insured, Mrs. Ingraham, her daughter, and the defendant conspired together to burn the house for the purpose of obtaining the insurance. . . . The question presented for determination is whether, upon the facts, the indictment can be sustained under Revised Statutes, chapter 119, section 1, which is in these words: 'Whoever willfully and maliciously sets fire to the dwelling-house of another, or to any building adjoining thereto, or to any building owned by himself or another, with the intent to burn such dwelling-house, and it is thereby burned, in the night time, shall be punished with death.' . . . In some states the common law has been modified, as in New York, where the willfully setting fire to or burning any inhabited dwelling in the night time is

made arson, so that the offense may be committed by one's burning his own dwelling-house. So in England, the British parliament has so modified the law in relation to arson, as to render it immaterial whether the house burned be that of the offender himself or a third person: *Shepherd v. People*, 19 N. Y. 537; *Stats. 1 Vict. c. 89, sec. 3*; *Rex v. Ball*, 1 Moody C. C. 30. . . . If Mrs. Ingraham had burnt her own dwelling, she would not have been amenable to the penalties prescribed by section 1. The fire was set at her instance, and for her supposed benefit. The servant obeying cannot be more guilty than the master commanding. The precise question before us arose in Tennessee (*Roberts v. State*, 7 Cold. 359), and it was there held that it was not arson to procure one's own house to be burned, and that the guilt of the agent was ⁶⁷⁶ only coextensive with the guilt of the principal. It is not arson for a man to burn his own house, or to procure it to be done, for the purpose of defrauding an insurance company." Upon the same principle, it is clear that the second count in the indictment fails to state such facts as would constitute the offense of arson, notwithstanding the fact that, in the second count, the defendant is charged with having procured the burning of his own dwelling-house, "with intent to defraud the Farmers' Mutual Fire Insurance Association," which had issued a policy of insurance on said dwelling-house, for the reason that there is no statute in this state, as there is in England, as well as in some of the other states of the Union, making it a felony to burn one's own dwelling-house with intent to defraud an insurance company. If, therefore, as has been shown, a person cannot be charged with arson in setting fire to his own dwelling-house, for the reason that it is not unlawful for a person to burn or otherwise destroy his own property, unless in so doing he injures or destroys the property of his neighbor, it is difficult to conceive how he could be accessory to any crime, when the act is done by another, by his own procurement. If it is no crime for him to do the act himself, it cannot be to procure or command it done by another. It is true that there are cases in which one may be accessory before the fact to a crime committed by another, which the party charged may be incapable of committing—as, for example, a female may be an accessory before the fact to the crime of rape committed by a man upon another femae. But in such a case the party charged as accessory is incapable physically of doing the act which constitutes the crime, and, if she procures the act to be done by one who is physically

capable, the law regards the act as done by herself. Still, even in such a case, the act done must be a crime in the person who actually does the act; and if it is not, then there can be no accessory. So that, in this case, if it would be no crime in John D. Sarvis to burn his own house, in his own proper person, he could not be accessory before the fact, if the act ⁶⁷⁷ of burning was done through the agency of another, by his command or procurement. I cannot, therefore, agree with the circuit judge in holding that the second count in the indictment was good; but, on the contrary, think that both counts were fatally defective.

The judgment of this court is, that the judgment of the circuit judge that the first count in the indictment be quashed, must be affirmed, and his judgment sustaining the second count must be reversed, and that the indictment be quashed.

ARSON—BURNING ONE'S OWN HOUSE.—A person cannot be convicted of arson in setting fire to and burning his own house, of which he is the occupant, even though the burning is with intent to destroy the buildings of others: *People v. De Winton*, 113 Cal. 403; 54 Am. St. Rep. 357, and note. See, also, the extended note to *Mary v. State*, 81 Am. Dec. 65.

CASES
IN THE
SUPREME COURT
OF
SOUTH DAKOTA.

JONES LUMBER & MERCANTILE COMPANY v. FARIS.
[6 SOUTH DAKOTA, 112.]

APPEAL—REVIEW OF ORDER DIRECTING VERDICT. If the court, at the close of the testimony, erroneously directs a verdict, the order may, if properly excepted to, be reviewed on appeal, without a motion for a new trial, as the error is one of law occurring on the trial.

ATTACHMENT—WHAT IS A VALID LEVY.—To constitute a valid levy of an attachment, the officer levying it must take actual possession of the property attached as far as, under the circumstances, practicable. He must put himself in position to, and must, in fact, assert and enforce a dominion over the property adverse to, and exclusive of, the attachment debtor, and such property must be in his substantial presence.

ATTACHMENT—KEEPING LEVY GOOD—SUBSEQUENT PURCHASER.—To keep a levy of an attachment good as against a subsequent purchaser of the attached property, the officer must retain it in his possession and exercise an adverse dominion and control over it, either by a keeper in custody, or by keeping it under lock and key, or by some other equivalent act of exclusive possession and control.

ATTACHMENT—ABANDONMENT OF LEVY—RIGHT OF PURCHASER.—It is an abandonment of an attachment, as to third persons, where the officer, after levying the writ, leaves the property in a room occupied and used by the debtor, surrenders the key of the room to the latter, and, for about three months and a half, neither sees nor gives any attention to the property, which, during that time, has nothing about it, or its surroundings, to indicate that the officer claims possession of it; and one who purchases the attached property from the attachment debtor, at the end of that time, takes it free from the lien of the attachment, although he knew of the original levy.

Action by the respondent company to recover damages from the defendant and appellant, Faris, a sheriff, for the conversion

of a safe bought by the company from one Hopkins, the attachment debtor. There was a judgment for the plaintiff and the defendant appealed.

L. W. Crofoot and Dudley P. Wayne, for the appellant.

C. A. Barron and Albert Gunderson, for the respondent.

¹¹⁴ KELLAM, J. Respondent, as plaintiff, brought this action to recover the value of a safe alleged to be the property of, and to have been taken from the possession of, plaintiff by defendant. Defendant justified as sheriff, on the ground that the taking was by virtue of an attachment against one Hopkins, who was the owner of the safe; that plaintiff bought and got possession of the safe while it was so under attachment, and that it had notice of the attachment before and at the time it so purchased. The regularity of the attachment proceedings was not questioned, and it is evident that the case hinged upon the question whether the sheriff held the safe under a valid and effective levy at the time of plaintiff's alleged ¹¹⁵ purchase from Hopkins. At the close of the testimony on both sides the court directed the jury to return a verdict for plaintiff for the value of the safe as they should find it. From the judgment entered on such directed verdict, and apparently without a motion for a new trial, the defendant appeals. He assigns as error, among other things, the direction by the court of a verdict for plaintiff. Respondent contends at the outset that this ruling cannot be reviewed in this court, because no motion for a new trial was made, and cites such cases as *Pierce v. Manning*, 2 S. Dak. 517, where it is held that the question of the sufficiency of the evidence to support the verdict of the jury will not be reviewed until such question has been presented to the trial court by motion for a new trial. But this is not such a case. Here the jury has never passed upon the evidence. The verdict is not the result of their deliberation upon the evidence and its probative force. It is not their verdict upon a question of fact, but the court's ruling upon a question of law. The court took the case from the jury, and disposed of it purely as a question of law. If such ruling was wrong, it was error in law occurring at the trial (*Cravens v. Dewey*, 13 Cal. 40), and may be reviewed without a motion for a new trial: *Jones Lumber & Mercantile Co. v. Faris*, 5 S. Dak. 348. There is nothing before us to indicate whether the trial judge directed the verdict on the theory that no sufficient levy was shown to have been made in the first instance, or that, having

been made, the lien of the sheriff thereunder had been lost by his subsequent treatment of the attached property.

First, then, as to the levy. The sheriff testified: That in company with the attachment debtor, and a Mr. White he went to the house of such debtor and then and there made a list of the articles, including the safe, which he claimed to have levied upon. The safe was in an adjoining room. He did not then go into that room. After making such list, he took a receipt for the safe from Mr. White, and took the key of the room in which the safe was. The attachment debtor gave notice of his ¹¹⁶ claim of exemptions, and served a schedule, which did not include the safe. (What became of the attached property, except the safe, does not appear, and it is not material, as this controversy involves only the safe.) That at or before the time of the appraisal, the officer placed a deputy in charge of the room and safe, and so continued him until some two or three weeks later, when the attachment debtor complained that he did not want the deputy there, but said, "if he would remove his man or deputy from the room, that they might leave the safe there as long as they wanted to." That the safe was a large double-door bank safe, with burglar chest, and that it would cost from five to ten dollars to move it. That immediately after this conversation with Hopkins, the attachment debtor, he procured sealing wax, "and sealed the safe up, by dropping the wax "right over the joining of the two doors," and impressing the same with a seal or form, and then gave the key of the room to Hopkins, the attachment debtor. It is unfortunately true that the adjudicated cases upon the question of just what will and what will not constitute a valid levy of either an execution or an attachment, are not entirely harmonious. The consensus of modern authorities, however, undoubtedly is that the officer levying an attachment must take actual possession of the property attached, as far as, under the circumstances, this is practicable. He must put himself in position to, and must in fact, assert and enforce a dominion over the property adverse to and exclusive of the attachment debtor, and such property must be in his substantial presence: Drake on Attachment, sec. 256; Wade on Attachment, sec. 129. In each of these text-books numerous authorities are cited, from which the rule is drawn which we have attempted in general terms to state. But if, in this case, it is doubtful that what the officer did at his first visit was sufficient to constitute a valid levy, his subsequently, while he was claiming to hold possession by his deputy, and before any other rights had intervened, proceeding to formally

“seal up” the safe, was such an overt act of exclusive dominion over it as would perfect the levy, if imperfect before.

¹¹⁷ We come now to consider the subsequent treatment of this safe with a view of ascertaining whether the sheriff continued his possession of it, so as to keep his levy good as against plaintiff, who knew that the sheriff had an attachment, and had attempted to levy upon the safe. As already noticed, the officer, at the request of Hopkins, the attachment debtor, withdrew his deputy, and, after sealing the safe, as before described, he delivered the key to the room to Hopkins, leaving the safe in the room. It is undisputed that within a day or two—and probably that same night—the wax dropped off, removing the only visible evidence of the sheriff’s claim to possession, and it so remained, without further attention from the sheriff, more than three months and a half. He testifies that during all that time, and until after April 15th, when plaintiff removed it under its alleged purchase, he did not see the safe. He never again saw it in that room, or gave any attention to it, either by himself or by a deputy or keeper. He had no key to the room, and could only have gotten in where the safe was by the indulgence of the attachment defendant, Hopkins. There is also uncontradicted evidence in the case tending to show that during this time Hopkins, the attachment debtor, either with or without the knowledge of the officer, used the safe substantially in the same manner as before the levy. There are cases in which it is held that allowing the attachment debtor or members of his family to use attached property would not necessarily release the levy; but in all of such cases, so far as we have observed, there was a keeper immediately representing the attaching officer, who was in the possession and control of such property. Such use was under the immediate supervision of the keeper, and the goods could not have been removed or diverted without his knowledge: *Baldwin v. Jackson*, 12 Mass. 131; *Train v. Wellington*, 12 Mass. 496. The facts before us in this case so nearly correspond with those in *Bagley v. White*, 4 Pick. 395, 16 Am. Dec. 353, that we quote from the opinion of the Massachusetts court its views of the legal effect of such ¹¹⁸ facts: “In the case at bar the plaintiff seemed to think that he should not want a keeper, and that the goods would be safe in the debtor’s store, where they were put after they were attached. That would have been sufficient if the plaintiff had kept the key. But he had not the key, nor any control of the shop, nor any possession by any one as his servant, for thirty or forty days after the goods were put there. On the

contrary, the debtor had the actual possession of the store in which the goods were put, and paid the rent for it. But it is contended that the defendant knew that the plaintiff had attached the goods, and so the attachment should be considered to be void as against him. All the evidence upon this point is that the defendant knew that, some thirty or forty days before, the plaintiff had attached the goods, and that they had been afterwards in the possession of the debtor, as has been before stated. The inference to be drawn from these facts is matter of law, and is the subject of this inquiry. If it should be that the lien originally created had been continued, then the defendant might be said to know that the goods were under attachment; but if not then it could not be said that he knew they were. The facts would rather warrant the assertion that the defendant knew that the attachment which had been made had for some reason or other been discharged, than that he knew the original attachment subsisted when he undertook to attach": See, also, in the same line, and to the same effect, *Sanderson v. Edwards*, 16 Pick. 144. In *Flanagan v. Wood*, 33 Vt. 332, the contest was between a prior and a later attaching creditor. The court said: "There must be a substantial and a visible change of possession to protect the property from subsequent attachment. Knowledge of the former attachment by the creditor will not stand in lieu of a change of possession or officer to protect the property." The same doctrine is laid down as the law upon this subject in *Drake on Attachment*, sec. 292 a. In this case, after about the twenty-fourth day of December until the middle of the April following, nothing appears to show that ¹¹⁹ the officer had possession of or control over the safe. He had no receipt from a third party. He had no keeper in custody. He had no key to the room in which it was. He had no notice upon the safe, indicating that he even claimed possession; nor did he even go near it himself. The safe itself, and all its surroundings, were as innocent of anything to indicate that it was in the custody of the sheriff as before it was attached. Studying the uncontroverted facts in the light of the rule which seems well established, their legal effect was an abandonment of the levy, because such is the legal inference. It being an inference which the law itself draws from the facts, it was not a question for the jury. The trial court was right in recognizing and acting upon it by directing the verdict. The judgment is affirmed.

Fuller, J., took no part in this decision.

APPEAL—FINDING OF COURT.—If a trial is had by a court without a jury, the question whether the finding of the court is contrary to the evidence may be reviewed on appeal, although no motion for a new trial was made before judgment: *North Hudson etc. Assn. v. Childs*, 82 Wis. 460; 33 Am. St. Rep. 57.

ATTACHMENT—VALID LEVY.—To constitute a valid levy of a writ of attachment, the officer must do such acts as, but for the protection of the writ, would amount to a trespass. The property must be under the control of the officer; and he must continue in control by remaining present himself, by appointing an agent in his absence, by taking a receipt for the property, or by removing it. The property must, in all cases, be put out of the control of the debtor: *Note to Corniff v. Cook*, 51 Am. St. Rep. 61.

ATTACHMENT—ABANDONMENT.—The possession of an attaching officer must not be temporary in character. It must continue as long as it is desired that the attachment lien shall remain in force. An abandonment of the possession is an abandonment of the levy. The property must not be restored to the real or apparent custody of the defendant: See monographic note to *Hollister v. Goodale*, 21 Am. Dec. 677-680, on what is necessary to attach personalty. An attachment is abandoned, though the officer gives notice of the attachment, where he takes no actual charge of the property, either personally or by a keeper: *Shephard v. Butterfield*, 4 Cush. 425; 50 Am. Dec. 796, and note.

HILL v. ALLIANCE BUILDING COMPANY.

[6 SOUTH DAKOTA, 160.]

MECHANICS' LIEN LAW—DESIGN—CONSTRUCTION. The design of the mechanics' lien law was to protect materialmen, contractors, and laborers, and it should be liberally construed to carry out the legislative intention and to do substantial justice to all affected by its provisions.

MECHANIC'S LIEN—WAIVER OF RIGHT—TAKING OWNER'S NOTE.—A mechanic or materialman does not waive his right to file and enforce a mechanic's lien by merely accepting, at the owner's instance and request, the latter's promissory note, payable in sixty days, for the amount of his claim, which note is given for the sole purpose of extending the time of payment for sixty days, and suspending, for that time, the claimant's right to foreclose his lien.

MECHANIC'S LIEN—WAIVER—ASSIGNMENT OF OWNER'S NOTE GIVEN TO EXTEND TIME OF PAYMENT. The mere assignment of a note, given by the owner, for the purpose of extending the time of payment and suspending the claimant's right, for a given time, to foreclose his lien, does not waive or extinguish the lien, nor prevent the assignee of the note from obtaining a decree of foreclosure, if he has the note and offers to surrender it, upon the trial, for cancellation.

MECHANIC'S LIEN—EFFECT OF TAKING OWNER'S NOTE TO EXTEND TIME OF PAYMENT—FORECLOSURE BY ASSIGNEE.—A materialman who takes the owner's note for sixty days, and, in consideration therefor, virtually agrees to forbear, for that time, to sue upon a debt secured by a mechanic's lien, though

he transfers the note under an agreement, created by his blank indorsement, that he will pay the note, if it is dishonored, still retains such an interest in the debt, as entitles him to file, in his own name, a valid claim for a lien, if it is done within the statutory time limit; and when such lien has been assigned to the holder of the note, it may be foreclosed by him.

MECHANIC'S LIEN—SURRENDER OF OWNER'S NOTE FOR CANCELLATION.—A claimant of a mechanic's lien who has taken the owner's note for the amount of his claim, for the express purpose of extending the time of payment, should surrender it for cancellation before a decree of foreclosure is entered; but its production is excused by proof of its unavoidable loss, while in the hands of an attorney for collection.

MECHANIC'S LIEN—DEFECTIVE JURAT TO AFFIDAVIT OF NOTICE OF CLAIM—PAROL EVIDENCE TO EXPLAIN—NOTICE OF LIEN.—Parol evidence is not admissible to prove that a notice or claim for a mechanic's lien was, in fact, verified, if, upon the trial of an action to foreclose the lien, it appears that the notary, who signed the jurat of the affidavit, attached to the notice or claim, omitted to affix his seal thereto; neither is such evidence competent to show that a claim was, in fact, sworn to, where it appears that the name of the notary is omitted from the jurat, though his seal is affixed. The defect, in each case, is fatal, and neither claim, when filed, with such verification, is sufficient to constitute constructive notice of the existence of a lien.

MECHANIC'S LIEN—EFFECT OF FAILURE TO FILE VERIFIED STATEMENT OF CLAIM—BONA FIDE PURCHASERS.—Under a statute making a mechanic's lien, though a claim therefor is not filed within the time specified, good, except as against purchasers or encumbrancers, in good faith, and without notice, after such time, the failure of a person entitled to such a lien to file a verified statement of his claim does not, per se, defeat the lien, but merely postpones it as to purchasers or encumbrancers, in good faith, and without notice, whose rights accrued after the time within which the verified statement should have been filed. Hence, such a failure, is not available to one who, with actual notice of the existence of the lien, takes a quitclaim deed to the property, subject to all valid liens, under circumstances failing, as a matter of law, to make him a bona fide purchaser.

USURY—DEFENSE OF, CANNOT BE URGED BY A STRANGER.—The defense of usury, being a personal privilege, cannot, in a proceeding to establish and foreclose mechanics' liens, be urged by the owner of an equity of redemption, who bought mortgaged premises subject to the mortgage lien, and took a quitclaim deed thereof, as he is a stranger to the contract claimed to be usurious.

Consolidated action to establish and foreclose a mechanic's lien, and to determine the priority of liens. The defendant, Walter N. Carroll, appealed from the judgment rendered, and from an order overruling his motion for a new trial.

Schenian & Savage, for the appellant.

Reed & Dougherty and Bair & Kehr, for the respondents, Hill & Co.

S. M. West, for the respondents, A. L. Dean & Co.

T. H. Null, for the Equitable Loan & Trust Co. and Wm. Tolmie.

W. A. Lynch, for Noyes Brothers & Cutler.

¹⁶⁵ BULLER, J. As consolidated at the trial in the court below, this is an action to determine the respective and relative rights of the plaintiff, as assignee of a mechanic's claim and lien, and the defendants A. L. Dean & Co., Noyes Bros. & Cutler, William Tolmie, and other defendants named in the title of the cause, each claiming to have a mechanic's lien upon the real property described in the complaint, and also to adjudicate the rights of the defendant the Equitable Loan and Trust Company, a mortgagee, and the defendant and appellant, Walter N. Carroll, whose claim is based upon a certain quitclaim deed to the premises involved in this suit, executed to him by the defendant the Alliance Building Company, on the twelfth day of November, 1891.

If, under the circumstances, the assignment of a mechanic's lien and a claim secured thereby entitles the plaintiff to enforce the same by foreclosure, the complaint, which is in the usual form, states facts sufficient to constitute a cause of action, and appellant's objection to the introduction of any evidence thereunder was properly overruled. The case was tried without a jury, and the court found, in effect and among other things, that the firm of Fraser & Shepherd furnished, under a contract with the defendant the Alliance Building Company, certain labor and materials which were employed and used in the erection and construction of the buildings and improvements situated upon the premises in controversy, and that, after deducting all credits, there was due on said account the sum of \$700, and that, within the time provided by law, said ¹⁶⁶ Fraser and Shepherd filed a lien therefor, and, before the commencement of this suit, sold and assigned to this plaintiff all their claim, right, title and interest in and to said account and lien against the defendant the Alliance Building Company, and that plaintiff is now the owner thereof, no part of which has been paid or satisfied; that defendant A. L. Dean & Co. likewise performed labor and furnished material amounting in the aggregate to \$200, for which a lien was duly filed; that the defendants Noyes Bros. & Cutler furnished materials for the construction of the building upon the premises in controversy, of the reasonable value of \$300, and duly filed a lien therefor; that the defendant William Tolmie

furnished labor and material amounting to \$167.92, for which a lien was duly filed; that, after the commencement of the erection of the buildings and improvements upon the premises in controversy, the Alliance Building Company made, executed, and delivered its promissory note for \$12,000 to the Bank of Volga, and at the same time, and for the purpose of securing the payment of said note executed and delivered to said bank a mortgage upon the premises described in the complaint, which was duly recorded and assigned and transferred to the defendant the Equitable Loan & Trust Company before the commencement of this suit, and that default has been made in the conditions of said mortgage; that afterwards, and on the twenty-third day of January, 1891, the defendant the Alliance Building Company borrowed from the Twin City National Bank of New Brighton \$1,500, and on the nineteenth day of August, following, executed and delivered, as security for the payment of the above mentioned amount, a mortgage upon the premises described in the complaint. The facts found by the court, of which but a brief conspectus appears in this statement of the case, concludes as follows: "That thereafter, on November 12, 1891, the defendant the Alliance Building Company made, executed, acknowledged, and delivered to defendant Walter N. Carroll its certain quitclaim deed of that date, in consideration of the payment of said notes by him, and ¹⁶⁷ the satisfaction of said mortgage to be then and there executed by said Twin City National Bank of New Brighton. The said Alliance Building Company sold and conveyed said premises to said Walter N. Carroll, which deed was thereafter duly recorded in the office of the register of deeds for said Beadle county, on November 12, 1891, in book 80 of Deeds, page 443, and defendant Walter N. Carroll is now the owner of said premises. That said Walter N. Carroll, the Twin City National Bank of New Brighton, the Bank of Volga, and the Equitable Loan & Trust Company knew at the time of the conveyance to each of them, as herein stated, of the construction of building, and the existence of the lien and claim of the lien, and the claim of lien of plaintiffs and defendants A. L. Dean & Co., Noyes Bros. & Cutler, Waibel & Donaldson, William Tolmie, and Isaac H. Raven in and to said premises and claim herein." As a conclusion of law, the court found, in effect, that the plaintiff and the several defendants relying upon liens were entitled to priority in the following order: W. S. Hill & Co., A. L. Dean & Co., Waibel & Donaldson, Noyes Bros. & Cutler, William Tolmie, Isaac H. Raven, the Equitable Loan & Trust Com-

pany—and, in case a surplus should arise from the sale of the property after paying the costs and claims above mentioned, it was found that the owner of said premises, at the time of such sale, was entitled to the same, and judgment was accordingly entered. This appeal is taken only from the judgment in favor of plaintiff and the defendants A. L. Dean & Co., Noyes Bros. & Cutler, William Tolmie, and the Equitable Loan and Trust Company, and from an order overruling a motion for a new trial.

Pursuing the order adopted by appellant's counsel, the assignments of error pertaining to the defendants W. S. Hill & Co. will first receive our attention. As fairly disclosed by the evidence, the Alliance Building Company, being indebted to the firm of Fraser & Shepherd for material used in and about the erection and construction of the buildings situated upon the ¹⁶⁸ premises in controversy, for the purpose of procuring an extension of the time of payment, executed on the sixth day of March, 1891, its promissory note, due sixty days after date, for \$700, payable to the order of Fraser & Shepherd, by whom it was sold and assigned to the plaintiff herein, three days after the same was executed. It further appears from the evidence that after this note was indorsed by Fraser & Shepherd, and transferred to the plaintiff, and on the eighteenth day of the same month, Fraser & Shepherd filed the mechanic's lien now under consideration, and, the day following, assigned the same to the plaintiff in this action.

The contention of counsel for plaintiff and respondent to the effect that the evidence fails to show that the note was negotiated prior to the filing of the lien is not sustained by the record. The witness Mr. Jenks testified, on the part of the plaintiff, W. S. Hill & Co., that he was, at the time of the assignment of the note, employed by Fraser & Shepherd in the capacity of book-keeper, and that he was still so engaged; that he had charge of all bills receivable belonging to said firm, including the note in question, and that said note was assigned to W. S. Hill & Co. on the ninth day of March, 1891, as shown by the books in which he entered and kept an account of whatever disposition was made of any of the bills receivable belonging to said firm. Nathan T. Shepherd, of the firm of Fraser & Shepherd, was present at the trial, and was called as a witness by the plaintiff, W. S. Hill & Co. On the ground that the note was sold and assigned to W. S. Hill & Co. before the lien was filed by Fraser & Shepherd, objections were made to the introduction of the lien in

evidence, and to the various questions propounded to the witness with reference to transactions between his firm and W. S. Hill & Co. concerning the sale of the note; and, notwithstanding these objections, the testimony of Mr. Jenks as to the time of the sale and transfer of the note remains undisputed. Had Fraser & Shepherd's book-keeper been mistaken as to the date of the assignment and ¹⁶⁹ transfer of the note, Mr. Shepherd, by whom the witness was directed to charge the note to the account of W. S. Hill & Co., had an opportunity, while upon the witness stand, to correct the statement; and the absence of conflicting evidence in that regard is, under the circumstances, significant and worthy of consideration in case the assignment of the note before the filing of the lien is a material fact to be considered in determining the rights of the assignee of said note and mechanic's lien.

Each respondent seems to be satisfied with the decree both as to priority of lien and the amount recovered, but it is urged by counsel for appellant that the taking of the note by Fraser & Shepherd from the Alliance Building Company, and negotiating the same to the plaintiff, before the claim for a lien was filed, constituted a waiver, and destroyed the right to a mechanic's lien, under the provisions of our statute. It appears from the evidence that the extension was granted at the instance and request of the debtor, and that the note was not taken in settlement or payment of the claim, but for the mere purpose of suspending the right to enforce payment by foreclosure of the lien, until the amount liquidated by the note became due; according to its terms. In the absence of an agreement to the contrary, or anything to indicate an intention to discharge the lien, the acceptance by the claimant of the promissory note of the owner for the amount of the claim in no manner affects the right to file a statement and enforce the lien under the provisions of article 1, chapter 31 of the Compiled Laws: Phillips on Mechanics' Liens, secs. 275-277, and numerous cases there cited and summarized.

It appears from the evidence that Fraser & Shepherd purchased the material furnished under their contract with the Alliance Building Company from the plaintiff, W. S. Hill & Co.; and, there being an unpaid balance of something over \$700 due from Fraser & Shepherd to W. S. Hill & Co. the \$700 note of the Alliance Building Company was indorsed in blank by Fraser & Shepherd, and transferred to W. S. Hill & Co., a few ¹⁷⁰ days prior to the filing of the lien by Fraser & Shepherd, and before

the assignment thereof to the plaintiff, W. S. Hill & Co. The question, therefore, to be determined, is whether the lien filed by Fraser & Shepherd can be enforced by the assignee of the note, which was executed and accepted for the purpose of adjusting the amount of the claim, and extending the time of the payment for sixty days from the date thereof, according to its terms. Our mechanic's lien law was designed to protect material men, contractors and laborers, and its provisions should receive a liberal construction, to the end that the intention of the legislature may be carried out, and substantial justice be done to all parties who may be affected by its provisions; and in the absence of any statutory provision restricting the right of assignment, we are unable to see why the claim and lien may not be transferred and payment enforced by the assignee in a suit instituted in his name to foreclose the lien. The contract under which the material was furnished was entered into with reference to the statute by which the lien was created; and if the claim was properly filed, a substantial compliance with the terms of the statute requires the payment of the debt thus secured before the lien can be discharged. Payment to the assignee would satisfy the lien; and, in case of default and foreclosure, the fact that the suit is instituted in the name of the real party in interest, and in compliance with the terms of the statute, in no manner affects the owner of the property.

It is evident that cases often exist in which the claimant and owner are mutually benefited by the assignment of the lien, and the case before us will serve to illustrate the proposition. The Alliance Building Company was disappointed in procuring funds with which to pay Fraser & Shepherd according to the terms of the contract. Fraser & Shepherd were indebted to W. S. Hill & Co. for a portion of the material furnished under that contract. For the apparent purpose of postponing, if not avoiding, the necessity of a foreclosure and the expense and delay incident to litigation of that character, they ¹⁷¹ extended for sixty days the time of payment by accepting the proposition of the Alliance Building Company, and immediately transferred the note thus secured to W. S. Hill & Co., under an agreement created by the indorsement of the note, by which they promise to pay the same if dishonored, together with interest, according to its recitals; and thus an extension of the amount due W. S. Hill & Co. was procured, and the consideration for the transaction above mentioned was, in effect, a forbearance to sue upon a debt secured by a mechanic's lien. We are unable to discover a valid reason

for holding that the assignment of a debt by a person who is entitled to a mechanic's lien as security therefor is alone sufficient to constitute a waiver of such lien; and the fact that a note was taken, not in payment of the debt, but for the accommodation of the debtor, and transferred under the conditions and circumstances disclosed by this record, has no tendency to create a waiver or discharge the lien while the debt remains unpaid, and the lien may be enforced by the assignee: *Kerr v. Moore*, 54 Miss. 286; *Skyrine v. Occidental etc. Min. Co.*, 8 Nev. 219; *Rankin v. Thompson*, 7 Colo. 381; *Sweet v. James*, 2 R. I. 270; *Smith v. Johnson*, 2 McAr. 481; *Aiken v. Steamboat Fannie Barker*, 40 Mo. 257; *Morrison v. Steamboat Laura*, 40 Mo. 261; *Tuttle v. Howe*, 14 Minn. 145; 100 Am. Dec. 205; *Phillips on Mechanics' Liens*, secs. 275-277.

In our opinion, the filing of the lien within the statutory time limit, by the parties for the benefit of whom the lien was created, and at a time when their interests required the full protection of the law enacted for their benefit, was a substantial compliance with the requirements of the statute as to notice; and the fact that the note had been, a few days prior thereto, conditionally disposed of, or transferred by an indorsement binding them to pay if the debtor failed, is of no concern to the owner of the property charged with the lien, or to his successors or assigns. The transfer of the note did not relieve Fraser & Shepherd from paying W. S. Hill & Co. for the material by ¹⁷² which the value of the premises in controversy was largely created, as they were liable upon their indorsement if the maker failed to pay the note at maturity. Neither did such transfer release the Alliance Building Company from liability to Fraser & Shepherd upon the original contract, so long as the note remained unpaid; and to say that a material man, in a case like the present, by assigning his claim, waives his rights, and is precluded from filing an available lien for the protection of himself and his assignee, would be to hold that our mechanic's lien law is not sufficient to provide effectual security to those who, by their labor, skill, and material, have created or enhanced the value of the property, which ought to stand as security until the debt is paid. There are no good reasons for saying that the lien is lost, or that it cannot be enforced by an assignee who has brought the note into court, and offered the same for cancellation. We therefore hold that the negotiation of the note neither defeated nor suspended the right of the claimants and payees therein named to file their lien, and make it available to their assignee or themselves in case

they had been called upon to take up the note and enforce the collection of their claim against the Alliance Building Company: *German Bank v. Schloth*, 59 Iowa, 316; *Miller v. Moore*, 1 E. D. Smith, 739; *Teaz v. Chrystie*, 2 Abb. Pr. 109; *Clement v. Newton*, 78 Ill. 427; *Sweet v. James*, 2 R. I. 270; 15 Am. & Eng. Ency. of Law, 106; *Phillips on Mechanics' Liens*, 278. In the recent case of *Kinney v. Duluth Ore Co.*, 58 Minn. 455, 49 Am. St. Rep. 528, the lien was filed by the assignee after the debt was transferred, but the right of the assignor to make the statement and file the lien after he had disposed of his entire interest appears to be conceded. The court says: "There is no good reason why the right to the lien should not be assignable before as well as after the statement has been filed, and there is an abundance of reasons why, if the right be assigned, the assignee should thereafter take all the necessary steps required to preserve and collect his claim. He must not be put at the mercy of the assignor, who might or might not ¹⁷³ choose to make or file the statement. It is elementary that the assignment of a debt carries with it all the liens, securities, and remedies which the assignor held or might have employed to enforce its payment, in the absence of a statute to the contrary. There has been some quibbling in the courts to avoid the application of this rule where the transfer has been of a claim or demand to which the right of lien attached. We are not inclined to follow the cases in which application of the rule has been denied."

Still pursuing the order adopted by counsel for appellant, we will pass to the assignments of error which relate to the respondents *Noyes Bros. & Cutler*. In that case a note was taken and held for the express purpose of extending the time of payment, at the instance and request of the Alliance Building Company; and the failure to surrender the same at the trial for cancellation was accounted for and excused by evidence establishing the loss of said note while in the hands of their attorney for collection. That, by merely taking the note, *Noyes Bros. & Cutler* waived their right to a lien, is the only remaining question so far as these respondents are concerned; and, as that question has received sufficient attention, further discussion is deemed unnecessary. There is no merit in either objection urged as a ground for invalidating the lien of *Noyes Bros. & Cutler*.

It is urged by appellant's counsel that respondents *Tolmie* and the firm of *A. L. Dean & Co.*, respectively, failed to comply with the statute, in that no verified claim for a lien was ever filed by either of these claimants; and we will now consider the assign-

ments of error predicated upon the action of the trial court in permitting, over appellant's objection, the introduction of parol evidence to supply certain omissions appearing upon the face of the papers offered in evidence upon that branch of the case. As the rules of law governing the Tolmie case apply with equal force to that of A. L. Dean & Co., both may be stated and discussed together.

¹⁷⁴ In order to be effectual as against purchasers or encumbrancers in good faith and without notice, after a specified time, the statute relating to mechanics' liens requires a notice or claim for a lien, verified by affidavit, to be filed by the clerk of the circuit court in the county within which the building or premises sought to be charged are situated; and while the jurat appearing upon the affidavit attached to the claim for a lien filed on the seventeenth day of August, 1891, by the respondent William Tolmie, has upon it the seal of a notary public, no signature of such officer is attached thereto; and although the jurat appearing upon the affidavit attached to the claim for a lien filed on the fifth day of May, 1891, by the respondent A. L. Dean & Co., bears the signature of a person purporting to be a notary public, residing in the state of Nebraska, no seal nor certificate of authority was affixed thereto; and the contention of appellant's counsel that these notices and claims for a lien are both fatally invalid, and that such defects cannot be cured by the introduction of parol evidence upon the trial, is well supported by authority. In *Stetson etc. Mill Co. v. McDonald*, 5 Wash. 496, which was an action to foreclose a mechanic's lien, the court says: "The objection to this notice was that the seal of the notary was not attached to the jurat, and this we have held to be necessary. At the trial of the cause the appellant offered to prove that the notice had, in fact, been sworn to; and he argues that this proof should have been received, and given the effect of curing the omission of the notary to affix his seal. This position is untenable. These notices are required to be recorded or filed for record; and, the notice being invalid when filed, no subsequent proof could be made as to any material fact omitted, to render the notice valid, and make it relate back to the time it was filed for record. The lien notice was rightly rejected." From the opinion in *Colman v. Goodnow*, 36 Minn. 9, 1 Am. St. Rep. 632, we quote the following: "Defendants claim that the proof fails to show that a properly verified account and claim for a lien was filed within that time." ¹⁷⁵ A paper purporting to be such claim was filed in the office of the register of deeds on June 25, 1881. The writing also

purported to be sworn to before the register, C. W. Fenlason, but the signature of the officer was not authenticated by his official seal. It was received in evidence by the trial court, which finds that at the time of the trial (October, 1882) there was an impression of the seal of the register of deeds immediately at the left of the name of 'C. W. Fenlason, signed to the jurat of the affidavit, but such impression was made and placed there subsequently to the fifth day of August, 1881, and before the trial, but by whom does not appear, but that, when C. W. Fenlason signed the jurat, he used no seal at all in the execution of it', and it is not shown that the instrument was so authenticated by the seal within the time allowed by law. The court below found the lien invalid, and we see no way of escape from arriving at the same conclusion." We think the defects above mentioned are fatal, and that the admission at the time of the trial of extrinsic evidence to supply the omission was improper: *State v. Green*, 15 N. J. L. 88; *Bank v. Hinchliffe*, 4 Ark. 445; *Ladow v. Groom*, 1 Denio, 429; *Ennor v. Thompson*, 46 Ill. 220; *Cantwell v. State*, 27 Ind. 505; *Harty v. Ladd*, 3 Or. 353; *McDermaid v. Russell*, 41 Ill. 489; *Hallagan v. Herbert*, 2 Daly, 253; *Conklin v. Wood*, 3 E. D. Smith, 663; *Gates v. Brown*, 1 Wash. 470.

It is, therefore, evident that the judgment, so far as respondents Tolmie and A. L. Dean & Co. are concerned, must be reversed, unless it should appear from the evidence before us that appellant is not a purchaser in good faith, and without actual notice of the existence of these liens. While there is conflicting evidence in the record upon the question of actual notice, we find that appellant, Walter N. Carroll, testified, in substance, at the trial, that he was a stockholder in the Alliance Building Company, and knew when the building upon the premises was being built, and understood that liens were filed for material furnished; that he bought the property November 17th 12, 1891, subject to any valid liens that might exist, and understood at the time that there was a mortgage and some liens against the property. "Q. Did you know that the lien of Mr. Hill was on premises? A. I may have known that A. L. Dean & Co. were one of the lienors. I know that the liens were for material furnished. I would not be positive that I knew the name. . . . Q. Did you authorize Mr. Schenian to examine the title for you? A. I guess I told him to get an abstract if he got a deed. Q. Didn't you direct him to examine the title as to condition of the liens? A. Well, if I did, it was only in case the deed was obtained. Q. Did he examine the title of the property? A. I don't know. Q.

Didn't you so state in your deposition taken before S. M. Chase, in Minneapolis, on the thirtieth day of March, 1892? A. I so stated. I supposed that Mr. Schenian had examined the title, but I won't say he examined it. I don't know. He sent me the deed and the abstract, and I inferred from that he examined the title. Q. You testified on that examination: "The transaction was made through Mr. Schenian, who examined the condition of the title to the property. Mr. Schenian is an attorney of DeSmet, S. D. He was acting in my behalf"—was your testimony? A. Yes, sir. . . . Q. Your testimony as given at that time was true? A. True, as I mention it now." It further appears that appellant was the owner of three promissory notes, of \$500 each, executed by the Alliance Building Company in favor of the Twin City National Bank on January 3, 1891; and that in consideration for the quitclaim deed dated November 12, 1891, upon which appellant bases his title to the premises in controversy, he canceled and surrendered said notes to the Alliance Building Company.

Article 1, chapter 31, of the Compiled Laws, provides that "every mechanic, or other person who shall do any labor upon, or furnish any material, machinery or fixtures for any building, . . . by virtue of a contract with the owner, . . . shall have for his labor done, or materials, machinery or fixtures ¹⁷⁷ furnished, a lien upon such building." But a failure to file the same within the time aforesaid (sixty or ninety days, as the case may require) shall not defeat the lien, except as against purchasers or encumbrancers in good faith, and without notice, after the sixty or ninety days, and before any claim for the lien was filed. A mechanic's lien is created under the statute by complying with a contract to perform labor or furnish material, and not by the filing of a claim for such lien; and the same need not be filed at any time in order to retain a lien as against those who are not purchasers or encumbrancers in good faith and without notice; and an unfiled claim for a lien may be enforced as against such person at any time within the statute of limitations. The phraseology of the entire statute upon the subject of liens being unambiguous, the legislative intention is clearly apparent. Section 5488 provides that the owner of a stallion or bull may have a service lien, but, in order to retain the same, a notice of his claim must be filed within ninety days after such service. Sections 5490 and 5491 provide that a person who purchases seed grain for another shall have a lien upon the crop, provided he file his lien within thirty days after the seed grain is

furnished. In the last two instances it will be observed that the retention of the existence of the lien depends upon the filing of the same within a specified time; and, if the statute by which a mechanic's lien is created requires interpretation, these sections to which we refer at least suggest that the view we have expressed accords with the intention of the framers of the statute in relation to the effect of an omission to file a mechanic's lien within the time provided by law. It fairly appears from the evidence that appellant had actual knowledge of the lien of A. L. Dean & Co.; and, if he was not aware of the Tolmie lien, he knew that liens existed against the property, and procured an abstract, which is presumed to have disclosed the condition of the title; and if he failed, under the circumstances, to examine his abstract, either by himself or his agent or attorney, he neglected an important duty, and ¹⁷⁸ his quitclaim deed, taken subject to all valid liens and in satisfaction of an antecedent debt, is not sufficient, as against the record in this case, to make him a purchaser in good faith, without notice, and enable him to defeat the unfilled liens of these respondents. Subject to the rights of a purchaser or encumbrancer in good faith, without notice, the law has saved a lien to these claimants, although their efforts to file the required statement, verified by affidavit, proved unsuccessful and came to naught: *Parker v. Randolph*, 5 S. D. 549; *Noel v. Temple*, 12 Iowa, 276; *Neilson v. Iowa East R. Co.*, 51 Iowa, 184; 33 Am. Rep. 124; *Kidd v. Wilson*, 23 Iowa, 464.

As against the claim of the Equitable Loan & Trust Company, appellant sought to interpose the defense of usury; and the ruling of the court in sustaining an objection to the introduction of any evidence in support of that defense, under the allegations of the answer, is assigned as error. It appears from the evidence that on the fifteenth day of December, 1890, the Alliance Building Company negotiated a loan and executed to the Bank of Volga its promissory note for \$12,000, secured by a mortgage on the premises in controversy, which note and mortgage, by purchase and assignment, became the property of the Equitable Loan & Trust Company, prior to the commencement of this suit, and prior to the date of the quitclaim deed, by which the premises were transferred to appellant, subject to said mortgage indebtedness; and the only question, therefore, presented, is whether the owner of the equity of redemption who buys mortgaged premises subject to the lien thus created, and takes a quitclaim deed thereof, can avail himself of the defense of usury. The law up-

on the subject of usury was enacted with reference to the interests of the borrower, but there is no law which requires him to avail himself of its benefits. To allow a stranger to interpose the defense of usury to a contract with which the maker is in all respects satisfied, and by the terms of which he desires to abide, and upon ¹⁷⁹ which he is liable for a deficiency judgment, would be exceedingly unfair to a debtor who desires to perform his contract, because he made it, or because he may deem it to be advantageous so to do. So long as the inclination to profit from man's adversity or necessity exists, a law limiting the rate of interest that the loaner may charge the borrower for the use of money will continue to be wholesome and beneficial to society; but common experience suggests many instances in which the borrower may not desire to invoke the protection of the law enacted for his especial benefit. At the time appellant took the quitclaim deed to the premises in controversy, he had both actual and constructive notice of the existence of the mortgage executed by his grantor to secure the payment of a note of \$12,000, together with seven per cent interest per annum, and he testified that he purchased subject thereto. If respondent's assignor, at the time of making the loan, withheld an amount of money sufficient to constitute usury under the statute fixing the maximum rate at twelve per cent per annum, appellant was not injured, and the fact is of no concern to him. Both appellant and respondent are strangers to the contract which is claimed to be usurious; and, assuming that the answer contains allegations sufficient to set up a usurious contract between the Alliance Building Company and the Bank of Volga, such a defense would not be available to appellant as against the Equitable Loan & Trust Company. To the effect that the plea of usury is so far a personal privilege that appellant and those similarly situated cannot avail themselves of it, we cite the following cases: *Cahn v. Farmers' etc. Bank*, 1 S. D. 237; *Pritchett v. Mitchell*, 17 Kan. 355; 22 Am. Rep. 287; *Green v. Kemp*, 13 Mass. 515; 7 Am. Dec. 169; *Perry v. Kearns*, 13 Iowa, 174; *Conover v. Hobart*, 24 N. J. Eq. 120; *Draper v. Emerson*, 22 Wis. 147; *Thomas v. Mitchell*, 27 Wis. 414; *Loomis v. Eaton*, 32 Conn. 550; *Reed v. Eastman*, 50 Vt. 67; *De Wolf v. Johnson*, 10 Wheat. 367; *Howell v. Ripley*, 10 Paige, 43; *Studabaker v. Marquardt*, 55 Ind. 341; *Ready v. Huebner*, 46 Wis. 692; 32 Am. Rep. 749.

There being in the record no reversible error, the judgment of the trial court, so far as appealed from, is affirmed.

MECHANIC'S LIEN.—STATUTES must be liberally construed: *Notes to Harrison v. Homeopathic Assn.*, 19 Am. St. Rep. 717; *Dugan Cut Stone Co. v. Gray*, 35 Am. St. Rep. 769. The mere taking of the debtor's note does not waive a mechanic's lien, even though it does not become payable until after the time when the claim of lien must be filed: See monographic note to *Kilpatrick v. Kansas City etc. R. R. Co.*, 41 Am. St. Rep. 761, discussing the waiver of mechanics' liens by taking notes, or other securities: *Chapman v. Brewer*, 43 Neb. 890; 47 Am. St. Rep. 779, and note. If a note given to represent a debt, secured by a mechanic's lien, is negotiated, the lien will revive in favor of the payee, if, by reason of the default of the maker, he becomes liable upon his indorsement, and takes up the note: See monographic note to *Goble v. Gale*, 41 Am. Dec. 222, on waiver of mechanic's lien. That a mechanic's lien attaches, even though there is given an extension of time for payment: *Note to Harrison v. Homeopathic Assn.*, 19 Am. St. Rep. 717. A perfected mechanic's lien may be assigned, and the assignee may enforce it in his own name: See monographic note to *Kinney v. Duluth Ore Co.*, 49 Am. St. Rep. 530-532, on the assignment of the liens of mechanics and materialmen. This note also shows that an assignee of the claim of a person entitled to a mechanic's lien may make and file the lien statement and enforce the lien: Compare *Mills v. La Verne Land Co.*, 97 Cal. 254; 33 Am. St. Rep. 168. Though one entitled to a mechanic's lien assigns the sum due him to another as collateral security for the payment of a debt, he still has sufficient interest to entitle him to file a lien statement afterward within the statutory time, which will secure his equitable rights in the claim assigned, and also inure to the benefit of his assignee: *Davis v. Crookston etc. Light Co.*, 57 Minn. 402; 47 Am. St. Rep. 622. A claim of mechanic's lien, not attested by the seal of the officer before whom it was sworn to, within the statutory time, is insufficient to preserve the lien: *Colman v. Goodnow*, 36 Minn. 9; 1 Am. St. Rep. 632. A failure to file a statement of claim in accordance with the statute relating to mechanics' liens does not deprive one furnishing material to be used in the construction of a house of the benefit of such lien when the rights of bona fide purchasers are not involved: *Kirkwood v. Hoxie*, 95 Mich. 62; 35 Am. St. Rep. 549.

USURY—STRANGER—MORTGAGOR.—A stranger cannot set up usury as a defense to an action, as the plea of usury is a personal privilege: *Zellner v. Mobley*, 84 Ga. 746; 20 Am. St. Rep. 390; *Pritchett v. Mitchell*, 17 Kan. 355; 22 Am. Rep. 287. After a mortgage is enforced by foreclosure, or otherwise, and when others have in good faith acquired an interest in the property, the defense of usury is no longer available to the mortgagor, especially where he has been guilty of laches: *Ferguson v. Soden*, 111 Mo. 208; 33 Am. St. Rep. 512. A mortgage upon usurious consideration is void only as against the mortgagor and those lawfully holding under him, and cannot be avoided by a purchaser of the mere equity of redemption: *Green v. Kemp*, 13 Mass. 515; 7 Am. Dec. 169.

STATE v. SASSE.

[6 SOUTH DAKOTA, 212.]

INTOXICATING LIQUORS—CONSTITUTIONAL LAW. The provisions of the prohibitory law of the state of South Dakota, so far as they relate to the subject of unlawful sales of intoxicating liquor, are constitutional.

CRIMINAL LAW—IGNORANCE OF FACT—DEFENSE.—If a statute commands that an act be done or omitted, which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, is no excuse for its violation.

CRIMINAL LAW—IGNORANCE OF FACT—OFFENSE—ILLUSTRATION.—One who sells intoxicating liquor to a minor, though innocently ignorant of the fact, violates, and incurs the penalty of a law prohibiting such sales, even where the purchaser makes affidavit that he is over twenty-one years old; but evidence of good faith and honest intention should be considered in mitigation of the penalty.

Indictment for unlawfully selling intoxicating liquor to a minor. The defendant was convicted and he appealed.

F. E. Strawder, C. G. Sherwood, and F. E. Van Liew, for the appellant.

Coe I. Crawford, attorney general, and S. H. Elrod, for the state.

214 FULLER, J. The plaintiff in error was charged with, indicted for, and convicted of the offense of selling intoxicating liquor to a minor, in violation of section 5, chapter 101 of the Laws of 1890, which provides that "any druggist or pharmacist, or assistant pharmacist in his employ, who shall . . . sell any intoxicating liquor, to any person whom he has reason to believe desires the same to use as a beverage; or shall sell liquor when he has reason to believe the liquor sold is not a remedy for the ailment described in the affidavit therefor; or shall sell, barter or give away, any intoxicating liquors to any minor, . . . shall be deemed guilty of a misdemeanor." Upon a verdict of guilty, as charged in the indictment, the trial court imposed the minimum penalty of the law, and defendant appeals **215** to this court. As the statute creating and describing the offense upon which this indictment is based has been carefully considered by this court, and declared to be constitutional so far as the same can affect this case, a re-examination of the constitutional questions discussed by counsel for plaintiff in error is deemed to be neither

instructive nor essential to a determination of this appeal: *State v. Becker*, 3 S. D. 29.

The indictment contains no averment that defendant knew that the person to whom he sold intoxicating liquor was a minor, and a demurrer which raised the question was overruled, and the case was tried and submitted to the jury upon the theory that the defendant's knowledge of the age of the person to whom the liquor was sold is not an essential element of the offense with which he was charged; and, as the assignments of error relate to the rulings of the court, consistent with the view that a want of knowledge is no excuse, a consideration of that question involves the various points presented, and is the only question necessary to be determined. It appears from the evidence that the defendant, in pursuance of the prohibitory liquor law, had obtained from the county judge, and held, a druggist's permit to sell, under certain restrictions, intoxicating liquors for medical, scientific, sacramental, or mechanical purposes, and that the person to whom the alleged illegal sale of one quart of alcohol was made at least signed the necessary affidavit containing all the statutory requirements, including a statement that the applicant was over the age of twenty-one years and the defendant testified that, at the time he sold the intoxicating liquor, he believed the purchaser to be over twenty-one years of age. That part of the provision which fixes the penalty in case a druggist sell intoxicating liquor to a person whom he has reason to believe desires to use the same as a beverage, or when he has reason to believe that the liquor sold is not a remedy for the ailment described in the affidavit, seems to involve the question of knowledge and intent; and, as the same immediately ²¹⁶ precedes the clause "or shall sell, barter or give away, any intoxicating liquor to any minor," it suggests that the legislature intended to impose the risk and hazard of selling to a minor upon the druggist, who must in all cases deal face to face with the purchaser of intoxicating liquors, and who is bound to know that such purchaser is over the age of twenty-one years. The word "knowingly" being omitted from that part of the act relating to minors, and no word of similar import being used, it is evident that good faith is unimportant, and the evidence of criminal intent no excuse, when intoxicating liquor has in fact been sold to a boy under the age of twenty-one years. As a rule, ignorance of fact and absence of criminal intent is a competent defense to a criminal charge; but a distinction is made between acts or omissions containing the element of turpitude and wrong in themselves, and such as are

made criminal by statutory enactment designed to promote the welfare of society. In making this distinction, Professor Greenleaf says: "This rule [that ignorance of fact will excuse] would seem to hold good in all cases where the act, if done knowingly, would be *malum in se*. But where a statute commands that an act be done or omitted which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation. That, for example, where the law enacts the forfeiture of a ship having smuggled goods on board, and such goods are secreted on board by some of the crew, the owner and officers being alike innocently ignorant of the fact, yet the forfeiture is incurred, notwithstanding their ignorance. Such is also the case in regard to many other fiscal, police, and other laws and regulations, for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law, in these cases, seems to bind the party to know the facts, and to obey the law at his peril": 3 Greenleaf on Evidence, sec. 21. The law prohibiting the sale of intoxicating liquor to a minor belongs to the class above mentioned, ²¹⁷ and its provisions have been framed with a view to bringing it clearly within the exception to the rule; so that ignorance of the age of the person to whom the liquor was sold was no excuse, and irrespective of good faith and honest intention, the mere fact of selling to a minor constitutes the entire offense: *State v. Cain*, 9 W. Va. 559; *Wharton's Criminal Law*, 88; *Redmond v. State*, 36 Ark. 58; 38 Am. Rep. 24; *State v. Kinkead*, 57 Conn. 173; *State v. Bruder*, 35 Mo. App. 475; *State v. Hartfiel*, 24 Wis. 60; *McCutcheon v. People*, 69 Ill. 602; *State v. Coenan*, 48 Iowa, 567; *People v. Roby*, 52 Mich. 577; 50 Am. Rep. 270; *Commonwealth v. Finnegan*, 124 Mass. 324; *State v. Lawrence*, 97 N. C. 492; *State v. Clottu*, 33 Ind. 409.

Plaintiff in error sold the liquor, charged by the statute with the knowledge that the purchaser was a minor; and proof that he acted in good faith, relying upon the sworn statement of such purchaser that he was over the age of twenty-one years, though mitigating in its character, was not competent as a defense upon the trial; and the court neither erred in giving its instructions to the jury or in refusing instructions offered by counsel for the defendant to the effect that, in the absence of knowledge or intent, there could be no conviction. That the defendant, at the time and place mentioned in the indictment,

sold intoxicating liquor to the minor named therein, stands admitted; and the fact that the court, upon a verdict of guilty as charged in the indictment inflicted the lightest penalty authorized by the statute, indicates that due consideration was given to mitigating circumstances; and there being no reversible error in the record, the judgment is affirmed.

CRIMINAL LAW—IGNORANCE OF FACT AS A DEFENSE. Ignorance of a fact, or state of things contemplated by a statute does not excuse its violation: *Commonwealth v. Weiss*, 139 Pa. St. 247; 23 Am. St. Rep. 182. Monographic note to *Alabama etc. Ry. Co. v. Jones*, ante, p. 488, on ignorance of one's rights as a ground of relief. Under a statute forbidding the selling of intoxicating liquors to minors, without the written consent of parents, an honest belief that the purchaser is of full age will not absolve the seller in case of mistake: *Redmond v. State*, 36 Ark. 58; 38 Am. Rep. 24. For authority to the contrary, see *Farrell v. State*, 32 Ohio St. 456; 30 Am. Rep. 614; but compare the monographic note to this case on ignorance of fact as a defense in criminal cases.

AULTMAN & TAYLOR COMPANY v. GUNDERSON.

[6 SOUTH DAKOTA, 226.]

NEGOTIABLE INSTRUMENTS—SIGNATURES—PAROL EVIDENCE.—If one party signs a promissory note on the lower right-hand corner, where a maker usually signs, and another party signs it on the lower left-hand corner where a witness usually signs, but without any words of attestation, parol testimony is admissible to show that the latter signed as a witness, and not as a maker.

APPEAL—TRIAL UPON NEW THEORY.—The question of defendant's liability cannot be tried in the court below upon one definite theory, as alleged in the plaintiff's complaint, and in the supreme court, on appeal, upon an entirely new and different theory, not indicated in the complaint. Hence, if the only issue presented by the pleadings is defendant's liability as maker of a note, the plaintiff cannot, on appeal, rely upon evidence of a guaranty.

APPEAL—REVIEW OF MOTION FOR A NEW TRIAL. A motion for a new trial, on the ground of "errors in law occurring at the trial" is not addressed to the discretion of the court, but involves only the correctness of the court's rulings upon which error is assigned. Hence, the decision of the trial court will be reviewed as presenting questions of law only, and not of discretion.

SALES—WARRANTY—SUFFICIENCY OF NOTICE OF DEFECTS—EVIDENCE.—A warranty, upon the sale of a steam-engine, requiring, in case the machine failed to operate well, written notice, stating wherein it failed to satisfy the warranty, to be given by the purchaser to the seller, at headquarters, by registered letter, within ten days after delivery, is not satisfied by a verbal notice to the local agent of whom the machine was bought. Evidence, therefore, that the local agent afterward notified the seller, "by letter or otherwise," is properly rejected, if it is not shown when or how, or

that such notice was ever received by the seller, or any agent authorized to receive it; and the fact that experts of the seller happened to be present on other business, and examined the engine, but without any general authority being shown for them to do so, could not take the place of the required notice to the seller, or render it unnecessary.

TRIAL—ONE CANNOT OCCUPY INCONSISTENT POSITIONS.—One cannot, at the same time, assert that a fact exists and prove that it does not exist. Hence, if the defendant, in an action on a promissory note, alleges in his answer that a certain person signed the note as a witness to his signature, there is no error, as to such defendant, in excluding evidence on his part, that such person signed after the execution and delivery of the note, thus creating an alteration in it.

Action on promissory notes. The court directed a verdict for the plaintiff, and the plaintiff appealed from an order granting a new trial.

Bailey and Voorhees, for the appellant.

Davis, Lyon and Gates, for the respondents.

228 KELLAM, J. This is an appeal from an order of the circuit court for Minnehaha county granting a new trial to the respondents, who were defendants below. As to the respondent Thompson, it is agreed by both sides that the case must turn upon one pivotal point. The action was upon four promissory notes. The complaint alleged that they were made by Gunderson as principal, and Thompson and Smith as sureties, and demanded judgment for the amount claimed to be due thereon. Smith was not served. Gunderson and Thompson answered separately. Each denied that Thompson signed the notes as maker, but alleged that he signed the same simply as a witness to the signature of Gunderson. The notes, except as to amount and time, were alike, and as follows:

229 "\$50.00. No. 55,709. Dated at Sioux Falls, S. Dak., on Aug. 3, 1891. On or before the first day of September, 1891, for value received, we or either of us, of Baltic Post Office, county of Minnehaha, state of South Dakota, promise to pay to the Aultman & Taylor Company, or order, fifty dollars. Payable and negotiable at the office of the Dakota National Bank, Sioux Falls, S. D., with interest at ten per cent, payable annually from date until paid; provided, if paid at maturity, interest shall be seven per cent. The drawers and indorsers severally waive presentment for payment, protest, and notice of protest and non-payment of this note.

"K. THOMPSON.

JOHN J. GUNDERSON.

"H. M. SMITH."

Upon the trial these notes were offered in evidence by plaintiff. Defendants objected upon the ground, *inter alia*, that they did not purport to be signed by Thompson as a maker, and did not tend to prove any liability against him. The notes were admitted in evidence. Subsequently the court allowed Thompson to testify, against plaintiff's objection, that he signed as a witness, and not as maker. At the close of the evidence, the court reversed its ruling in this respect, and directed judgment for plaintiff against both defendants. Upon these facts it seems clear that, if the position of Thompson's name at the lower left-hand corner of the note carried with it a presumption that he signed as a witness only, the ruling of the trial court was wrong, and the granting of a new trial must be sustained. In *Camden v. McKoy*, 3 *Scam.* 437, 38 *Am. Dec.* 91, this was not the very question upon which the case turned, but the court, in illustration, plainly expressed its view of the same, as follows: "For instance, a signature at the bottom of a note on the right hand side of the paper is *prima facie* evidence that it was affixed there in the character of maker, whilst the same signature at the left hand side of the paper would furnish equally satisfactory evidence that it was placed there only as a witness to the instrument." In *Garrison v. Owens*, 1 *Pinn.* 471, the note in ²³⁰ suit was signed, as this was, by one party on the lower right-hand corner, where a maker usually signs, and by another party on the lower left-hand corner, where a witness usually signs. The court held evidence was admissible to show that the one so signing at the left-hand corner signed as a subscribing witness. In *Steininger v. Hoch*, 39 *Pa. St.* 263, 80 *Am. Dec.* 521, "where one executed a single bill, and opposite his name on the left, in the place for the subscribing witness, the name of another was written, who was sought to be held as a copromisor because the word 'witness' did not appear, it was held that the signature of the defendant [the one signing at the left] was not *prima facie* evidence that it was his promise, to go to the jury on proof of execution merely, and that it was in error to so instruct the jury." In its opinion the court attached some importance to the fact that the bill in form was single, and did not seem to contemplate more than one maker. In the case in hand the promise was by "we, or either of us," thus indicating that more than one maker was contemplated. We think, however, the effect of this fact is somewhat qualified by the further fact that in the making of these notes printed blanks were used, and that these words were printed, and so not the immediate act of the parties. If these words had been writ-

ten by one of the parties at the time, as in the case last cited, they would have been more strongly suggestive that it was contemplated that the note should be signed by more than one maker.

These cases seem to go upon the theory that it has become an established and well-known custom for makers to sign in one place, and witnesses in another. The Illinois court, in the case *supra*, said: "If custom has ripened into the form of legal presumption, in these respects, it would seem to follow that a departure from this custom would negative such presumption"; that is, one signing where a witness usually signs will be presumed to have signed as a witness, rather than as a maker. At all events, these cases, which are all we have found upon this direct question, at least teach the doctrine that parol testimony ²³¹ is admissible to show that one signing where a witness generally signs, but without any words of attestation, did sign as a witness, and not as a maker. We think this evidence was admissible generally, and that there was no admission in Thompson's answer which precluded him from making such proof. He admitted signing the notes, but expressly averred that he signed as a witness to Gunderson's signature, and not as a maker. In excluding such evidence we think the trial court was in error. It is claimed, however, by appellant, that enough was shown by the evidence on the trial to charge Thompson as a guarantor of these notes under his contract of agency with appellant, but no such question was tried in the court below. There was no claim nor suggestion of his liability other than as the maker of the note. That was the issue presented by the pleadings. It was the only claim he was called upon to defend against, and the only question litigated was whether or not he was liable as a maker of the notes. The very verdict which the court directed, the vacation of which is appellant's alleged grievance on this appeal, was so directed on the specific ground, as stated by him in his motion, "that the defendants have proven no defense to the notes set up in the complaint." There can be no doubt that that was the case, and the theory of the case tried below. It is frequently said that a party cannot try a case on one theory in the trial court and upon another on appeal, for that would be to submit to the appellate court for review questions which were not presented to or passed upon in the trial court: *Brooks v. Yocum*, 42 Mo. App. 516; *Sandusky etc. Works v. Hooks*, 83 Iowa, 305; *Brumfield v. Potter etc. Mfg. Co.*, 4 Misc. Rep. 194; 23 N. Y. Supp. 1025. From these views it follows that, in our opinion, the trial court

was justified in granting a new trial as to respondent Thompson.

We now pass to Gunderson and his defense, to ascertain if there was error there justifying the granting of a new trial as to him. The motion for a new trial was made upon the ground ²³² of "errors in law occurring at the trial, and excepted to by defendants." A motion upon such ground is not addressed to the discretion of the court, but involves only the correctness or incorrectness of the court's rulings upon which error is assigned, and the decision of the trial court will be reviewed here as presenting questions of law only, and not of discretion: *Sandmeyer v. Dakota etc. Ins. Co.*, 2 S. D. 346; *O'Brien v. Brady*, 23 Cal. 243; *Cochran v. O'Keefe*, 34 Cal. 554; *Hinkle v. San Francisco etc. R. R. Co.*, 55 Cal. 627. It becomes the duty of this court, therefore, to affirm or reverse the order appealed from, granting a new trial to defendant Gunderson, according as we find or fail to find error in the trial as to him. If error intervened, the court was right in granting him a new trial. If it did not, then the court was wrong in granting it. In his separate answer he set up a breach of the warranty contained in the contract of sale of the engine for which the notes were given. The terms of this warranty required the purchaser to "intelligently follow the printed hints, rules and directions of the manufacturers, and if, by so doing, they are unable to make it operate well, written notice, stating wherein it fails to satisfy the warranty is to be given by the purchasers to the Aultman & Taylor Company, at Mansfield, Ohio, by registered letter, within ten days after the delivery of the machine to the purchasers, and reasonable time allowed to get to it and remedy the defect, unless it be of such a nature that they can advise by letter." Some notice to the appellant company which would be a substantial compliance with this requirement was essential before Gunderson could avail himself of defects as a breach of the warranty, or a waiver of such notice must have been shown. The first alleged error relied upon by respondents to justify the granting of a new trial to Gunderson was the refusal of the court to allow him to show that within the required time he notified the local agent, of whom he bought the machine, of the defects. This alone was plainly insufficient to meet the requirements of the warranty. It was not in substance or effect ²³³ what the parties had agreed upon. The obvious purpose of the requirement that notice should be sent by registered letter was to make the fact of sending or not sending susceptible of easy and definite proof, and probably to render more certain its receipt by the appellant company at their head office.

Every practicing lawyer knows that in all sorts of cases where notice is required to be given and proved the question whether or not it was given is a fruitful source of dispute. To foreclose contention on this point, the parties definitely stipulated how and to whom this notice should be given. It should be written, and thus obviate dispute as to just what ground is covered; it should be registered, thus furnishing very satisfactory evidence of the fact and time of its mailing; and it should be sent direct to the home office, thus fixing the want of authority of the local agent to receive such notice. It was a condition the parties had an undoubted right to agree to, and verbal notice to the local agent was not a substantial compliance therewith: *Connell v. Milwaukee etc. Ins. Co.*, 18 Wis. 387. The South Carolina case of *Badgett v. Frick*, 28 S. C. 176, cited by respondent, is not sufficiently like this case to control it. There the condition was that in case of failure written notice should be given to the local agent, and also to the company by "registered letter." Written notice was given to the agent, and it was also sent to the company, but not by "registered letter." The court held the notice sufficient; but here the warranty itself informed Gunderson that the local agent was not authorized to receive the notice, nor was it offered to be shown that notice of any kind was sent to the company within the time, or substantially within the time, stipulated. When it was sent is left to conjecture. In our judgment there was no error in excluding this evidence.

It is also claimed as error that the court refused the evidence of the local agent that he afterward notified the company, "by letter or otherwise," of the condition of the engine. If this evidence had been supplemented with a showing that ²³⁴ the company received such notice, and acted upon it, or made no objection to the method of its conveyance, it would not have been important that it was not transmitted by registered letter; but with nothing to show that the notice thus sent in a manner not authorized by the contract was ever received, or even that it was sent within the time limited in the contract, or that it was in any manner waived, there was no error in rejecting the evidence. It is contended by respondents, however, that as appellant's experts were soon after in the neighborhood, and examined this engine, both parties should be treated as though notice was properly given to the appellant company, and their experts had been sent in response thereto. It is affirmatively shown that the notice had not been sent when these experts came, and so that they did not

come in reply thereto. The parties had stipulated that in case of the failure of the engine to work satisfactorily notice should be sent to appellant's headquarters, at Mansfield, Ohio, particularly stating wherein it failed. This may have been for the very purpose of enabling the company to determine whom they would send as an expert to correct the particular defect reported. The machine purchased was a steam engine, and it would seem probable that the nature of the defect in the machine would have something to do with determining the skill and experience required to understand the cause of such defect and correct it. At all events, they had contracted for this information as a condition precedent to sending an expert, and we cannot assume that these experts who were in the neighborhood upon other business were the same whom the company would have sent to examine this machine had they been notified of its defects and failure. We are of the opinion that the presence of these particular experts, under the circumstances disclosed, did not take the place of the stipulated notice to appellants.

There was no error in refusing evidence on the part of Gunderson that Smith signed the notes as a witness after their execution and delivery, thus creating an alteration of the notes, ²³⁵ for Gunderson, in his separate answer, expressly admitted and alleged that he signed the notes as maker, and that Smith and Thompson signed the same as witnesses to his signature. He could not at the same time assert that a fact existed and prove that it did not exist.

Upon an examination of this record we are unable to discover any error of law that required a new trial as to defendant Gunderson. The judgment of this court, therefore, is that the order granting a new trial is affirmed as to Thompson, and reversed as to Gunderson. The case is remanded to the circuit court for further action in accordance with this opinion; each prevailing party to recover one-half his taxable costs and disbursements.

All the judges concur.

NEGOTIABLE INSTRUMENTS — SIGNING — PAROL EVIDENCE.—If the names of parties are so placed upon a note as to leave it doubtful what their real intention is, resort may be had to parol evidence, to show the capacity in which they signed, or, in other words, to establish the true relation of the parties to the note and to each other: *Cook v. Brown*, 62 Mich. 473; 4 Am. St. Rep. 870; note to *Kulenkamp v. Groff*, 15 Am. St. Rep. 287; *Irvine v. Adams*, 48 Wis. 468; 33 Am. Rep. 817; *Harmon v. Hale*, 1 Wash. 422; 34 Am. Rep. 816. One who signs an instrument in the place for a subscribing witness is not *prima facie* liable as a copromisor, because the word

"witness" does not appear if the instrument is in form the single bill of another, and is executed by him as such: *Steininger v. Hoch*, 39 Pa. St. 263; 80 Am. Dec. 521.

APPEAL—NEW GROUND—PRACTICE.—As a general rule, appeals must depend on questions submitted to the court below, and no new ground can be taken in the appellate court, but that court may, after giving full opportunity for explanation and argument, decide a case upon a ground not taken or presented in the court below: *Mitchell v. Anderson*, 1 Hill, 69; 26 Am. Dec. 158; *Elliott v. Rhett*, 5 Rich. 405; 57 Am. Dec. 750; but this is done only when some question of jurisdiction is raised, or some vital point affecting the merits of the case is presented: *Harlan v. Bernie*, 22 Ark. 217; 76 Am. Dec. 428.

MERRILL v. LUCE.

[6 SOUTH DAKOTA, 354.]

ASSIGNMENT OF MORTGAGE—RECORDING.—The assignment of a real estate mortgage is a proper instrument for record.

A MORTGAGE AND ITS ASSIGNMENT ARE "CONVEYANCES," within the meaning of that term, as used in the recording act.

ASSIGNMENT OF MORTGAGE, NOT RECORDED—INVALIDITY OF.—An unrecorded assignment of a real estate mortgage is, under the recording act, void as to subsequent purchasers or encumbrancers of the mortgaged premises, in good faith, and for a valuable consideration, whose conveyances are first recorded.

MORTGAGE TO SECURE NON-NEGOTIABLE NOTE—FAILURE TO RECORD ASSIGNMENT—PRIORITY OF MORTGAGE LIENS.—If a real estate mortgage, given to secure a non-negotiable note, is assigned to a purchaser of the note, who fails to record the assignment, and the mortgagee, disregarding the assignment, forecloses the mortgage, and sells the premises, and a subsequent grantee of the mortgagor redeems them within the statutory time, without notice of the assignment, but in good faith, relying upon the record and the right of the mortgagee to so foreclose, the redemptioner takes title free from the lien of the mortgage; and one who, under the same conditions, furnished money to make such redemption, secured by another mortgage on the same premises, takes his mortgage free of the first mortgage lien.

Action by Mary E. Merrill against Herman N. Luce and others to foreclose a mortgage executed to the American Mortgage and Investment Company, and by it assigned to the plaintiff. There was a judgment for the defendants and the plaintiff appealed.

Winsor & Kittredge, for the appellant.

H. H. Keith and Robert J. Gamble, for the respondents.

356 KELLAM, J. This appellant, as plaintiff in the court below, brought this action as assignee of a note and trust deed given to secure the same, which, for facility of expression, we

shall, as counsel do, call a "mortgage." The respondents Walker claim to hold the premises described in the mortgage as innocent purchasers from the respondent Luce, who was the mortgagor, and as redemptioners from the sale of the mortgaged premises under a previous foreclosure of said mortgage made by the mortgagees named in the mortgage. Respondents Potter and Parrish claim to be the innocent holders of a mortgage for two thousand five hundred dollars, given on said premises, after such foreclosure sale, by said Luce, alleging that the two thousand five hundred dollars for which such mortgage was given was loaned for the purpose of, and was actually used in making the redemption of said premises from such foreclosure sale. The respondent, the American Mortgage & Investment Company was the original mortgagee or beneficiary in the trust deed. E. H. Jacobs, the trustee therein named, and S. W. Jacobs, his successor in trust, were officers of said American Mortgage & Investment Company. Matthew W. Daly was the general assignee of said mortgage and investment company, and respondent Lee the sheriff who made the foreclosure sale. Other respondents who were named as defendants were alleged to severally claim interests in the mortgaged premises subordinate to those of appellant. Their rights were derived from, and must stand or fall with, those of the principal defendants and respondents, Walker. Upon the trial the court gave judgment against appellant upon findings of fact duly filed, and this appeal is from such judgment. The record is quite long, and only such portions of it will be referred to as have a bearing upon, and will assist in determining, the one main question: Did the foreclosure of this mortgage by the original mortgagee, under the facts disclosed, bar this subsequent action for the same purpose by appellant, as the alleged assignee thereof?

One line of appellant's argument is based upon the theory that the mortgage note in this case was a negotiable note, so ³⁵⁷ that when it passed to appellant before maturity, for a valuable consideration, she took it free from defenses of which she had no notice, and that the mortgage, as incidental thereto, partook of the same character of negotiability. Neither a copy nor the form of the note, nor a statement of what purports to be its contents, is given in the record. We shall therefore be compelled to assume, if necessary to support the judgment, that the note was non-negotiable, as every intendment and presumption consistent with the record is in favor of the correctness of the judgment. This is but another form of expressing the established rule that

error will not be presumed, but must be affirmatively disclosed: *Kent v. Dakota etc. Ins. Co.*, 2 S. D. 300, and cases there cited.

Respondents raise a question as to the efficacy of what is claimed as the assignment from the mortgage and investment company to appellant to invest her with the title to the note and mortgage; but, for the purpose of what we have now to say, we shall assume that by such assignment she became the real and legal owner of the mortgage. The assignment was in writing, but was not recorded until long after the foreclosure by the mortgagee, the redemption of the premises therefrom, the giving of the second mortgage to Parrish and Potter, and the conveyances under which the other respondents claim.

The facts, then, the legal effect of which we have now to determine, are these: The respondent the American Mortgage & Investment Company, and the mortgagee of the mortgage in question sold and indorsed the note which it was made to secure, and in writing assigned the mortgage itself, to appellant Merrill. Afterward the said mortgagee foreclosed the mortgage, and sold the premises thereunder. During the year of redemption, Luce, the mortgagor, conveyed the mortgaged premises to respondent Walker. Prior to such conveyance to Walker, he, Luce, executed to respondents Parrish and Potter a mortgage upon the same premises for two thousand five hundred dollars, which, it would seem, was made for the purpose of obtaining money to redeem ³⁵⁸ the premises from the foreclosure sale. The money realized from this mortgage was paid to Walker, he taking the title to the premises, subject to said mortgage, and he used the money in making the redemption. Parrish and Potter furnished the money, and took the mortgage upon the understanding and belief that such redemption, when made, would leave the title in Walker, unencumbered by this mortgage, which had, in form at least, been foreclosed. Neither Luce nor Walker, nor the other respondents claiming under them, had any knowledge that the note and mortgage had been transferred by the mortgagee, the assignment not having been placed on record until long subsequently, nor did the appellant have any knowledge of such foreclosure until after it had occurred. The testimony was sharply conflicting as to whether the mortgagee or the appellant, as assignee, had possession of the note and mortgage during the time intermediate that of the assignment and the foreclosure sale and redemption. The fact is probably not important, except as it bears evidentially upon the good faith and diligence of Luce and Walker in treating the mortgage as properly and authoritatively

foreclosed by the mortgagee, and in making redemption from the sale thereunder. The court finds as a fact that such redemption was made in good faith. If the fact of the presence of the note and mortgage as in the possession of the mortgagee during the progress of the foreclosure proceedings and at the time of the redemption is involved, it is sufficient to say that the evidence does not strongly preponderate against an affirmative conclusion. It may be proper to add that the distinct question of who had possession of the note and mortgage on the third day of June, 1887, the date of the foreclosure sale, was by the court submitted to a jury, who answered that they were then in the possession of the American Mortgage & Investment Company. In its findings of fact the court says that it "does not accept the verdict of the trial jury as binding, but disregards the same." This is not equivalent to affirmatively finding otherwise, but might have been disregarded ³⁵⁹ because the court did not regard the fact as an issue in the case, or essential to its determination upon the theory upon which it decided the case. Respondents must therefore be considered as having acted in good faith, and without knowledge of any facts putting upon them the duty of further inquiry. While not assigned as error, appellant in her argument raised the objection that the findings of the court did not pass upon all the issues, and are therefore inadequate to support the judgment rendered; but the neglected issues mentioned by appellant, such as whether appellant bought the note and mortgage as alleged in the complaint, whether they were properly assigned to her, and whether she was the owner of the same at the time of the alleged foreclosure by the mortgagee, became unimportant under the construction which the trial court evidently put upon the recording acts of this state. And this question—the effect of the failure to record the assignment of the mortgage upon subsequent bona fide purchasers of the mortgaged premises, who bought upon the strength of the record showing such mortgage to have been foreclosed or discharged by the mortgagee—we shall now examine as the pivotal point in this case. The assignment of the mortgage was a proper subject and instrument for record: Comp. Laws, sec. 4360. The section is brief and is as follows: "The assignment of a mortgage may be recorded in like manner as a mortgage, and such record operates as a notice to all persons subsequently deriving title to the mortgage from the assignor." Appellant contends that this section specifically defines the effect, and the only effect, of recording the assignment, and limits it to purchasers of the mortgage itself. It is more than probable that

this particular section was designed to define the rights of persons purchasing the mortgage itself, and not the rights of those purchasing the premises covered by the mortgage; and if this section constituted the entire law upon the subject of the rights of those dealing with the mortgaged premises the question now before us would not be very difficult of solution. ³⁶⁰ While the courts cannot assume legislative functions, and make a law, because in their judgment such law would be convenient and helpful in the accomplishment of an object recognized by the general law as desirable, still the courts may, and ought to read and interpret such laws as the legislature has made in the light or view of an obvious general plan or system upon which such laws are founded, or of which they are a part. The purpose and object of our system of laws for the recording of written instruments affecting the title to real estate cannot be misunderstood. It is to give notice in the manner most likely to prove efficacious, to all who are or may become interested, of such contracts and agreements between parties as may affect the title to such real estate, or the rights and liabilities of parties who may deal in or with reference to it. To this end it is provided, in this and other states, that "every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or encumbrancer, including an assignee of a mortgage, lease, or other conditional estate, of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded." "The term 'conveyance' as used in the last section embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged or encumbered, or by which the title to any real property may be affected, except wills, executory contracts for the sale or purchase of real property, and powers of attorney": Comp. Laws, secs. 3293, 3294. A mortgage, although in this jurisdiction it does not convey the title to the thing mortgaged, is, within the meaning of the recording acts, a conveyance: See under this same section, *Hassey v. Wilke*, 55 Cal. 528. So, too, an assignment of a real estate mortgage is a "conveyance" within the meaning of the term as used in the recording act. This has been repeatedly held in New York, under a law of which our section 3294 is an exact reprint. In *Decker v. Boice*, 83 N. Y. 220, the court said: "It is doubtless somewhat incongruous ³⁶¹ in view of the doctrine, now well settled in this state, that a mortgage is a mere security, and not a title, to define it as a conveyance of an estate or interest in the land mortgaged;

but the character of mortgages as mere choses in action was not as well understood when the Revised Statutes were enacted as it has since been. By the common law a mortgage was a conditional conveyance of the land mortgaged, and it still is a conveyance within the recording act. An assignment of a mortgage in writing is also a conveyance within the act, for the reason that it is an instrument by which the mortgagee's interest or title is transferred": See, to same effect, *Vanderkemp v. Shelton*, 11 Paige, 28; *Bacon v. Van Schoonhoven*, 87 N. Y. 450; *Westbrook v. Gleason*, 79 N. Y. 23. Michigan has precisely the same section, and the term "conveyance" is held to include "mortgages and the assignments thereof": *Burns v. Berry*, 42 Mich. 176. The same is held to be the law in Wisconsin, under provisions the same as ours in substance, but slightly different in phraseology: *Fallass v. Pierce*, 30 Wis. 443; *Girardin v. Lampe*, 58 Wis. 267. In *Jones on Mortgages*, section 472, it is said: "The registration laws, and the doctrines of priority by record, generally extended to assignments of mortgages as well"; referring to many cases to support the text. With this understanding, let us rewrite section 3293 of the Compiled Laws, making it applicable to the facts in this case. "Every assignment of a mortgage on real property is void as against any subsequent purchaser or encumbrancer of the same property in good faith and for a valuable consideration, whose conveyance is first duly recorded." We are unable to see why the practically conceded facts in this case do not meet all the conditions named. Appellant took from the mortgagee a written assignment of a real estate mortgage. It was not recorded. Walker and Parrish and Potter were, one a subsequent purchaser, and the others subsequent encumbrancers, in good faith and for a valuable consideration, and their conveyances were ³⁶² severally recorded prior to the assignment. The effect of these facts, as declared by this section, is to make the assignment void as to them. If so, their rights were the same as though it had not been made. From *Bacon v. Van Schoonhoven*, 87 N. Y. 450, we quote as follows: "The assignments of the mortgage are also conveyances within the act. This is well settled by authority, and such assignments, if not recorded, are void, not merely as against subsequent purchasers of the same mortgage, but also as against subsequent purchasers of the mortgaged premises whose interests may be affected by such assignments, and whose conveyances are first recorded."

Appellant cites *Jones on Mortgages*, and cases referred to by him, as teaching a contrary doctrine, but a careful reading of the

context from which the citations are made shows that the author is not undertaking to state the law upon facts like those now before us. The section first cited is 474, in which it is said: "As against subsequent purchasers of the premises, or the holders of subsequent mortgages upon them, the record of a prior mortgage is sufficient notice of its existence, without the record of an assignment of the mortgage to one who has purchased it. The failure to record the assignment does not blot out the record of the mortgage." This is undoubtedly true. The simple failure to record the assignment does not of itself affect the lien of the mortgage, and so the consequence of which this proposition is only preliminary follows: If a mortgagee takes title to the mortgaged premises after he has assigned the mortgage, there is no merger of the mortgage, and the mortgage, although the assignment is unrecorded, is still a lien against a subsequent purchaser of the premises who purchased upon the theory and belief that the mortgagee still held the mortgage, and that, consequently, it became merged in his title and so discharged. It is with reference to such conditions that the author says: "That knowledge and notice (from the record) made it his (the purchaser's) duty, in the exercise of a proper diligence, to inquire whether his vendor, the mortgagee, ³⁶³ was still the owner and holder of the mortgage; and his omission to make that inquiry deprives him of the protection of a bona fide purchaser." And these are the conditions upon which the cases were decided which are cited in support of the text. One of these cases (*Jones v. Smith*, 22 Mich. 360) it seems to us, is directly against the doctrine which appellant draws from the sections cited, for it states, as established law, that until notice of assignment, actual or constructive, the mortgagor may treat the mortgagee as the owner of the mortgage, unless the mortgage is given to secure negotiable paper transferred before due. As already noticed, the mortgage note in the case before us is not shown to be negotiable, and under this rule, respondents having no notice of the assignment, actual or constructive, were entitled to deal with and regard the mortgage and investment company as the owner of the mortgage and entitled to foreclose it. Mr. Jones very definitely states his understanding of the law which we think controls this case, in section 957 of the work already cited. He says: "An entry of satisfaction by a mortgagee, after he has parted with his interest in the security, will not discharge the mortgage in favor of one who had acquired an interest in the land before the discharge was made. He is no worse off than he supposed himself to be when he ac-

quired his interest; and there is no reason in equity why the person really entitled to the mortgage should not have the benefit of it so far as he is concerned. But the case is quite otherwise when one has purchased the land in good faith after such entry of satisfaction, and relying upon it, having no notice of the assignment, or of any want of authority in the making of such entry. The effect of the discharge cannot be avoided as against him."

We are satisfied that the provisions of our recording laws were intended to have, and therefore should be given, the effect we have indicated. There is no hardship in requiring a party taking a mortgage by assignment to give notice of the same through the easy and inexpensive means of the public records, ³⁶⁴ and thus put interested parties in position to know with whom and how they may safely deal with respect to the mortgaged premises. On the other hand, it would be a hardship and unreasonable to require all persons to deal with the same at their peril unless they should succeed in tracing the mortgage through the devious and unmarked channels of written and verbal assignments, and finally locating it in the physical possession of the last and real owner. In many cases it would be practically impossible to do this. To hold as asked by appellant would make the dealing in mortgaged premises extremely hazardous, without any corresponding advantage to anybody. We think the judgment of the circuit court was right, and it is affirmed.

All the judges concur.

ASSIGNMENT OF MORTGAGE—RECORDING.—It is not important, as between the assignee of a mortgage and the mortgagor, that the assignment should be recorded, where there is no pretense of payment to the assignor, without notice: *King v. Harrington*, 2 Aiken, 33; 16 Am. Dec. 675. The assignee of a mortgage is not bound to record it, but it may be necessary for his safety, especially where the recording act requires its registry: *Mott v. Clark*, 9 Pa. St. 399; 49 Am. Dec. 566, and note; *Merrill v. Hurley*, 6 S. Dak. 592; post, p. 859. An unrecorded assignment of a real estate mortgage is, under the recording act, void as to subsequent purchasers or encumbrancers of the mortgaged premises, in good faith, and for a valuable consideration, whose conveyances are first recorded: *Merrill v. Hurley*, 6 S. Dak. 592; post, p. 859. Under the recording act of Iowa, a mortgagee is protected against unrecorded instruments in the same way as is a purchaser: Note to *Norwood v. Norwood*, 31 Am. St. Rep. 882. The assignee of a mortgage who fails to record his assignment will be estopped from asserting the priority of his mortgage over that of a subsequent mortgagee who took upon the faith of a release executed by the administratrix of the original mortgagee and entered of record: *Connecticut Mut. Life Ins. Co. v. Talbot*, 113 Ind. 373; 3 Am. St. Rep. 655.

IN RE STATE WARRANTS.

[6 SOUTH DAKOTA, 518.]

CONSTITUTIONAL LAW.—THE LEGISLATURE may, as a general principle, do what the state constitution does not prohibit.

STATES—CURRENT EXPENSES—INCURRING INDEBTEDNESS.—APPROPRIATIONS from the assessed, but not yet collected revenues of the state, and the issuance of warrants, in pursuance thereof, to defray current expenses, are not the incurring of indebtedness, within the meaning of a constitutional provision which provides that for the purpose of making public improvements, or to defray extraordinary expenses, or to meet casual deficits or failure in revenue, the state may contract debts never to exceed, with previous debts, the aggregate amount of one hundred thousand dollars, and that no greater indebtedness shall be incurred except for the purpose of repelling invasion, suppressing insurrection, or defending the state, or the United States, in war.

STATES—REVENUES—APPROPRIATIONS — INCURRING INDEBTEDNESS.—Revenues of the state, assessed and in process of collection, may be considered as constructively in the treasury, and may be appropriated and treated as though actually and physically there. Hence, an appropriation of them by the legislature does not constitute the incurring of an indebtedness, within the meaning of the constitutional prohibition.

STATES—REVENUES—WARRANTS DRAWING INTEREST—INCURRING INDEBTEDNESS.—The fact that warrants issued in anticipation of assessed but uncollected revenues of the state draw interest, does not make the issuance of the warrants an incurring of indebtedness, to the extent of such interest, within the constitutional prohibition, where the warrants authorized, in respect to interest, are not different from other warrants which may be properly drawn and issued.

Advisory opinion of the judges of the supreme court as to the legality of an act of the legislature to provide for the issue of warrants by the state to defray current expenses, based on revenues assessed and not yet collected.

518 Supreme Court Chambers.

Pierre, S. D., February 8, 1895.

To His Excellency, Charles H. Sheldon, Governor:

We have the honor to acknowledge the receipt of your communication of this date, accompanied by a copy of an act, with amendment thereto, which has just passed the legislature, entitled "An act to provide for the issue of warrants by the state of South Dakota, to defray current expenses, based upon revenues assessed and not yet collected," asking our opinion as to 519 the legality of the same. We recognize this as one of the occasions upon which the constitution of the state authorizes you to call upon us for our opinion; and while the obvious importance of a speedy answer renders impracticable so thorough an examination

of the question, or so careful a formulation of our views in respect thereto, as its gravity makes desirable, we have the honor to present the following as a reply to the question you propound:

The act provides:

“Section 1. That to protect the public credit and enable the state to provide for current expenses, the state treasurer, with the advice and consent of the governor and auditor, is hereby authorized and directed, whenever he finds it necessary to do so in order to provide for the actual and necessary current expenses of conducting the public business of the state, to issue warrants based upon the revenues of the state already assessed for the current and preceding years but not yet collected and in an amount never exceeding the amount of such revenues so assessed and not yet collected and for the purpose only of providing for the immediate and necessary current expenses of the state as aforesaid. Said warrants shall not be negotiated for less than their face value, and shall be subject to the same provisions of law as to the rate of interest thereon and otherwise as all other warrants on the state treasury. All money received from the negotiation of such warrants shall be applied only to the payment of the necessary and actual current expenses of the state. And all money hereafter received or collected into the state treasury from or on account of such ‘revenues assessed but not yet collected,’ or so much thereof as may be necessary, is hereby set apart and appropriated to the payment of such warrants, if any, as may be issued in pursuance of the foregoing provisions, and the state treasurer is hereby authorized and required to make payment of the same from such funds so hereby appropriated.

“Sec. 2. This act shall not be construed so as to authorize in any way the increase of the public debt, it being the intention ⁵²⁰ to issue said warrants within the limits of the revenue already assessed for the current year and preceding years but not yet paid.”

This law is valid, of course, unless it violates some provision of the constitution; for, as a general principle, what the state constitution does not prohibit, the legislature may do. While your question is general, we take it that the special point of inquiry is the relation of this act to those provisions of the state constitution designed to regulate and limit the indebtedness of the state.

The general financial system of the state, as provided by the constitution, by and under which revenue shall be raised and public moneys expended, is shown and developed in the following general provisions:

"Art. 11, sec. 1. The legislature shall provide for an annual tax sufficient to defray the estimated ordinary expenses of the state, for each year, not to exceed in any one year, two mills on each dollar of the assessed valuation of all taxable property in the state, to be ascertained by the last assessment made for state and county purposes. And whenever it shall appear that such ordinary expenses shall exceed the income of the state for such year, the legislature shall provide for levying a tax for the ensuing year, sufficient with other sources of income, to pay the deficiency of the preceding year, together with the estimated expenses of such ensuing year."

"Art. 11, sec. 9. All taxes levied and collected for state purposes shall be paid into the state treasury. No indebtedness shall be incurred or money expended by the state, and no warrant shall be drawn upon the state treasurer except in pursuance of an appropriation for the specific purpose first made."

"Art. 12, sec. 1. No money shall be paid out of the treasury except upon appropriation by law and on warrant drawn by the proper officer."

"Art. 13, sec. 2. For the purpose of defraying extraordinary expenses and making public improvements, or to meet casual ⁵²¹ deficits or failure in revenue, the state may contract debts never to exceed, with previous debts, in the aggregate one hundred thousand dollars, and no greater indebtedness shall be incurred except for the purpose of repelling invasion, suppressing insurrection, or defending the state or the United States in war, and provision shall be made by law for the payment of the interest annually, and the principal when due, by tax levied for the purpose, or from other sources of revenue; which law providing for the payment of such interest and principal by such tax or otherwise shall be irrepealable until such debt is paid."

Thus, upon the legislature is imposed the duty of providing by an annual tax a sufficient revenue to meet the estimated ordinary expenses of each year, not exceeding the limit of two mills, with power to provide for levying a further tax to pay a deficiency in the preceding year, if the ordinary expenses of the state shall exceed its income in such year. Our views as to the authority of the legislature under this latter provision were expressed to you in our communication of January 14, 1893, *In re Limitation of Taxation*, 3 S. D. 456, in response to your request therefor.

By general law the legislature has provided for the levy of an annual tax for meeting the ordinary expenses of the state. By so providing, in a constitutional manner, for the levy of a sufficient tax, it has provided a revenue, to the extent of the tax,

for the payment of the ordinary or current expenses of the state. It may then make appropriation of such revenue for diverse and specific purposes, included within the ordinary expenses of the state, and may authorize the issue of evidence of such appropriation in the form of warrants, without incurring an indebtedness therefor; within the meaning of said section 2, art. 13 of the constitution. If this were not so, then the appropriations of each legislature in excess of the cash actually in the hands of the state treasurer, and in the fund from which such appropriations were made, would, to the extent of such excess, constitute the creation of a debt against the state. It is well understood that the aggregate of the general appropriations ⁵²² of each legislature in this, as in other states, generally greatly exceeds the amount of actual cash in the hands of the state treasurer when such appropriations are made. The taxes levied and in process of collection are treated as in the state treasury, though not yet actually paid over to the state treasurer. It has been ruled in several cases, and by high judicial authority, that state funds, so in sight, but not yet in hand, may be anticipated and appropriated as though actually in the possession of the state treasurer. In *State v. McCauley*, 15 Cal. 430, the learned Chief Justice Field, speaking for the court said: "The eighth article [the constitutional article limiting state indebtedness, and corresponding to our section 2, article 13] was intended to prevent the state from running into debt, and to keep her expenditures, except in certain cases, within her revenues. These revenues may be appropriated in anticipation of their receipt as effectually as when actually in the treasury." This case, decided in 1860, has been subsequently several times approved and followed by the supreme court of California: See *McCauley v. Brooks*, 16 Cal. 28; *Koppikus v. Commissioners*, 16 Cal. 253; and *People v. Pacheco*, 27 Cal. 175. The same question was before the supreme court of Ohio in *State v. Medbery*, 7 Ohio St. 529, where the proposition of the California court was fully indorsed, subject only to the restriction based upon a provision of the Ohio constitution that such appropriations of incoming revenues should not extend beyond the limit of the two years next ensuing. The court says: "So long as this financial system is carried out in accordance with the requirements of the constitution [two years' restriction], unless there is a failure or defect of revenue, or the general assembly have failed, for some cause, to provide revenue sufficient to meet the claims against the state, they do not and cannot accumulate into a debt. Under this system of prompt payment of expenses and claims as they accrue, there is, undoubt-

edly, after the accruing of the claim, and before its actual presentation and payment, a period of time intervening ⁵²³ in which the claim exists unpaid; but to hold that for this reason a debt is created would be the misapplication of the term 'debt,' and substituting for the fiscal period a point of time between the accruing of a claim and its payment, for the purpose of finding a debt; but appropriations having been previously made, and revenue provided for payment, as prescribed by the constitution, such debts, if they may be so called, are in fact, in respect of the fiscal year, provided for with a view to immediate adjustment and payment. Such financial transactions are not, therefore, to be deemed debts." The same question is elaborately discussed in *State v. Parkinson*, 5 Nev. 15, and the same conclusions reached as by the California and Ohio courts. It would seem, therefore, that, both upon authority and principle, we should be justified in saying that appropriations from the assessed, but not yet collected revenues of the state, and the issuance of warrants in pursuance and in evidence thereof, is not the incurring of an indebtedness, within the meaning of section 2, article 13, of the constitution.

At first thought, it may seem difficult to maintain that the issuing of an obligation to pay is not the incurring of an indebtedness; but as aptly said by the court in *State v. Parkinson*, 5 Nev. 15, "similar language [prohibiting state indebtedness beyond a designated limit] in the constitutions of other states had judicial interpretation before the foundation or adoption of the constitution of the state, . . . and thus the legal presumption arises that the language was used with reference to such interpretation." Critically considered, it may constitute the incurring of an indebtedness; but it is not an indebtedness repugnant to the constitution, because its payment is legally provided for by funds constructively in the treasury. If the drawing of a warrant upon the state treasury is the incurring of indebtedness by the state, then the drawing of such warrant would violate the constitution, even if there was money in the state treasury to pay it, if the constitutional limit of indebtedness had been reached; for there must always be some time intervening ⁵²⁴ between the drawing of the warrant and its payment, and during such time the indebtedness of the state would be increased beyond the constitutional limit. Such an interpretation of the constitutional limitation would obviously be too hypercritical to be practicable or reasonable. It being once established, as we think it is by the authorities already cited, that the revenues of the state, assessed and in process of collection, may be considered as constructively in the

treasury, they may be appropriated and treated as though actually and physically there; and an appropriation of them by the legislature does not constitute the incurring of an indebtedness, within the meaning of section 2, article 13.

In the light of, and following these conclusions, the answer to the immediate question submitted to us does not seem to involve serious doubt or difficulty. The legislature has, by this law, set apart and appropriated, as we have seen it may do, a portion of the assessed and incoming revenues of the state, to be exchanged for or converted into ready cash, for immediate use in meeting the current expenses of the state. If the legislature may lawfully make appropriation from such revenues, in various and different amounts, to meet specific items of expense, we can see no objection, in principle, to its aggregating a number of such amounts, and covering the appropriation therefor all in one act. To illustrate: It has already been shown by the authorities cited that, although there may be no funds actually in the hands of the state treasurer, yet the legislature may lawfully appropriate from the incoming revenues of the state a sufficient amount to pay the per diem and mileage of the members of the legislature, without incurring an indebtedness therefor, within the meaning of the constitutional prohibition. The several members take their warrants, and hold them against the incoming funds so appropriated until they come within the physical reach and control of the state treasurer. Would it import a new or different principle if one member should take them all, and advance to the individual members the several ⁵²⁵ amounts due them? We think not. But, if a member may do so, there is no reason why a third party may not; and this, in effect, is just what the law under consideration proposes to have done. It may be suggested that the warrants authorized by this law will draw interest, and to that extent, if no more, an objectionable indebtedness is incurred; but, in respect to interest, the warrants authorized by this law are not different from those which we have already seen may properly be drawn and issued. If the issuance of the warrant creates no unconstitutional debt, how can the incident of interest, which the statute imposes as a compensation or allowance for delay, make that an unconstitutional debt which was not so before? As we read *State v. Parkinson*, 5 Nev. 15, that case, both as to facts and questions of law, was entirely analogous to that now presented to us. The law now before us expressly sets apart and appropriates a sufficient amount of the accruing funds of the state to meet and pay whatever of these representative

warrants may be issued. It simply provides for the reimbursement of the party who immediately pays, or furnishes the money to pay, such current expenses of the state as the legislature may now lawfully make appropriations for. The revenues so appropriated are as effectually set apart and devoted to the payment of the current expenses of the state as though the representative warrant or warrants did not intervene, and, to the extent so appropriated, they cannot be used for any other purpose.

In line with the foregoing views, and influenced thereby, we conclude, and express the opinion, that there is nothing in the general plan or the terms of the act which conflicts with the constitution of the state, and that warrants issued in pursuance thereof, and under the conditions therein named, will be legal and binding upon the state.

Very respectfully, your obedient servants,
DIGHTON CORSON,
A. G. KELLAM,
H. G. FULLER,
Judges of Supreme Court.

LEGISLATURE — STATE INDEBTEDNESS. — The legislative power of the state represents the whole power and authority of the people, except that which has been withheld, or limited by the constitution, or conferred upon some other department: *Note to People v. Freeman*, 13 Am. St. Rep. 126; *Lawton v. Steele*, 119 N. Y. 226; 16 Am. St. Rep. 813. The legislature has supreme power to make appropriations of state money for the payment of state indebtedness, except as prohibited by the constitution of the state: *Carter v. Thorson*, 5 S. Dak. 474; 49 Am. St. Rep. 893.

STATES—INDEBTEDNESS.—TO AN APPROPRIATION, within the meaning of the constitution, nothing more is requisite than a designation of the amount, and the fund out of which it shall be paid. It is not essential that the funds to meet the same should be, at the time, in the treasury: *Ingram v. Colgan*, 106 Cal. 113; 46 Am. St. Rep. 221. Monographic note to *Carr v. State*, 22 Am. St. Rep. 640, on what are appropriations. A constitutional provision prohibiting the incurring of state indebtedness, "except in pursuance of an appropriation for the specific purpose first made," does not prevent the legislature from incurring or directing the immediate incurring of a state indebtedness for the usual and current administration of state affairs without a specific appropriation first being made therefor: *Carter v. Thorson*, 5 S. Dak. 474; 49 Am. St. Rep. 893.

MERRILL v. HURLEY.

[6 SOUTH DAKOTA, 592.]

NEGOTIABLE INSTRUMENTS—DELIVERY TO CORPORATION—ESCROW.—The unconditional delivery of promissory notes, together with a mortgage, in the form of a trust deed, securing their payment, at the principal office of a corporation, to its president acting officially for it, as payee and beneficiary, is a delivery to the corporation, and not to a third person in escrow.

NEGOTIABLE INSTRUMENTS—PROVISIONS NOT AFFECTING NEGOTIABILITY.—Neither a provision, in a promissory note, for a specified additional rate of interest after maturity, nor a recital therein to the effect that it may, at the holder's option and by reason of the maker's default, become due and payable at a date earlier than that fixed, destroys the character of the note as a negotiable instrument.

CORPORATIONS—POWER OF PRESIDENT TO INDORSE NOTES—PRESUMPTION.—The managing president of a corporation, engaged in loaning money, and in buying and selling negotiable instruments, is presumed, in the absence of evidence to the contrary, to have authority, as such officer, to transfer, by indorsement, a promissory note made payable to the corporation.

NEGOTIABLE INSTRUMENTS—INDORSEMENT NOT AFFECTING NEGOTIABILITY.—A writing on the back of a promissory note, designed for the purpose of transferring title, does not destroy the negotiability of the instrument, unless words apparently intended for that purpose are used.

NEGOTIABLE INSTRUMENTS—CONTRACT OF INDORSEMENT—ASSIGNMENT.—The words, "For value received, I hereby assign the within bond, together with all our interest in, and all our right under, the mortgage securing the same, to Mary E. Merrill, without recourse," written by the managing president of a corporation, upon the back of a negotiable interest-bearing bond, payable to the corporation, and signed by him in his official capacity, constitute a contract of indorsement, and not a mere assignment of the instrument.

MORTGAGE—TRUST—INTENT OF PARTIES.—If real property is conveyed to a third person, in trust, as security for a debt, and it is provided that, in case of default, the trust is to be executed by the creditor, the trustee having no authority to perform any act in relation to the trust property, such conveyance is, according to the obvious intent of the parties, a mortgage, and it will be so considered.

NEGOTIABLE INSTRUMENTS SECURED BY MORTGAGE—TRANSFER—RECONVEYANCE—INNOCENT PURCHASERS. If a person, desiring to borrow money, voluntarily executes to the payee and beneficiary, his negotiable promissory note and a trust deed mortgage, as security, without receiving any consideration, and subsequently, knowing that the mortgage is of record, and that the note has been transferred, accepts, in settlement of a suit to procure a redelivery and cancellation of such instruments, a bond, as indemnity against loss from such note and mortgage, and, at the same time, procures a reconveyance from the trustee, he cannot defeat an action for the foreclosure of the mortgage, brought by an innocent purchaser of such note and mortgage, for value, before ma-

turity, though no assignment of such instruments appeared of record at the time the property was, without payment, reconveyed by the trustee.

NEGOTIABLE INSTRUMENTS SECURED BY MORTGAGE—TRANSFER—RECONVEYANCE—PRIORITY OF MORTGAGE LIENS.—If a note and mortgage have been given without consideration, the mortgage put upon record, and the note and mortgage assigned, without any record of the assignment being made, but the property is afterward reconveyed to the mortgagor, and the deed recorded, thus apparently reinvesting the mortgagor with the unencumbered title to the property, the lien of a third person who makes a loan, and takes a mortgage, upon the property, there being no assignment of the first mortgage on record at the time, is superior to the lien of the purchaser of the note.

Action to foreclose a mortgage. The plaintiff obtained a judgment and appealed from an order granting a new trial.

Winsor & Kittredge, for the appellant.

Palmer & Rogde, for the respondents.

594 FULLER, J. The trial of this action, which was to foreclose a certain trust deed or mortgage, executed by the defendant Hurley and his wife to secure the payment of their bond or **595** promissory note for six hundred dollars, together with certain interest coupons thereto attached, resulted in plaintiff's favor, and a decree of foreclosure was accordingly entered, in which a sale of the encumbered premises was ordered and adjudged as prayed for by plaintiff, and in which the right, title, and interest of all defendants herein were forever barred and foreclosed, subject to the statutory right of redemption. Upon the application of the defendants John M. Hurley, Mary Hurley, and Thomas Fitzgerald, the court vacated its decree, and granted a new trial, and from the order thus entered plaintiff appeals. The facts apparently essential to an understanding of the questions presented are, in substance, as follows: On the twenty-fourth day of December, 1885, defendants John M. Hurley and Mary Hurley executed a mortgage and trust deed to E. H. Jacobs, as trustee of the American Mortgage & Investment Company, upon the premises in question, to secure the payment of six hundred dollars and interest, according to the terms of their promissory note, payable to the American Mortgage & Investment Company or order, bearing date December 1, 1885, the terms of which will receive more particular attention later on. It appears from the evidence that on the eighteenth day of February, 1886, plaintiff purchased for a valuable consideration and in the usual course of business the bond and mortgage above mentioned, together with other securities belonging to the American Mortgage & Invest-

ment Company, and that a default existed in the conditions of said bond and mortgage at the commencement of the suit to enforce by foreclosure the collection of the amount alleged to be due thereon. The trust deed or mortgage was duly recorded in the office of the register of deeds on the day of its execution, and the bond or principal note, when sold and transferred to plaintiff, contained on its back the following indorsement: "For value received I hereby assign the within bond, together with all our interest in and all our right under the mortgage securing the same, to Mary E. Merrill, without recourse. S. W. Jacobs, Prest." And each of the interest coupons ⁵⁹⁶ thereto attached was, upon its back, indorsed as follows: "Pay to the order of Mary E. Merrill, without recourse. S. W. Jacobs, P." But no assignment of the trust deed was procured at the time, and none was placed of record, until the eleventh day of October, 1888. It further appears from the evidence that although it was understood and agreed between the parties to the original transaction, at or subsequent to the time the papers were signed, that the same would be withheld from record by the officer of the defendant loan company, with whom the loan was negotiated, until the money was received and paid over to the defendant John M. Hurley, said loan company caused the trust deed to be placed of record, and neglected and refused to pay over the money, or any part thereof, for which the note was given, except the sum of \$500, which was offered on the twenty-eighth day of January, 1886, in full consideration for the \$600 note, and which the defendant Hurley refused to accept, for the avowed reason that it was not paid at the time agreed upon, and was not for the full amount of the loan; that subsequently to the sale and delivery of the note and trust deed to plaintiff, and on the thirteenth day of June, 1887, E. H. Jacobs, trustee, released and reconveyed to John M. Hurley the premises in controversy, and caused the instrument of reconveyance to be recorded in the office of the register of deeds, and apparently as a part of the same transaction, the American Mortgage & Investment Company, by its officers, S. W. and E. H. Jacobs, executed to the defendant Hurley a bond in the sum of \$1,000, conditioned that they would cause to be returned to him the \$600 note in question. On the first day of February, 1888, the defendant Fitzgerald loaned \$300 to the defendant Hurley, and took a mortgage on the premises in controversy to secure the payment of the same, and said mortgage remains of record and in full force.

No effort has been made to present all the testimony offered at the trial bearing upon the issues raised by the pleadings, and

should a proper determination of this appeal, viewed as we are ⁵⁰⁷ disposed to regard it, require a consideration of the evidence contained in the record, to which no reference has been made, such facts and circumstances will receive merited attention in connection with an examination of the questions of law presented for our determination. To sustain the action of the trial court in granting a new trial, respondent's counsel maintain that the interest-bearing bond or promissory note in question is a non-negotiable instrument; that no consideration was ever received therefor; and that said note, and the trust deed securing the same, were delivered in escrow only, upon the specified condition that such note and trust deed should be held by the defendant S. W. Jacobs, and should be of no force or effect until the money for which they were executed was paid to the defendant Hurley.

In determining whether or not the delivery of the note and trust deed was absolute or in the nature of an escrow, it will be necessary to briefly examine the evidence in relation thereto. The defendant Hurley testified, in effect, that he went to the principal office of the American Mortgage & Investment Company, the payee named in the note, and applied to S. W. Jacobs, the president of said company, for a loan of \$600; that the papers including the instrument in which the secretary of said company is named as trustee, were all executed by John M. Hurley and Mary Hurley, and left at the office of the loan company; that witness expected to receive the money as soon as papers were signed, and before they were filed for record. There is nothing in the evidence tending to prove an obligation in the nature of an escrow. The trust deed was not delivered to a stranger subject to a contingency, or to be held by a third person until the money evidenced by the bond was paid by the grantee or payee to the defendant Hurley. All that was required in the way of delivery, to give the instrument full force and effect, was fully performed. A corporation can act only through its officers and authorized agents, and it clearly appears that the business under consideration was thus transacted. Section ⁵⁰⁸ 3231 of the Compiled Laws is as follows: "A grant cannot be delivered to the grantee conditionally. Delivery to him or to his agent as such, is necessarily absolute; and the instrument takes effect thereupon, discharged of any condition on which the delivery was made." The above statute, which is in complete harmony with the definition of an escrow, and fully consistent with the frequent decisions of the courts, renders further comment unnecessary. As between the maker of a written instrument and a bona

vide holder for value without notice, the delivery was complete and beyond recall.

Counsel for appellant, basing their argument upon the hypothesis that the note in suit is a negotiable instrument, transferred to plaintiff in good faith for value before due, confidently maintain that it is now free from any equities or defenses, existing between the Hurleys and the American Mortgage & Investment Company, and that the judgment for plaintiff thereon should not have been vacated nor disturbed. The following is a copy of the note: "Madison, Dakota, Dec. 24th, 1887. On the first day of Jan'y, eighteen hundred and ninety-one, for value received, we promise to pay to the American Mortgage & Investment Company, or order, six hundred dollars, with interest thereon at the rate of seven per centum per annum, payable semiannually, according to the tenor of ten interest coupons hereto attached. . . . If any part of the principal is not paid at maturity, it shall bear interest at the rate of twelve per cent per annum, payable annually; and, if any interest remains unpaid twenty days after due, the principal shall become due and collectible at once without notice, at the option of the holder." Upon the authority of *Hegeler v. Comstock*, 1 S. D. 138, respondents' counsel contend that the foregoing is not a negotiable instrument; and thus a question of importance, if not decisive of the appeal, is presented for our consideration. If the note is subject to all defenses existing between the original parties, the order granting a new trial must be in all respects affirmed. The provision in the note in the case ⁵⁰⁰ of *Hegeler v. Comstock*, 1 S. D. 138, considered by this court and found to be sufficient to destroy its negotiability, is as follows: "With interest from date until paid at the rate of ten per cent per annum; eight per cent if paid when due." While, in the opinion of the writer a promissory note, otherwise unobjectionable, meets the requirements, and stands the test of negotiability, when there is no date at which the exact amount then due cannot be ascertained by inspection and computation, this court has placed itself in line with a class of authorities which require such a degree of certainty that the exact amount to become due and payable at any future time is clearly ascertainable at the date of the note, uninfluenced by any conditions not certain of fulfillment; and the rule thus established must control cases subsequently arising, where the facts are substantially the same. But, in our opinion, the note in suit is clearly distinguishable from the note in the case of *Hegeler v. Comstock*, 1 S. D. 138. That note is inherently uncertain as to the rate of interest that will be paid for the use of the money. There is nothing from which the

payee or purchaser can determine with certainty the amount which he will realize upon his loan or investment, or the rate of interest that the note is drawing, until by reason of its dishonor it has lost every element and incident of negotiability. The same cannot be said concerning the note before us. If the maker of this note fails to perform his contract, he becomes absolutely liable to pay twelve per cent interest after a default exists; but the rate of interest before dishonor is unconditionally fixed at seven per cent, and no act or omission of either party can change the stipulated rate of interest, which is, in effect, seven per cent from date till due, and twelve per cent, thereafter, and, as there seems to be no condition not certain of fulfillment, we characterize and regard the note as a negotiable instrument. It was said in *Towne v. Rice*, 122 Mass. 67, that "an instrument which in its terms and form is a negotiable promissory note does not lose that character because it also recites that an additional rate of interest will be paid after due": *De Hass v. Roberts*, 59 Fed. Rep. 853; *Crump v. Berdan*, 97 Mich. 293; 37 Am. St. Rep. 345.

It is further maintained by counsel for respondents that the provision authorizing the holder to declare the whole amount matured and payable, if any interest remains unpaid twenty days after due, introduces another element of uncertainty, tending to destroy the negotiability of the instrument, and, while cases may be found going to that extent, we should be reluctant to follow them. It was said in the case of *Chicago etc. Equipment Co. v. Merchants' Bank*, 136 U. S. 268, concerning a note containing a similar provision, "that its negotiability was not affected by the fact that it might at the option of the holder, and by reason of the default of the maker, become due at a date earlier than that fixed": See, also, *Roberts v. Snow*, 27 Neb. 425; *Heard v. Dubuque City Bank*, 8 Neb. 10; 30 Am. Rep. 811; *DeHass v. Roberts*, 59 Fed. Rep. 853; *Ernst v. Steckman*, 74 Pa. St. 13; 15 Am. Rep. 542. In our opinion, there is no provision in the note in suit which, under the statute or mercantile law, destroys its negotiability.

It has been noticed that the interest-bearing bond which we find to be a negotiable instrument upon its face was made payable to the American Mortgage and Investment Company or order, and it is contended that the indorsement, "For value received I hereby assign the within bond, together with all our interest in, and all our right under, the mortgage securing the same," is not, as to form or effect, the indorsement required by the statute or the law merchant, and that the mere signature, "S. W. Jacobs, Prest." attached thereto, is insufficient in the

absence of an indorsement by the American Mortgage and Investment Co., to constitute a valid assignment of the right, title, and interest of the payee named in the instrument. It appears from the uncontroverted evidence that S. W. Jacobs was the president of the corporation named as payee in the note, and it will be presumed, in the absence of anything to the contrary, that he was authorized to act for the corporation, and to transfer its title to the instrument: *Lay v. Austin*, 25 Fla. 933; ⁶⁰¹ *Northampton Bank v. Pepoon*, 11 Mass. 288; *Elwell v. Dodge*, 33 Barb. 336; *Falk v. Moebs*, 127 U. S. 597; 1 *Daniel on Negotiable Instruments*, 416.

As subdivision 4, section 4351, of the Compiled Laws, provides that a transfer of a debt secured by mortgage carries with it the security, the expression, "I hereby assign the within bond," is the only portion of the writing upon the back of that instrument requiring further consideration; and the phrase, "together with all our interest in, and all our rights under, the mortgage securing the same," will be regarded as unimportant. As it is clear from the evidence that the note was transferred to plaintiff for full value, before maturity, without notice of any defense on the part of the makers, plaintiff's right to enforce the collection thereof, notwithstanding the existence of a defense valid between the makers and the original payee, depends upon the character and legal effect of the transfer to plaintiff as shown by the writing upon the back of such instrument. Section 4472 of the Compiled Laws is as follows: "One who writes his name upon a negotiable instrument, otherwise than as a maker or acceptor, and delivers it with his name thereon to another person, is called an indorser, and his act is called indorsement." In order to destroy the negotiability of a promissory note, the indorsement of which specifies the indorsee, words expressly employed for that purpose must be used, and in no other manner can the instrument be rendered non-negotiable: *Comp. Laws*, sec. 4478. Section 4871 is as follows: "In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any setoff or any defense existing at the time of, or before notice of, the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before due." It is clear from the foregoing provisions that the framers of our statute did not intend to establish a more stringent or technical rule concerning the indorsement of negotiable instruments than is justified and ⁶⁰² sustained by the commercial law, and in our opinion, the writ-

ing under consideration constitutes an indorsement, and not a mere assignment of the instrument upon which it is placed. In an English case the holder of a promissory note wrote on the back of the instrument: "I hereby assign this note, and all benefit of the money secured thereby, to John Granger, . . . and order the within-named Thomas Fox Hitchcock to pay him the amount, and all interest in respect thereof." The court said: "It amounts to nothing more than an ordinary indorsement of the note": 1 Daniel on Negotiable Instruments, 685 b, citing *Richards v. Frankum*, 9 Car. & P. 221. In *Sears v. Lantz*, 47 Iowa, 658, the court had under consideration a note payable to John Bowman or order, indorsed as follows: "I hereby assign all my right and title to Louis Mickey. John Bowman,"—and it was held that the above assignment was equivalent to an indorsement of the note. In *Shelby v. Judd*, 24 Kan. 161, the court held the following to be a contract of indorsement, and not an assignment: "For value received I hereby sell and assign all my interest in the within note, and mortgage accompanying the same, to Mrs. Mary H. Bowman. Byron Judd." The following has been held to be an "indorsement," in the legal and mercantile sense of the term: "For value received I assign the within note, on condition that the property of the maker and indorsers be exhausted before recourse on me": *Duffy v. O'Conner*, 7 Baxt. 498. It was held in *Bisbing v. Graham*, 14 Pa. St. 14, 53 Am. Dec. 510, that the transferee of a negotiable promissory note was not put upon inquiry as to the equities between the original parties by the following, which was declared to be an indorsement: "For value received, I assign to William Graham or order all my right, title, and interest in the within note, without recourse. Daniel Paynter." To the effect that any form which manifests an intention to transfer a negotiable promissory note is sufficient to constitute an indorsement: See *Herring v. Woodhull*, 29 Ill. 92; 81 Am. Dec. 296; *Heard v. Dubuque City Bank*, 8 Neb. 10; 30 Am. Rep. 811; *Rowe v. Haines*, 15 Ind. 445; 77 Am. Dec. 101. The payee of a negotiable promissory note, who wrote and signed his name to the following words upon the back thereof, was held to be an ordinary indorser: "I this day sold and delivered to Catherine M. Adams the within note." The court said: "The liability implied by indorsing a note can be qualified or restricted only by express terms": *Adams v. Blethen*, 66 Me. 19; 22 Am. Rep. 547. In our opinion the negotiable character of the note or bond in suit was not destroyed by the indorsement upon the back thereof, and, as be-

tween the plaintiff and the defendants who executed the instrument, the defense interposed is unavailing.

Counsel for respondents confidently maintain that the instrument for the foreclosure of which this suit was instituted, if not an absolute nullity, is in no sense a mortgage, and that consequently an action of this kind is unauthorized, and cannot be maintained. Section 4348 of the Compiled Laws, upon which respondents measurably rely, is as follows: "Every transfer of an interest in property, other than in trust, made only as security for the performance of another act, is to be deemed a mortgage." From a careful examination of the provisions of our statute relating to powers, user and trusts, we are confident that the writing before us is not of the character specified therein, nor does it evidence the accomplishment of any of the enumerated purposes of a trust deed; and we therefore conclude that the transfer in trust of an interest in real property contemplated in the foregoing section of the statute was not affected by this instrument made only as security for a debt, and which is interchangeably denominated a "mortgage" or "trust deed," and which contains all the essential requisites of a mortgage. In *Koch v. Briggs*, 14 Cal. 257, 73 Am. Dec. 651, and *Grant v. Burr*, 54 Cal. 298, it was held, under a statute in some respects similar to ours, that a trust deed which authorized the trustee to sell and convey the land described therein, upon default of the payment of a debt, was not a mortgage requiring a foreclosure, but an absolute conveyance of the legal title from the grantor to the trustee, free from any right or equity of redemption; ⁶⁰⁴ but, from an examination of the cases, it is clearly apparent that the instruments considered were materially different from the one before us. In this case the officer of the Mortgage & Investment Company, named as trustee, is not authorized in any event to sell the property, nor to do any other act in relation to the trust estate, in case of a default on the part of the maker of the note and the mortgage given to secure the same; but, on the contrary, it is expressly provided, in case of a default, that "this mortgage or trust deed" may be foreclosed at the option of the holder of the note, by action or by advertisement, as provided by article 1 of chapter 2 of the Compiled Laws. It was said by Chief Justice Dixon, speaking for the court in *Marvin v. Titsworth*, 10 Wis. 320 (261), that "the test, whether the conveyance is a mortgage or a trust, is to be determined by the question whether the trust is to be executed by the creditor or a third party. If by the former, it is a mortgage; if by the latter, a trust." In this case the power to foreclose and sell the property,

subject to the equity of redemption is vested in the party for the security of whose debt the instrument was executed, and, as it is confessedly obvious that the parties intended to make a contract that would operate as a mortgage, we so characterize without hesitation the instrument before us. When the mortgaged premises were conveyed by the trustee, the defendant Hurley was evidently aware that the trust deed and note had been placed beyond the control of the mortgagee and trustee, as the bond, in which it was agreed that the property should be reconveyed by the trustee to Hurley, expressly recites that the defendants were unable to cancel or redeliver the note secured by the mortgage, and, in consideration of a discontinuance of his suit to obtain a cancellation thereof, this indemnifying bond was executed by the defendant mortgage company, and by E. H. Jacobs, trustee; and thereupon the defendant Hurley dismissed his suit, brought to regain possession of the note and cancellation of the mortgage, and took the bond executed for \$1,000 by such mortgagee and ⁶⁰⁵ trustee, conditioned that they would indemnify and save him harmless against loss or damage that he might sustain by reason of said lien upon his property; and it is reasonable to presume that he knew, or at least under the circumstances ought to have known, that the note had been negotiated or placed in the hands of some one who would attempt to enforce its collection, and that he elected to rely upon the bond executed for his protection. He is furthermore charged with a knowledge of the recitals and legal effect of the trust deed, given by him to secure the note transferred to plaintiff, and that such security inured to her benefit, and that the trustee named therein had no authority to reconvey the encumbered premises until the note was fully paid. We therefore conclude that the reconveyance by the trustee, as between the defendant Hurley and the plaintiff, was insufficient to defeat his rights under the instrument, which we deem a mortgage, and which was executed by the defendant Hurley to secure the payment of the note in suit, and which contains the following provision: "A reconveyance of the premises is to be made at the expense of the party of the first part, on full payment of the indebtedness." As previously observed, plaintiff took no assignment of the mortgage at the time she purchased the note, and none was of record when the defendant Fitzgerald made a loan of \$300 to the defendant Hurley, and took a mortgage upon the premises to secure the payment thereof; and as the recorded deed from the trustee, Jacobs, to the defendant Hurley, appeared to reinvest him with the unencumbered title to the property, Fitzgerald was justified, in the

absence of any knowledge to the contrary, in presuming that plaintiffs had been paid; and upon the authority of *Merrill v. Luce*, 6 S. Dak. 354, ante, p. 844, we are of the opinion that the mortgage lien of the defendant Fitzgerald is superior to plaintiff's mortgage, and the order appealed from is therefore affirmed.

NEGOTIABLE INSTRUMENTS—NEGOTIABILITY, PROVISIONS NOT AFFECTING—CONTRACT OF INDORSEMENT.—A provision in a note for a specified additional rate of interest, if the note is not paid at maturity, does not destroy the negotiability of the note: *Crump v. Berdan*, 97 Mich. 293; 37 Am. St. Rep. 345, and note; *Hope v. Barker*, 112 Mo. 338; 34 Am. St. Rep. 387. An indorsement of a note, expressing the object for which the transfer is made, does not affect its validity, if the indorsement is absolute and unconditional. Hence, an indorsement as follows: "I assign the within note to M. to secure him as security to N.," is sufficient to vest the title to the note in the indorsee, and he may again assign it: *Rowe v. Haines*, 15 Ind. 445; 77 Am. Dec. 101. If the payee of a negotiable note writes and signs his name to the following words upon the back thereof: "I this day sold and delivered to Catherine M. Adams the within note," he is liable as an ordinary indorser: *Adams v. Blethen*, 66 Me. 19; 22 Am. Rep. 547. If the payee of a note indorses it specially thus: "For value received, I order the contents of this note to be paid to A. B. at his own risk"; such special indorsement transfers the property in the note to the indorsee without impairing its negotiable quality: *Rice v. Stearns*, 3 Mass. 225; 3 Am. Dec. 129.

CORPORATIONS—POWERS OF PRESIDENT—INDORSEMENT OF NOTES—PRESUMPTION.—The president of a business corporation may, by contract, bind it in matters arising in the usual course of business: *Note to Lyndon Mill Co. v. Lyndon etc. Institution*, 25 Am. St. Rep. 788. His authority to transfer its negotiable securities may be inferred from evidence that he was in the habit of exercising such power: *Mitchell v. Deeds*, 49 Ill. 416; 95 Am. Dec. 621. The assignment of the note of a railroad company by its president is prima facie the act of the company: *Goodrich v. Reynolds*, 31 Ill. 490; 83 Am. Dec. 240. Compare *Kennedy v. Knight*, 21 Wis. 340; 94 Am. Dec. 543.

MORTGAGE—TRUST—INTENT OF PARTIES.—Whether an instrument is a mortgage or a deed of trust is determined from ascertaining the real intention of the parties as expressed in the writing: *Reece v. Allen*, 5 Gilm. 236; 48 Am. Dec. 336; and the fact that the instrument is made directly to a creditor of the grantor, and not to a third party, is immaterial: *More v. Calkins*, 95 Cal. 435; 29 Am. St. Rep. 128.

NEGOTIABLE INSTRUMENTS SECURED BY MORTGAGE—RECORDING ASSIGNMENT—INNOCENT PURCHASERS OR ENCUMBRANCERS.—The assignee of a mortgage and the accompanying negotiable note, transferred before maturity and for a valuable consideration, takes the securities free from any equities existing between the original parties of which he had no notice: *Note to Murphy v. Barnard*, 44 Am. St. Rep. 340. The indorsee of a promissory note secured by mortgage succeeds to the benefits of the mortgage

security, even though the latter be not formally assigned: *Williams v. Keyes*, 30 Am. St. Rep. 442. An unrecorded assignment of a real estate mortgage is, under the recording act, void as to subsequent purchasers or encumbrancers of the mortgaged premises, in good faith, and for a valuable consideration, whose conveyances are first recorded: *Merrill v. Luce*, 6 S. Dak. 354; ante, p. 844.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

McDOUGALL v. WALLING.

[15 WASHINGTON, 78.]

SURETY—RELEASE OF.—An agreement extending the time of payment made by the principal debtor with the holder of a note must, in order to release the surety, be such an agreement as the principal debtor may enforce.

SURETY, WHEN NOT RELEASED BY AN AGREEMENT TO EXTEND TIME FOR PAYMENT.—An agreement between the principal debtor and the holder of the indebtedness to extend the time for its payment, made upon a false representation that the surety desired and consented to such extension will not release the surety, because the fraudulent misrepresentation employed in procuring it makes the agreement itself invalid, unenforceable, and not binding on the principal debtor.

Andrew F. Burleigh and Thomas A. Gamble, for the appellant.

H. D. Cooley and Francis H. Brownell, for the respondent.

79 GORDON, J. Appellant, McDougall, brought this action in the superior court of Snohomish county upon a promissory note executed by N. D. Walling and William G. Swalwell, payable to the order of Walling, dated April 24, 1893, and payable ninety days thereafter; said note being for the sum of two thousand eight hundred dollars, and interest at the rate of twelve per cent per annum from date until paid. The defendant Walling made default. Respondent Swalwell answered that he executed the note solely for the accommodation of Walling, and was a surety only, all of which was known to plaintiff at the time of the indorsement and delivery of said note to him by Walling; that after the maturity of the note, appellant entered into a definite

agreement with the defendant Walling, whereby the time of payment of said note was extended, and that the agreement to extend was made without the consent of the respondent, and released him from the payment thereof. The appellant replied, denying all of the affirmative matter set out in the answer, and, the cause having been tried before a jury, a verdict was returned in favor of Swalwell. Thereafter, appellant's motion for a new trial was denied, judgment entered dismissing the action as to Swalwell, and the cause appealed.

The undisputed testimony in the case shows that, ⁸⁰ shortly after the execution of the note, Walling sold the same to the appellant, and that, prior to becoming the owner thereof, appellant had no conversation whatever with respondent Swalwell. At the time of its maturity, or within a few days thereafter, Walling requested an extension. It further appears that the sum of two hundred dollars was paid by him at that time to the appellant, for the purpose, as testified by Walling, of paying the interest then due on the note, amounting to about seventy-five dollars, and the balance as consideration for an extension of the note for a period of thirty days, or until August 24, 1893. The appellant, in his testimony, admitted the receipt from Walling of two hundred dollars for the purpose of paying the interest then due upon the note, and the remainder as consideration for his agreeing to postpone suit on the note until August 24, 1893. He further testified that this arrangement was entered into upon the representation of Walling that he came with instructions from Swalwell to get the time extended; that he, Swalwell, was a banker at Everett; that "it was panicky times, and he could not draw the money out of the bank. . . . He pleaded very hard for Mr. Swalwell's credit," and "I finally consented that I would not start an action for a certain length of time. . . . He stated most distinctly that he came down with Mr. Swalwell's sanction and consent." Counsel for the respondent Swalwell objected to the introduction of any testimony as to what Walling said to appellant, because not made in the presence of Swalwell, etc., and the lower court thereupon held that said statements were not competent as against Swalwell; adding: "I will allow him to state what was said there, but will cover it with instructions to the jury afterward"; ⁸¹ and thereafter the court charged the jury in respect thereto as follows: "You are further instructed that when it is sought to bind the defendant by statements made by a third party, not in the presence of the

defendant sought to be charged, it must be shown, not only that such statements were so made, but it must be further shown that such third party was authorized to make such statements by the party sought to be charged." To this ruling, and the giving of the instruction set out, appellant excepted, and has assigned the same as error.

We think that the testimony was competent, and should have been permitted to go to the jury. An agreement between a principal debtor and the holder of a note, to extend the time of payment for a definite period after maturity, in order to release the surety, must be such an agreement as the principal debtor could himself enforce. The representation by Walling (assuming that it was made) that Swalwell requested and consented to the extension which was sought became material, because, assuming that Swalwell was a surety merely, the representation, if false in fact, was fraudulent, and the agreement to extend, which was secured by means of the false statement, was invalid and ineffectual. Walling could not have enforced it, because of the fraudulent means employed in obtaining it. If, on the other hand, the representation was made by Walling upon authority from Swalwell, or if Swalwell subsequently consented to the extension so obtained, he would not be released, assuming that he was a surety only, and that appellant had knowledge of that fact.

The question here presented was involved in *Bangs v. Strong*, 10 Paige, 11. It was there held that where ⁸² an "agreement is obtained from the creditor by a principal debtor upon the false representation of the latter that the surety had authorized him to make it, and the surety afterward refuses to assent to the agreement, the creditor will be at liberty to repudiate it."

It is further insisted by appellant that the evidence was insufficient to justify the verdict. We think, however, that, upon the material issues, the testimony was sufficiently conflicting to require its submission to the jury under proper instructions. As the cause must be retried, however, we deem it proper to say that instructions Nos. 8 and 9, which were excepted to by appellant, should not, in our opinion, have been given. They are incomplete, and, in a measure inconsistent with instructions 1-3, given by the court, which correctly stated the law. Whether the giving of these instructions constituted such error as would require a reversal of the cause, we are not called upon to determine.

As a new trial must be had, we think that, in order to fully determine the rights of parties, special findings should be required of the jury, as provided in section 375 of the Code of Procedure; and, if the jury find that respondent Swalwell was merely surety for Walling, and that appellant knew of that fact at or prior to the time of the purported extension, then they should be required to find whether such extension was secured wholly or in part by means of Walling's falsely representing that Swalwell consented thereto; and, if the jury shall find that such representations were made, then the appellant would be entitled to recover the amount of the note with interest from July 23, 1893, less the sum of one hundred and twenty-five dollars, withheld as bonus or consideration for the extension granted, which last-mentioned sum it ⁸³ would be the right of the respondent to have treated as a partial payment upon the note.

Reversed and remanded.

Scott, Dunbar, and Anders, JJ., concur.

Hoyt, C. J., concurs in the result.

THE TOPIC OF THE RELEASE of a surety from the operation of an agreement between the principal debtor and the payee of an obligation to extend the time of payment was the subject of further consideration in the case of *Bank of British Columbia v. Jeffs*, 15 Wash. 230. Among the contentions in that case was one to the effect that the person claiming to be a surety had signed the note as an apparent maker, and that it was not competent for him to show that he executed that note in the capacity of surety. This contention was overruled, on the ground that it was not only contrary to the great weight of authority elsewhere, but also to several decisions in the same state: *Binnian v. Jennings*, 14 Wash. 677; *Warburton v. Ralph*, 9 Wash. 537; *Culbertson v. Wilcox*, 11 Wash. 522; *First Nat. Bank v. Harris*, 7 Wash. 139.

On several occasions, the principal debtor had given checks for the interest upon the note some days in advance of its actually falling due, and it was insisted that the reception of such interest implied a valid extension of the time of the payment of the note, and therefore operated as a release of the surety. The officials of the bank receiving payment testified that when these checks were given nothing was said about the extension of the time for the payment of the principal debt. The court said that if a creditor, without inadvertence or mistake, received a payment of interest in advance on the note of a debtor, without expressly reserving the right to sue before the expiration of the period for which interest was taken, an implied contract arose to extend the time of payment during the period for which interest was thus paid: *Kerns v. Ryan*, 26 Ill. App. 177; *Hamilton v. Winterrowd*, 43 Ind. 393; *Woodburn v. Carter*, 50 Ind. 376; *Starret v. Buckhalter*, 86 Ind. 439; *Crosby v. Wyatt*, 10 N. H. 318; *New Hampshire Sav. Bank v. Ela*, 11 N. H. 335; *Wakefield Bank v. Truesdell*, 55 Barb. 602; *Union Bank v. McClung*, 9 Humph. 97; *People's Bank v. Pearsons*, 30 Vt. 711; *Uniontown Bank*

v. Mackey, 140 U. S. 220; **Scott v. Scruggs**, 60 Fed. Rep. 721. The court was further of opinion that though none of the checks was received more than six days in advance of the time when interest fell due, that this fact was immaterial, for the reason that an extension of time for six days, or even for one day, would operate to release the surety as fully and effectually as if made for a year, and cited **Brandt on Suretyship**, sec. 344; **Winne v. Colorado Springs Co.**, 3 Colo. 155; **Kerns v. Ryan**, 26 Ill. App. 177; **Berry v. Pullen**, 69 Me. 101; 31 Am. Rep. 248; **Ducker v. Rapp**, 67 N. Y. 464.

Another defense interposed by the surety was, that the creditor, a banking corporation, had after the maturity of the note a considerable amount of money to the credit of the principal debtor, which it was its duty to apply to the extinguishment of his obligations, and to that extent relieve the surety from liability. It appeared, however, that such deposit was the result of a temporary loan made by the creditor to such debtor, and by him subsequently checked out, and it was the opinion of the court that, under these circumstances, the failure to apply the deposit to the obligation sued upon did not constitute any defense on behalf of the surety: **Voss v. German American Bank**, 83 Ill. 599; 25 Am. Rep. 415.

SURETYSHIP—EXTENSION OF TIME OF PAYMENT—RELEASE OF SURETY.—A surety will be discharged if the creditor, by a valid and binding agreement, without the assent of the surety, gives further time for payment to the principal debtor: **Price v. Dime Sav. Bank**, 124 Ill. 317; 7 Am. St. Rep. 367; **Benson v. Phipps**, 87 Tex. 578; 47 Am. St. Rep. 128, and note. But a mere indulgence by a ward of his guardian after coming of age, without any valid agreement for delay or extension of time, does not affect the obligation of the sureties, nor are such sureties released by any agreement procured from the ward through fraud, and which he, on discovering the fraud, resists and procures to be annulled: **Douglass v. Ferris**, 138 N. Y. 192; 34 Am. St. Rep. 435. A void extension of time will not release a surety: **Note to Davis v. Strout**, 22 Am. St. Rep. 567. See, also, the note to **Scott v. Fisher**, 28 Am. St. Rep. 691.

PACKWOOD v. COUNTY OF KITTITAS.

[15 WASHINGTON, 88.]

MUNICIPAL BONDS.—A NOTICE OF AN ELECTION to be held for the purpose of validating county warrants is not fatally defective because it does not state the polling places in the county at which the election will be held, nor the hours of the day when the polls will be open, if the voters, by resorting to the notices required by the general election law to be posted in the several precincts, can ascertain where in each precinct the election will be held.

MUNICIPAL BONDS, AUTHORITY TO MAKE PAYABLE IN GOLD.—County officers authorized to issue bonds are necessarily left with much discretion respecting the condition of such bonds, and may provide that they shall be payable in gold coin, when it has been the usual custom in the state where they are to be issued to make all municipal bonds payable in such coin.

Wood & Oakley, for the appellant.

Eugene E. Wager, for the respondents.

⁸⁹ HOYT, C. J. By this action it was sought to prevent the county of Kittitas from issuing certain proposed funding bonds, and to restrain the officers of said county, who were made defendants, from signing, attesting, or countersigning said bonds. The grounds upon which these objects were sought were the alleged invalidity of the act of March 9, 1893 (Laws, p. 181), under which there had been an attempt to validate the warrants for which the funding bonds were to be issued, the invalidity of the act of March 22, 1895 (Laws, p. 465), which authorized the issuing of funding bonds, and the insufficiency of the election held for the purpose of validating the warrants, even if the act under which it was held was valid. The validity of the first of these acts was recognized by this court in the case of *Hunt v. Fawcett*, 8 Wash. 396, and in *Williams v. Shoudy*, 12 Wash. 363, the objections to the other are not clearly pointed out and we see no reason for holding that it is not in full force.

The regularity of the election proceedings for the validation of the same warrants which are involved in this action was also passed upon in the case of *Williams v. Shoudy*, 12 Wash. 363, and a conclusion reached adverse to the contention of appellant, but the particular ground upon which the appellant in this action principally relies was given but slight consideration. The main contention of appellant in the case at bar is, that the election proceedings were invalid, for the reason that no sufficient notice was given of such election. The alleged insufficiency of the notice consists in the fact that it was not stated therein at what place or places the election would be held, the only statement as to time and place being that on the eighth ⁹⁰ day of November, 1894, in the county of Kittitas, state of Washington, such election would be held, and it is claimed the failure to state in the published notice the places at which the election would be held rendered the notice insufficient. But we are of the opinion that the law did not contemplate that more than a general notice as to when the election would be held throughout the county should be published; that it was intended that voters should resort to the notices required by the general election law to be posted in the several precincts to ascertain where in each precinct the election would be held. We see no reason to doubt the correctness of the decision in the case above referred to, to the effect that this election was sufficient for the purposes for which it was held.

One other fact was alleged which it was claimed would make

the proposed issue of bonds illegal. It was that under the terms of the contract with the firm to whom the bonds were to be sold they were to be made payable in gold coin, and it is claimed that without express authority from the legislature the county officers could not legally make such bonds so payable. But, in our opinion, such authority may be implied from the legislation upon the subject, though not conferred in express terms. When the legislature grants to a municipality the right to issue bonds it necessarily leaves to such municipality much discretion as to the conditions of such bonds, and, excepting as it is restricted by the terms of the act granting the authority, such municipality has discretion to issue such bonds as will best accomplish the general object to secure which their issue was authorized; and since such bonds must be payable in some kind of money, in the absence of express restriction, it is for the municipality to determine as to the kind of money. ⁹¹ Besides, the legislation of this state, when interpreted in the light of surrounding circumstances, may well be held to have conferred express authority to issue bonds payable in gold. All legislation should be interpreted in the light of surrounding circumstances, and it was a well-known fact at the time the legislation in question was enacted, which must be presumed to have been known to the legislature, that the bonds which had theretofore been issued by the municipalities of this state and territory were mostly, if not all, made payable in gold coin. Hence, when authority was given for a further issue of such bonds, without any restriction as to the kind of money in which they should be made payable, it may well be presumed that it was the intention of the legislature that the former custom should be followed and the bonds made payable in gold.

This question was before the circuit court for the district of Washington in the case of *Moore v. Walla Walla*, 60 Fed. Rep. 961, and it was there decided that municipalities of this state were authorized to issue gold bonds. To the same effect is *Farson v. Board of Commissioners*, 97 Ky. 119.

No error is disclosed by the record which can avail appellant, and the judgment of the superior court will be affirmed.

Anders, Dunbar, and Gordon, JJ., concur.

MUNICIPAL BONDS.—The effect of irregularities in voting upon the issue of municipal bonds is discussed in the note to *State v. Commissioners*, 7 Am. St. Rep. 570; but see, especially, the extended note to *De Voss v. Richmond*, 98 Am. Dec. 671.

SODERBERG v. KING COUNTY.

[15 WASHINGTON, 194.]

MORTGAGE SALE, SURPLUS, WHEN EXISTS.—If the mortgagee at a foreclosure sale bids a sum in excess of the mortgage debt, under the mistaken belief that such sum is necessary to pay the commissions due the sheriff for making the sale, such excess must be regarded as a surplus remaining after the satisfaction of the judgment, to which the mortgagor is entitled. His right to the excess is not lost by its payment into the county treasury under the supposition that the county was entitled thereto as commissions for the services of its sheriff.

COUNTY, LIABILITY OF FOR MONEYS MISTAKENLY PAID INTO ITS TREASURY.—Where money is received into the county treasury without right or consideration, and which it would be inequitable for the county to retain, assumpsit may be maintained against it to recover such moneys. So held where the sheriff had retained as commission part of the moneys paid at a foreclosure sale, and paid them to the county, he having no right to exact such commissions, nor the county to receive or retain them in its treasury.

COUNTY, PAYMENT TO, WHEN NOT VOLUNTARY.—If a sheriff receives at a foreclosure sale moneys in excess of the mortgage debt, in the mistaken belief that it was his duty to exact such excess as commissions and to pay it to the county treasurer, the mortgagors are entitled to such excess, and the disposition made of it by the sheriff cannot be regarded as a voluntary payment to the county on the part of the mortgagors, and therefore cannot estop them from maintaining an action against the county therefor.

ACTION FOR MONEYS HAD AND RECEIVED—WANT OF PRIVACY.—An action for moneys had and received lies against any one who has money in his hands which he is not entitled to retain as against the plaintiff. Want of privity between the parties is no obstacle to the action.

Lindsay, King & Turner, for the appellant.

A. W. Hastie and W. W. Wilshire, for the respondent.

194 GORDON, J. Appeal from judgment of the superior court of King county in favor of defendant. This action was brought by plaintiff, as assignee of divers **195** persons, judgment debtors in various foreclosure proceedings, claiming to be entitled to a surplus arising upon each of such foreclosure sales. There are thirty-five separate and independent causes of action, all based upon similar facts, and governed by a common rule of law. The aggregate amount claimed is two thousand and four dollars and eighty-four cents. There was no redemption in any case, and the plaintiff in each of the foreclosure actions became the purchaser. From the record it appears that the amount claimed as surplus in each case was the sum claimed by the sheriff as fees and commission in conducting the sale, and that the

sheriff thereafter paid into the treasury of the respondent county the several amounts, under the mistaken belief that it was his duty to deduct a commission from the amount bid in the respective cases, and turn the amount so collected or deducted into the county treasury, as he is by law required to in all cases where fees as compensation for official services are received by him.

Two principal defenses are urged. First, that the sums claimed by plaintiff were not surplus, to which the plaintiff's assignors were entitled, but constituted a fee or commission which the officer making the sale claimed the right to charge, and which the purchaser at the sale knowingly paid to such officer as a commission charge on said sale; and that "neither the appellant nor his assignors had or has any interest in or concern with the money or transaction, but the same is a matter between the purchaser and the sheriff." The second ground of defense is: "That the sheriff's payment to the county of this indebtedness due from him to either the county or the appellant's assignors was voluntary, with full knowledge of all the facts, under a claim of the county to payment in its own right, and not in any wise as the ¹⁹⁶ agent of or pretending to be authorized to receive the same for or on behalf of appellant's assignors; that the county claimed said payment as creditor of the sheriff on account of his liability to the county for all fees and commissions received by him; that the sheriff was indebted for the amounts herein claimed as surplus, either to the county as for commissions, or to the respective judgment debtors as for surplus; and that his payment of this indebtedness to the county, an independent claimant, in preference of the respective judgment debtors, also independent claimants, does not invest appellant, as assignee of said judgment debtors, with a right of action against respondent for the amounts of these payments, upon a money demand, as for money had and received or otherwise, although it may be true that of right the sheriff should have made such payments to appellant's assignor."

It becomes necessary to ascertain whether appellant's assignors were entitled to the respective sums claimed from the sheriff conducting the sales. Counsel for respondent do not seriously contend that they were not, and this court held in *State v. Prince*, 9 Wash. 107, that a sheriff was not entitled to a commission upon the sale of mortgaged premises under a decree of fore-

closure where the property was bid in by the plaintiff for the amount of the mortgage debt. It matters not that the officer believed that he was by law entitled to and required to retain a commission upon such sale, and that this opinion was concurred in by the bidder, because, in contemplation of the law, the property is sold for the highest sum bid, and the law makes the application of the purchase price. To give effect to what is asserted to have been the intention of the purchaser, viz., that a portion of the sum bid by him was in payment of a commission which the sheriff conducting the sale demanded, and which the bidder supposed he had a ¹⁹⁷ right to demand, would be, in effect, to give such purchaser a preference at the sale, and would be to permit the bidder and the officer to control and apply the proceeds of the sale. He bids a lump sum for the property, not a certain sum for the land, and an additional sum as and for costs and commission. The reasons which induced him to make the bid are quite immaterial, and cannot be inquired into. He is conclusively presumed to know the law. Were the rule otherwise, how could it be ascertained that the actual purchaser was the highest bidder? The amount claimed by appellant as a surplus in one of these causes of action is about five hundred dollars. The logic of respondent's position is, that the purchase price in that case was theoretically five hundred dollars less than the amount actually bid. Who can say that this five hundred dollars might not have deterred some other bidder, who likewise would be presumed to know the law, but might well be ignorant of what was really intended by the rival bidder? There is one sufficient answer to this. That is that the judgment debtor is entitled to an accounting for the sum actually bid as the purchase price of the property sold, and that the law directs how the purchase price shall be applied. Therefore it is not competent to inquire the reasons which may have actuated the purchaser in making his bid. It cannot be told that he would have received the property had his bid been less than it actually was. Suppose that the judgment debtor had availed himself of his statutory right to redeem from the sale; is it not clear that he would have been obliged to pay the amount for which the property was sold as returned by the sheriff, including the very sum which is here termed a "commission," wrongfully but mistakenly claimed by the sheriff, and voluntarily paid by the purchaser? Our conclusion is, that the sum ¹⁹⁸ claimed constituted a surplus in the

hands of the sheriff, which it was his duty to have paid to the judgment debtor: *Wilkinson v. Baxter*, 97 Mich. 536; *Mitchell v. Weaver*, 118 Ind. 55; 10 Am. St. Rep. 104.

2. The remaining question is, Will assumpsit lie against the county for the recovery of such surplus which the sheriff has wrongfully and mistakenly paid into its treasury? Counsel for the respondent insist that the county stands in the position of an independent and adverse claimant, and that it only received from the sheriff payment of a claim alleged upon its part, and that payment by the sheriff "upon its independent claim does not discharge the sheriff from such indebtedness if, as a matter of right, appellant's assignors were entitled to have it paid to them by the sheriff." It is not pretended that the respondent has any valid or legal right to the moneys in controversy. It received the moneys of plaintiff's assignors without right or consideration, and it would be inequitable for it to retain the sums so received. Under such circumstances, the law implies a promise of restitution for the benefit of the rightful owner. As was said by Judge Field in *Pimental v. San Francisco*, 21 Cal. 352: "If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it. . . . If she obtain other property, which does not belong to her, it is her duty to restore it, or, if used, to render an equivalent therefor. . . . The legal liability springs from the moral duty to make restitution. And we do not appreciate the morality which denies in such cases any rights to the individual whose money or other property has been thus appropriated. The law countenances no such wretched ethics; its command always is to do justice."

¹⁹⁹ Nor can plaintiff's right of action be defeated upon the ground of "voluntary payment" made to respondent by the sheriff. As regards the plaintiff or his assignors, the payment is not to be considered a voluntary payment. It was made without their knowledge or consent.

But it is insisted that there is no privity between the plaintiff or his assignors and the respondent respecting the transaction. It is well settled that "an action for money had and received lies against anyone who has money in his hands which he is not entitled to hold as against the plaintiff, and want of privity between the parties is no obstacle to the action": *Bank of Metropolis v. First Nat. Bank*, 19 Fed. Rep. 301.

In *Bayne v. United States*, 93 U. S. 642, the supreme court of the United States say: "Assumpsit will lie whenever the defend-

ant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund."

A well-considered case, which involved this very question, is that of *State v. St. Johnsbury*, 59 Vt. 332. In the course of the opinion in that case, this language appears: "But it is said that assumpsit for money had and received will not lie, for that there is no privity between the state and the village, as the latter received from third persons and has retained the money in good faith, under an adverse claim of right and ownership. But, in order to maintain this action, there need be no privity between the parties, nor any promise to pay, other than what arises and is implied from the fact that the defendant has money in his hands belonging to the plaintiff that he has no right conscientiously to retain. In such case, the equitable principle on which the action is founded implies the ²⁰⁰ promise. When the fact is found that the defendant has the plaintiff's money, if he can show neither legal nor equitable ground for keeping it, the law creates the privity and the promise."

The rule was announced by the court of king's bench as early as 1725, in the case of *Attorney General v. Perry*, 2 Comyn, 481, that "whenever a man receives money belonging to another without any reason, authority, or consideration, an action lies against the receiver as for money received to the other's use; and this as well where the money is received through mistake, under color, and upon an apprehension, though a mistaken apprehension of having good authority to receive it, as where it is received by imposition, fraud, or deceit in the receiver."

In addition to the authorities already cited, the proposition is fully sustained in *Haebler v. Myers*, 132 N. Y. 363; 28 Am. St. Rep. 589; *United States v. State Bank*, 96 U. S. 30; *Criswell v. Whitney*, 13 Ind. App. 67; *Board of Education v. Robinson* (N. M. Aug. 24, 1893), 34 Pac. Rep. 295; *Brand v. Williams*, 29 Minn. 238; *Knapp v. Hobbs*, 50 N. H. 476. Respondent's counsel concede "that the considerations relating to the liabilities of individuals in such cases apply to respondent"; and we know of no reason why the common obligation to do justice, which is binding upon individuals, is not equally applicable to a county. Indeed, in many of the cases cited, the action was upheld against municipal corporations.

A further defense, of the statute of limitations, was interposed by respondent to five of the thirty-five causes of action. As to

this defense, the lower court found against the respondent, and we think its finding in this particular was correct.

For the reasons given, we think that the appellant ²⁰¹ is entitled to recover; and the judgment will be reversed, and the cause remanded for further proceedings in accordance herewith.

Anders and Dunbar, JJ., concur.

ASSUMPSIT—PRIVITY.—Assumpsit must be brought by the person to whom the promise was made and from whom the consideration moved: *Hall v. Huntoon*, 17 Vt. 244; 44 Am. Dec. 332, and note. See, also, the note to *Neale v. Newland*, 38 Am. Dec. 45.

MISTAKE OF LAW—RECOVERY OF MONEYS PAID UNDER.—Fees paid by a county to a public officer under a mistaken belief on his part and that of the county that he was entitled to them by law cannot be recovered by the county, for the reason that its mistake was one of law, for which no recovery can be had: *Painter v. Polk County*, 81 Iowa, 242; 25 Am. St. Rep. 489, and note.

TURNER v. GREAT NORTHERN RAILWAY COMPANY.

[15 WASHINGTON, 213.]

PRACTICE—BILL OF PARTICULARS.—The granting or refusing of a motion for a bill of particulars is within the sound discretion of the trial court, and its ruling in that regard will not be reviewed on appeal, unless there has been a palpable abuse of such discretion. The refusal, in an action against the railway corporation, wherein the plaintiff seeks to recover a sum specified for loss of time, worry, trouble, and annoyance, and anxiety of mind, to compel his filing a bill of particulars to designate the sum which he claims for each of those causes separately, is not an abuse of discretion justifying the reversal of a judgment subsequently rendered against the defendant.

RAILWAY CORPORATION, LIABILITY FOR MISREPRESENTATION OF UNION TICKET AGENT.—If a ticket seller, authorized to sell tickets for several railway corporations, in response to an inquiry made before purchasing a ticket over a designated line, represents that such line will carry the intending purchaser to his place of destination at a time stated, whereas, through a previous accident, such line was out of repair and unable to send trains to such place, the corporation whose tickets are sold with such misrepresentation is answerable to the purchaser for damages resulting to him.

RAILWAY CORPORATIONS, TICKET SELLERS, LIABILITY FOR.—Passengers have a right to rely on information received by them from ticket agents at railway stations in answer to inquiries respecting the arrival, departure, and running of trains, and may recover of the corporation damages resulting to them from receiving incorrect information upon those subjects.

RAILWAYS—DAMAGES FOR DELAY IN TRAINS.—Where an intending passenger is falsely informed by an agent of a railway

corporation of the condition of its road, and is thereby induced to take passage on such road to a point to which such agent knows the road cannot be operated because out of condition; and such passenger, after reaching a point beyond which the road cannot take him, attempts to reach his destination by another road, on which he is delayed because of its condition, the first named corporation is answerable for the damages resulting from this delay, including the expenses of the passenger while thus detained on the line of the second road.

DAMAGES FOR WORRIMENT AND DISAPPOINTMENT resulting from delay in carrying the plaintiff on a railway train and his being compelled to suspend his journey, and mental anxiety induced by the illness of his wife and his inability to make her comfortable, and from his limited means and his inability to hear from home, owing to the interruption of telegraphic communication, cannot be regarded as the proximate result of the wrong of the railway corporation in sending the passenger with his wife over a line when such line was known not to be in a condition to transport them to their point of destination.

DAMAGES WILL NOT BE GIVEN FOR MERE INCONVENIENCE AND ANNOYANCE, such as are felt at every disappointment to one's expectations, if there is no actual physical or mental injury. Therefore, damages are not recoverable for anxiety and suspense of mind in consequence of delay caused by the fault of a common carrier.

DAMAGES FOR LOSS OF TIME BY AN ATTORNEY—EVIDENCE.—If an attorney who is a passenger on a railway train is delayed from a cause entitling him to recover damages against a railway corporation, the amount of his damages can only be established by showing what he had actually earned as an attorney either before or after that time. Evidence of what attorneys of his ability and learning were earning in active practice at that time is not admissible, when he does not appear to have been then engaged in such practice.

EVIDENCE OF DAMAGES FROM LOSS OF TIME.—It is not permissible to permit a plaintiff to give his opinion or estimate of the value of his time while delayed through the wrongful act of a railway corporation without stating the facts upon which such opinion was based.

EVIDENCE.—THE OPINION OF A WITNESS as to the value of an attorney's time is not a question of science or skill, such as could not be determined by a person of ordinary intelligence, and therefore is not admissible in evidence.

DAMAGES FOR LOSS OF ATTORNEY'S TIME.—Where an attorney is entitled to recover from a railway corporation for loss of time occurring through its fault, the jury should be charged to weigh the probability of the attorney's being employed during the time he was thus delayed, even had he reached his point of destination without delay.

C. Wellington, Jay H. Adams, and M. D. Grover, for the appellant.

Graves & Wolf, for the respondent.

214 ANDERS, J. This was an action for damages for the failure on the part of the defendant to transport the plaintiff

and his wife over its line of railway from St. Paul, Minnesota, to the city of Spokane, in accordance with its agreement and duty.

The material facts set forth in the complaint are, briefly, that the defendant is, and at all the times mentioned in the complaint was, a corporation operating a line of railway from St. Paul to Seattle by way of the city of Spokane; that on May 30, 1894, the plaintiff purchased from the agent of defendant, at St. Paul, tickets for himself and wife, and procured checks for their baggage, over the defendant's railway from St. Paul to Spokane, and was induced so to do by the representation of said agent that defendant's passenger train, which would leave St. Paul on the said day, would reach the city of Spokane on the morning of the second day of June following, and that the tickets purchased from the defendant's agent were limited to that time and train; that defendant then ²¹⁵ well knew that it had not been able to run a through train from St. Paul to Spokane for several days prior to that time, and that, owing to a serious break in its roadbed west of Havre, it would not be able to run such through train for a long time thereafter, which fact it negligently and fraudulently concealed from the plaintiff; that plaintiff and his wife took passage on defendant's passenger train which left St. Paul on the evening of May 30, 1894, and, when said train reached Havre, the conductor thereof informed the plaintiff that because of some damage to defendant's road further west, in the state of Idaho, the train would proceed no further, but that the plaintiff and his wife would be taken on defendant's line of railway to Helena, Montana, from which place they would be carried to their destination over the line of the Northern Pacific Railroad Company, and that the tickets then held by plaintiff were good and would be honored for transportation over that road; that plaintiff arrived at Helena on June 1st, and, on the following day, boarded the first west-bound Northern Pacific train and presented his tickets to the conductor, who refused to accept them for transportation and required the plaintiff to pay the fare for himself and wife to Missoula, that being the end of the conductor's division; that owing to serious damage to that road caused by high water, plaintiff could proceed no farther, and was compelled to remain in Missoula from the second to the twentieth day of June; that on said last-mentioned day plaintiff paid the fare demanded for

transportation to his home at Spokane, which place he reached on the twenty-first day of June, having been delayed over night at Hope, Idaho, and that the expense necessarily incurred for extra railroad ²¹⁶ fare and for board and lodging, during the delays at Helena, Missoula, and Hope, was \$86.20.

It is averred in the complaint that "during their detention and delay plaintiff's said wife, in consequence of said delay and her anxiety of mind as to their situation, became sick at said city of Missoula, and was confined to her bed for several days, and plaintiff was much worried, vexed, and annoyed because of his inability to make his wife comfortable, situated as they were at a hotel among strangers, far from home and without access to their baggage; that, because of said detention and delay and of his inability to reach his said home, plaintiff was greatly harassed, troubled, and perplexed about his business, and it otherwise caused him great annoyance, vexation, and anxiety of mind because of his embarrassed situation, the uncertainty when they would reach their home, and the great dangers incident to traveling at that time. That in addition to said extra expense made necessary, as aforesaid, because of defendant's negligent and fraudulent conduct in the premises, and of plaintiff's delay and detention, as aforesaid, and consequent loss of time, worryment, trouble, annoyance, and anxiety of mind, as aforesaid, he has been damaged in the further sum of one thousand dollars."

The plaintiff accordingly demanded judgment against the defendant for one thousand and eighty-six dollars and twenty cents. The defendant moved the court to require the plaintiff to furnish a bill of particulars showing the respective amounts claimed for loss of time, trouble, annoyance, disappointment and anxiety of mind, which motion was denied. The defendant then answered, denying all the allegations of the complaint, except that relating to the incorporation and business of the defendant, and that the plaintiff purchased the tickets mentioned in the complaint. From a judgment in favor of the plaintiff for the sum of seven hundred and fifty dollars this appeal is prosecuted.

²¹⁷ It is claimed by defendant that it had a right, under section 205 of the Code of Procedure, to be advised, in advance, of how much plaintiff sought to recover for loss of time, how much for anxiety of mind, etc., that it might be prepared with its proofs to meet the allegations of the complaint, and that if the allegations as to loss of time, trouble, annoyance, and disap-

pointment of mind, authorized the introduction of any proof, the damages were special and the defendant was entitled to a statement of the particular items.

It has been repeatedly held in New York, under a statute like ours, and seems to be the settled rule, that the granting or refusing of a motion for a bill of particulars is within the sound discretion of the trial court, and its ruling in that regard will not be reviewed on appeal, except in cases where there has been a palpable abuse of such discretion: *Tilton v. Beecher*, 59 N. Y. 176; 17 Am. Rep. 337; *People v. Tweed*, 63 N. Y. 194; *Dwight v. Germania Life Ins. Co.*, 84 N. Y. 493.

No such case, we apprehend, is presented here. The object of the statute is to enable a party reasonably to protect himself against surprise on the trial: *Butler v. Mann*, 9 Abb. N. C. 49; but we are unable to see how the defendant could have been surprised by the testimony adduced by the plaintiff corroborative of the averments of the complaint, to which defendant's motion for a bill of particulars was especially addressed. So far as the complaint is concerned, its allegations were sufficient to let in the evidence admitted. The damages claimed, or at least those claimed for loss of time, were general, and therefore were not required to be specifically alleged: *Thompson on Carriers of Passengers*, 550.

It appears from the testimony of plaintiff that he ²¹⁸ purchased his tickets for transportation at the office of the Union Depot at St. Paul, and not at the office of the defendant company, and that the person from whom he purchased them was engaged in selling tickets over various other lines of railway whose trains entered and departed from that depot. Upon the trial, the court permitted the plaintiff, over the objection of defendant, to detail a conversation between himself and the ticket seller, which occurred at the time the plaintiff purchased his tickets, in which the ticket seller stated, among other things, that defendant's trains were running through to Spokane on schedule time, and, if there were no accidents, plaintiff would arrive at his destination on the morning of June 2, 1894.

It is contended that this was error, for the reason that it was not shown that the person who made these statements was an agent of the defendant, and authorized to bind it by such declarations. But the fact that the tickets so sold were furnished by the railway company, and were accepted as its tickets by the conductors of its trains, would seem to be sufficient proof that the

seller was a ticket agent of the company, and therefore clothed with the usual powers of such agents.

It is generally the fact that there is no other person than the ticket agent at a railroad station who can give travelers the necessary information as to the arrival, departure, and running time of trains, and the rule, as formulated by a learned text-writer, is, that passengers have a right, until otherwise informed, to rely on information received by them from ticket agents, in answer to inquiries concerning those matters, provided they do not disregard other reasonable means of information: 3 Wood on Railroads, Minor's ed., 1654.

²¹⁹ The testimony objected to was certainly competent for the purpose of showing that the plaintiff himself was not in fault in taking the particular train on which he started home. It was also competent as tending to prove the contract between the parties, but, for that purpose, it was comparatively unimportant, in view of the fact that the tickets themselves, which were prima facie evidence of the defendant's contract, represented upon their face that plaintiff would be carried to his destination within the time mentioned by the ticket seller.

Objection is made by the defendant to the action of the court in permitting the respondent to state to the jury the amount he was compelled to pay for board and lodging and other necessary expenses for himself and wife while at Missoula, and it is urged, with much earnestness, that the expense incurred at that place was not the result of the breach of defendant's contract, but of an independent, intervening cause, viz., the inability of the Northern Pacific Railroad Company, upon whose line the plaintiff had become a passenger, seasonably to carry him to his destination. The fact is, however, that the plaintiff and his wife while at Missoula were not passengers on the Northern Pacific Railroad, and the company operating that road had violated no contract with them, or duty or obligation concerning them. It carried them safely and promptly to that place and thereby discharged its whole duty. If plaintiff had, on arriving there, requested it immediately to convey him to Spokane, the fact that its road had been so damaged by floods and high water that it could not move its trains would have been a legal excuse for a failure to comply with such request. The plaintiff had no right of action against the Northern Pacific ²²⁰ Railroad Company for damages suffered by reason of the delay at Missoula, and it therefore follows that, if the defendant is not liable therefor, the

plaintiff is without remedy, and must suffer a loss occasioned by no fault on his part.

But we do not think that the plaintiff is thus remediless. It was his privilege, if not his duty, on being informed that the defendant was unable to transport him in accordance with the terms of its undertaking, to procure some other reasonable means of conveyance, and proceed on his journey. He chose what seemed to him, and apparently to the conductor of the defendant's train, to be the most direct and expeditious route, and which, so far as we are advised, was the only one practicable. The omission of the defendant to fulfill its engagement caused the plaintiff to seek transportation over the Northern Pacific Railroad, and it is therefore justly liable for the expense thereby incurred, including that incident to unavoidable delay: 3 Sutherland on Damages, 2d ed., sec. 936; 2 Sedgwick on Damages, 8th ed., sec. 864.

In answer to the question "Now Colonel, I wish you would go on and state to the jury what, if any anxiety, worriment, etc., you suffered on account of your delay, being separated from your baggage, and all of those things that are proper under the ruling of the court, in consequence of this delay?" the plaintiff was allowed, notwithstanding the defendant's objection, to testify that he was greatly worried, troubled, and annoyed by the combination of circumstances surrounding him at that time, among which were that he had to pay out more money than he had contemplated paying out; that the Northern Pacific Railroad Company would not board him at Missoula as they did their passengers; that his means were limited and ²²¹ he did not know how long he had to stay there; that he could not hear from home, the telegraph line being broken down; that his wife was taken sick and lay in bed three days in consequence of her worriment, and that he could not make her comfortable under the circumstances.

Damages for "worriment" and disappointment, resulting from such circumstances, are too remote to be recovered in this action. The mental anxiety of the plaintiff induced by the sickness of his wife and his inability to make her comfortable, or his limited means, or his inability to hear from home owing to the interruption of telegraphic communication, cannot be regarded as the proximate result of the alleged wrongful acts, or omissions of the defendant, and the court therefore erred in permitting this testimony to be submitted to the consideration of the jury.

The court also erred, and for the same reason, in instructing the jury generally that the plaintiff was entitled to recover for worry and mental excitement such sum as would fairly and reasonably compensate him therefor.

"Damages will not be given for mere inconvenience and annoyance such as are felt at every disappointment of one's expectations, if there is no actual physical or mental injury": 1 Sedgwick on Damages, 8th ed., sec. 42.

And hence damages cannot be recovered for anxiety and suspense of mind in consequence of delay caused by the fault of a common carrier: *Triggs v. St. Louis etc. Ry. Co.*, 74 Mo. 147; 41 Am. Rep. 305; *Hobbs v. London etc. Ry. Co.*, L. R. 10 Q. B. 111; *Hamlin v. Great Northern Ry. Co.*, 1 Hurl. & N. 408; *Walsh v. Chicago etc. Ry. Co.*, 42 Wis. 23; 24 Am. Rep. 376.

Nor, in an action against a railroad company for a ²²² refusal to carry, can the plaintiff recover damages for fatigue suffered by him in walking to his place of destination, or for mental and physical suffering caused by sickness contracted in such walk: *St. Louis etc. Ry. Co. v. Thomas* (Tex. Civ. App. June 13, 1894), 27 S. W. Rep. 419.

But it is urged by the learned counsel for plaintiff that this court in the case of *Willson v. Northern Pac. R. R. Co.*, 5 Wash. 621, repudiated the doctrine that damages cannot be recovered for mental suffering which is not connected with physical injury, and that the testimony and the instruction as to mental anxiety and excitement, above mentioned, were in accordance with the principles there announced. That was an action for damages for an unlawful expulsion of a passenger from a railway train, and, while it is true that we held, in accordance with what was deemed to be the weight of authority, that the plaintiff was entitled to compensation for the sense of wrong suffered and the feeling of humiliation and disgrace occasioned by the wrongful act, we did not undertake, or intend, to announce any rule with respect to the measure of damages in a case like the one at bar. That case is clearly distinguishable on principle from this, and the decision therein, in our judgment, in no wise militates against the views we have here expressed. In *Willson v. Northern Pac. R. R. Co.*, 5 Wash. 621, the court proceeded upon the theory that humiliation and mental distress were the natural and proximate, if not in fact the necessary, result of the wrongful act of the defendant, but, in the present case, the necessary element of proximity is wholly wanting. The case of *St. Louis*

etc. Ry. Co. v. Berry (Tex. App. Nov. 12, 1890), 15 S. W. Rep. 48, cited by plaintiff, and which supports his contention, seems to us to be contrary to sound policy and opposed to the general current of authority.

²²³ In fact, the trial court, in one portion of its charge to the jury, recognized and announced what we hold to be the correct doctrine, when it stated to the jury that the plaintiff could not recover damages for any mental suffering experienced by reason of the refusal of the conductor of the Northern Pacific Railroad Company to accept the tickets tendered to him by plaintiff for transportation; and for what reason, then, it told the jury that the plaintiff was entitled to damages for mental anxiety and suffering endured in consequence of his delay, we are unable to perceive. Surely no court could say that, in contemplation of law, the mental agitation or excitement caused by being delayed on a journey is of a different character from that produced by unexpectedly having to pay extra fare for transportation. The mental sensation in each case, whether it be called excitement, anxiety, annoyance, or worry, is manifestly the result of disappointed hope or expectation merely, for which, as we have seen, no damages can be awarded.

It appears from the evidence that the plaintiff is an attorney at law and well known as such at Spokane, but that he had not been engaged in the practice of his profession for two years prior to the time when his alleged cause of action arose, and, upon the trial, he testified that he estimated the time lost, by his being delayed, to be reasonably worth the sum of twenty-five dollars per day. Two other attorneys were also called as witnesses for plaintiff, one of whom stated that the services of attorneys of the ability and learning of the plaintiff, who were engaged in active practice in Spokane during the month of June, 1894, were worth from twenty-five to thirty dollars per day, and the other that they were worth from thirty to forty dollars per day.

All of this evidence was objected to on the alleged ²²⁴ ground that it was incompetent, irrelevant, and immaterial, and it is here insisted that the court erred in overruling the objection. Now, it is evident that, if the plaintiff was delayed in reaching his destination by the fault of the defendant, he was damaged, on account of lost time, to an amount exactly equal to that which he would have earned by the practice of his profession (for it is as a lawyer only that he claims damages for loss of time), had he been at home during such delay; but, to entitle him to a recov-

ery, it was incumbent upon him to prove such amount by competent and legal evidence.

As to the proof of damages for time lost by professional men, Mr. Sedgwick says: "In the case of most professional men, there can be no way of fixing a general scale of remuneration. The exclusive services of such men cannot be measured by any pecuniary scale common to a whole class. The most trustworthy basis of damages in such a case is the amount which the injured party has earned in the past. This is, however, only evidence from which the jury will be enabled to say what the services of such a man as the plaintiff are worth, and the jury should distinctly understand that it is not to be taken as the necessary and legal measure of damages": 1 Sedgwick on Damages, 8th ed., sec. 180. And this statement of law seems to be amply supported by the authorities.

It is apparent, therefore, that the "most trustworthy basis of damages" was not adopted in the trial of this cause. There was no proof whatever of what the plaintiff actually earned, as an attorney, either before or after the particular time in question. Of course, he earned nothing immediately before that time, because he had not been engaged in the practice of the law for the preceding two years, but, as he resumed ²²⁵ the practice of his profession immediately after his arrival at Spokane, we think it would have been proper to have shown what he earned thereafter, not as establishing in itself the value of his time, but as evidence to aid the jury in fixing it. It would even have been permissible to submit to the consideration of the jury, under proper instructions, proof of the earnings of the plaintiff when previously engaged in practicing law in the city of Spokane; but we are inclined to the opinion that it was hardly proper to prove what the time of practicing attorneys was worth, as that would constitute no fair basis of damages, where the value of a person's time depends so much upon his individual exertions.

Neither was it proper to permit the plaintiff himself to state his own opinion or "estimate" of the value of his time, without stating the facts upon which such opinion was based. Indeed, the testimony of each of the witnesses, who testified as to the value of an attorney's time was substantially nothing more than an expression of his individual opinion upon the subject, and the question involved was not one of science or skill, such as could not be determined by a jury of ordinary intelligence, without the aid of the opinions of others. If facts only had been stated, the jury could have drawn their own conclusions. Upon this issue the

jury were instructed that for loss of time plaintiff was entitled to recover such sum as his time at home, for the period he was delayed by reason of defendant's failure to transport him, was reasonably and fairly worth in his profession or business. And, as an abstract proposition of law, the instruction was correct, but, as applied to the proofs, it was misleading ²²⁶ because it virtually authorized the jury to adopt the amount stated by the plaintiff himself, or that which they might infer from the testimony of either of the other witnesses to be the reasonable value of plaintiff's time, as the absolute and certain measure of damages. Even if it were conceded that the evidence was admissible and that it showed a "general scale of remuneration" common to all attorneys, such as the plaintiff, the instruction would still be open to the same objection, for it left out of consideration entirely the probability that plaintiff would have had professional employment had he been at home during the period of his detention: *Yonge v. Pacific Mail S. S. Co.*, 1 Cal. 353; 3 *Sutherland on Damages*, 2d ed., sec. 936; 2 *Sedgwick on Damages*, 8th ed., sec. 863.

The jury should have been distinctly charged to weigh that probability, for the manifest reason that the plaintiff's right to damages, for loss of time, depended upon the fact whether the time during which he was delayed would have been of pecuniary value to him if he had arrived at his destination without detention. Under the instructions as given, the jury were left to determine, as best they could, the amount of damages, without being informed as to the rule by which such damages should be measured. It is difficult at best to determine the value of time in a case like this, where such value is not governed by any established rate of wages, and it is therefore highly important that the jury should be fully informed as to the rules and principles by which they should be guided.

What we have already said renders it unnecessary for us to specially consider the remaining points made by the defendant.

²²⁷ The judgment must be reversed and the cause remanded for a new trial.

Hoyt, C. J., and Gordon, J., concur.

BILLS OF PARTICULARS—DISCRETION OF COURT.—In an action of criminal conversation the trial court has power to grant a bill of particulars, although granting or refusing thereof is discretionary: *Tilton v. Beecher*, 59 N. Y. 176; 17 Am. Rep. 337.

RAILROADS—DAMAGES FOR DELAY.—A passenger on a railway train negligently carried beyond her destination, but receiving

no personal injury or insult, may not recover for anxiety: *Trigg v. St. Louis etc. Ry. Co.*, 74 Mo. 147; 41 Am. Rep. 305, and note. A person negligently carried beyond his station may recover from the railroad compensation for the inconvenience, loss of time, and labor of traveling back: *Pennsylvania R. R. Co. v. Aspell*, 23 Pa. St. 147; 62 Am. Dec. 323. See, also, *Thompson v. New Orleans etc. R. R. Co.*, 50 Miss. 315; 19 Am. Rep. 12.

RAILROADS—LIABILITY FOR ACTS OF TICKET AGENT.—A person purchasing a railway ticket has a right to rely upon the agent of the company to give him a proper ticket when called and paid for, and the company may be compelled to respond in damages for his mistake: *Georgia R. R. etc. Co. v. Dougherty*, 86 Ga. 744; 22 Am. St. Rep. 499, and note; *Hufford v. Grand Rapids etc. R. R. Co.*, 64 Mich. 631; 8 Am. St. Rep. 859, and note.

FAWCETT v. SUPERIOR COURT.

[15 WASHINGTON, 342.]

APPEAL, WHEN DOES NOT SUSPEND PROCEEDINGS.—If a judgment is entered in a quo warranto to the effect that the relator is entitled to an office held by the defendant, an appeal, though accompanied by a stay bond, does not stay the judgment, nor deprive the relator of the right to the immediate possession of the office.

JUDGMENT, WHEN SELF-EXECUTING AND NOT SUSPENDED BY AN APPEAL.—A judgment of ouster from a public office is self-executing, and deprives the person against whom it is of all official duty, and completely excludes him from the office as long as the judgment remains in force. Its force is not released by the pendency of an appeal, whether accompanied by a stay bond or not.

Hugh Farley, for the relator.

Murray & Christian and J. S. Whitehouse, for the respondent.

³⁴² **ANDERS, J.** At a municipal election held in the ³⁴³ city of Tacoma on the seventh day of April, 1896, the relator herein and one Edward S. Orr were opposing candidates for the office of mayor. Having received and canvassed the returns of the election, the city council determined and declared that Mr. Fawcett had received the highest number of votes cast for the office of mayor, and that he was entitled to the office, and thereupon caused a certificate of election to be issued and delivered to him. He thereupon entered upon the duties of the office and took possession of the books, papers, and property belonging thereto. Soon thereafter, Mr. Orr, claiming to have been elected notwithstanding the determination of the council to the contrary, filed an information in the nature of a quo warranto in the superior court of Pierce county to test the title to said office. Upon the trial of the issues presented by the pleadings in that

proceeding, it was adjudged that the relator Orr was entitled to the office, and a judgment of ouster was entered, and the defendant, Fawcett, was ordered to deliver over all books, papers, and property belonging to the same. Defendant, Fawcett, thereupon gave notice of an appeal to this court, and, in due time, filed his appeal bond, after which he requested the judge of said court to fix the amount of a bond to stay proceedings on the judgment, which request the judge complied with, but distinctly ruled that he would not determine the effect of such bond, and that he would not make any ruling or decision as to the status of the parties or the litigation in case such bond should be given. Thereafter, Mr. Fawcett filed a bond in the sum designated by the court, and conditioned in accordance with the provisions of the statute. Subsequently, Mr. Orr demanded possession of the office and of the property belonging thereto. Said demand was refused, and said Fawcett ³⁴⁴ retained the possession of said office and said property, and continued to use and exercise the rights and privileges and to perform the duties appertaining to said office. The making of said demand, and the refusal thereof, was brought to the attention and knowledge of the judge of the superior court by complaint and affidavits, and such proceedings were had thereon that said Fawcett was ordered to show cause why he should not be arrested to answer for contempt for disobedience of the lawful order and judgment of said court. At this stage of the proceedings, said Fawcett caused to be issued out of this court an alternative writ of prohibition directed to said superior court and to W. H. Pritchard, judge thereof, requiring and commanding it and him to show cause why they should not be prohibited and restrained from further proceeding to punish said Fawcett for said alleged contempt of court.

The position of the relator herein seems to be that the bond which was filed in the quo warranto proceeding not only stays the proceedings, but suspends the judgment of ouster, so that he may, pending the appeal, continue to exercise the functions of the office from which the judgment, by its terms, expressly excluded him. On the other hand, the respondent contends that a bond to stay proceedings, conditioned as required by law, will not stay or suspend a judgment rendered in a proceeding upon an information in the nature of a quo warranto to determine the title to a public office. Which one of these propositions is correct, is the first question for our determination.

Our statute (Laws 1893, sec. 7, p. 123) provides that: "An appeal shall not stay proceedings on the judgment or order ap-

pealed from, or on any part thereof, unless the original or a subsequent appeal bond be ³⁴⁵ further conditioned that the appellant will satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the supreme court may render or make, or order to be rendered or made by the superior court, and (where such condition is applicable) shall pay all rents of or damages to property accruing during the pendency of the appeal, out of the possession of which any respondent shall be kept by reason of the appeal."

This provision is quite general and comprehensive in its application, but it will be observed that it only prescribes what shall be the conditions of bonds which must be filed in order to stay proceedings on judgments and orders appealed from, and does not, either directly or by necessary implication, purport to suspend or destroy the force and effect of such judgments or orders. In fact, the only fair and reasonable implication from the language used is, that it was the understanding and intention of the legislature that such judgments and orders should remain in force during the pendency of the appeal. The effect, then, of the appeal in the quo warranto case, after the statutory stay bond was filed, was to leave the proceedings in the same situation they were in at the time the appeal bond was filed, and the appeal became effectual: *Graves v. Maguire*, 6 Paige, 379; *Clark v. Clark*, 7 Paige, 607; *Burr v. Burr*, 10 Paige, 166; *First Nat. Bank v. Rogers*, 13 Minn. 407; 97 Am. Dec. 239.

If, therefore, the judgment of ouster deprived Mr. Fawcett of the office of mayor, and if such judgment is, as the respondent claims, self-executing, he was not restored to his former official position by the filing of a bond to stay proceedings.

The question then is, What is the effect and nature of a judgment of ouster from a public office? It seems to be the settled rule that such a judgment divests ³⁴⁶ the person ousted of all official authority whatever, and fully and completely excludes him from the office as long as the judgment remains in force: *High on Extraordinary Legal Remedies*, 2d ed., sec. 756; *Mechem on Public Officers*, sec. 497.

And a judgment in favor of a relator in a proceeding by information to try the title to a public office is, from its very nature, self-executing. By its own force, and without the aid of process or further action of the court, it accomplishes the object sought to be obtained. So far, then, as such a judgment is concerned, there is nothing upon which a stay bond can operate, **except an execution for costs, where, as in this case, costs are**

awarded to the relator. As soon as the judgment was rendered in favor of Mr. Orr, he became the mayor of the city of Tacoma, and was entitled, by virtue of section 685 of the Code of Procedure, to proceed to exercise the functions of the office, after qualifying as required by law, unless the judgment was absolutely annulled by the filing of the stay bond, and we are clearly of the opinion, as already intimated, that it was not.

The result of permitting such a judgment to be suspended by an appeal and stay bond would, for obvious reasons, in many instances, in effect, completely destroy the relator's remedy. If such a result had been intended, or contemplated, by the legislature, they would, we think, have so stated, or at least would have required the filing of a bond by the appellant providing for the payment to the respondent of all damages sustained by reason of being deprived of the office during the pendency of the appeal, as they have done in cases where a respondent is kept out of the possession of property. The following authorities are in point on the questions here involved: *People v.* ³⁴⁷ *Stephenson*, 98 Mich. 218; *State v. Woodson*, 128 Mo. 497; *Fylpaa v. Brown County* (S. D., April 20, 1895), 62 N. W. Rep. 962; *Allen v. Robinson*, 17 Minn. 113; *Jayne v. Drorbaugh*, 63 Iowa, 711; *State v. Meeker*, 19 Neb. 444; *Walls v. Palmer*, 64 Ind. 493; *Elliott on Appellate Procedure*, secs. 392, 393.

In the case last cited, the supreme court of Indiana ruled that a judgment suspending an attorney from practice executed itself, except as to costs, and that the granting of a supersedeas only suspended the right to enforce the collection of costs, and did not allow the attorney to practice pending the appeal. That is an interesting and instructive case, and the principle upon which the decision rests is equally applicable to the case at bar.

In *Jayne v. Drorbaugh*, 63 Iowa, 711, which was an action upon a supersedeas bond given in a proceeding to test the title to an office, the court held that the plaintiff, who was the successful party, had, under the statute of Iowa, which is almost identical with ours, the right to the possession of the office, and that the judgment was not suspended by the appeal and stay bond. The conditions of the bond in that case were substantially in the language of the bond now under consideration, and in the course of the opinion the court said: "When it has been determined by the district or circuit court, in a proper proceeding, that a person is entitled to the possession of a civil office to which he claims to have been elected by the people, an appeal to this court should not have the effect to deprive such person of such of-

fice, pending the appeal, unless the statute in terms so provides. It is provided by statute that 'an appeal shall not stay proceedings on the judgment,' unless a bond is filed, conditioned as provided by law: Code, sec. 3186. The bond sued on is thus conditioned. ³⁴⁸ . . . We think, if the intent was that the bond and appeal should have the effect to prevent the plaintiff from taking possession of the office, the statute, in fixing the terms and conditions of the appeal bond, would, in clear and distinct terms, have contained provisions to that effect. It is obvious, however, that it does not do so." This language, in our judgment, is peculiarly applicable to this case. And in *People v. Stephenson*, 98 Mich. 218, the same rule was announced, under a statute as to stay bonds in terms fully as general as our own.

Nor are the views we have expressed opposed to the decisions of this court in *State v. Sachs*, 3 Wash. 96, and in *State v. Superior Court*, 12 Wash. 677. In the first of these cases, this court held that the party appealing had a right to file such a bond as the statute provided for, and that it was the duty of the judge of the trial court to fix the amount thereof, as required by law. But we expressly refrained from determining the effect of such bond upon the judgment appealed from. The judgment from which the appeal was taken in that case was final, and the appellant was adjudged to pay the costs, and he therefore had an undoubted right to arrest proceedings for costs at least, and, hence, to file the only bond provided by law for arresting or staying proceedings; and all that was actually decided in the case in 12 Washington, above mentioned, relating to the effect of bonds to stay proceedings, was that the provision of the statute as to such bonds applied to and stayed proceedings on the order then under consideration. The proceeding for contempt was not instituted for the purpose of enforcing the judgment of ouster, for, as we have seen, that judgment was already executed, but to compel ³⁴⁹ obedience to a lawful order of the superior court. It was an independent proceeding in which the state was plaintiff (Code Proc., sec. 783), and although the judgment appealed from constituted evidence on which the court, in part, acted in making the order now sought to be prohibited, it was not a proceeding on the judgment, and hence was not stayed or suspended by the bond which was filed in the original case: *Welch v. Cook*, 7 How. Pr. 282.

And besides, if the relator herein should be found guilty of contempt, as alleged, he can appeal from the judgment of conviction, as in other cases, and have the proceeding reviewed by this court upon the merits.

From the foregoing considerations, it follows that the peremptory writ must be denied, and it is so ordered.

Scott, Dunbar and Gordon, JJ., concur.

THE OPINION OF THE COURT in the principal case was re-affirmed and applied in *State ex rel. Mullen v. Superior Court*, 15 Wash. 376. After the relator had obtained a judgment in his favor, and been placed in possession of the office, the defendant appealed, and sought an order in the superior court requiring the relator to surrender possession of the office during the pendency of the appeal. An application was made to the supreme court for a writ prohibiting the superior court from taking any action which might deprive the relator of the possession of the office. The court held that when the appeal was perfected, the superior court had no jurisdiction to take any action in the proceeding, except those specially provided for in the act relating to appeals in which the making of the threatened order was not included, and, therefore, that as the superior court was without jurisdiction, the supreme court would, by prohibition, prevent it from making any order in the case, and further that the judgment in the principal case established it as the rule of the state of Washington that a judgment of ouster was not suspended by an appeal, and therefore that the relator, notwithstanding the appeal, remained entitled to the possession of the office.

APPEAL—EFFECT OF.—The only effect of an appeal from a judgment supplemented with the filing of a proper supersedeas bond is to stay execution: *Willard v. Ostrander*, 51 Kan. 481; 37 Am. St. Rep. 294, and note. An appeal from a judgment forfeiting the charter and franchise of a corporation supported by a sufficient bond stays all further proceedings under such judgment: *Have-meyer v. Superior Court*, 84 Cal. 327; 18 Am. St. Rep. 192. An appeal bond conditioned to pay a judgment, if affirmed, stays the proceedings, but does not operate to discharge a levy made prior thereto: *First Nat. Bank v. Rogers*, 13 Minn. 407; 97 Am. Dec. 239, and note.

QUO WARRANTO.—The effect of a judgment of ouster in quo warranto is discussed in the extended note to *People v. Rensselaer etc. R. R. Co.*, 30 Am. Dec. 52.

WATSON v. REED.

[15 WASHINGTON, 440.]

JURY TRIAL, VERDICT WHEN NOT OBTAINED BY LOT. If the jurors, after agreeing to find a verdict for the plaintiff, at the suggestion of their foreman, each wrote on a piece of paper the amount to which he deemed plaintiff entitled, after which the amounts so written were added together and the aggregate divided by the number of jurors, and they subsequently and without making any agreement to do so accepted the quotient as the amount of their verdict, such verdict is not reached by chance or lot, and the mode of reaching it is not objectionable.

Frank H. Rudkin, for the appellant.

Reavis & Englehart and Whitson & Parker, for the respondents.

⁴⁴⁰ GORDON, J. This action was brought to recover damages for a breach of a contract to execute a lease. A verdict for the appellant, plaintiff below, in the sum of one hundred and sixty-five dollars, was returned by the jury, which verdict was thereafter set aside and a new trial awarded in the lower court upon the sole ground that it was "arrived at by a resort to the determination of chance or lot." From the order setting aside said verdict and granting a new trial the plaintiff has appealed.

Subdivision 2 of section 400 of the Code of Procedure makes the affidavits of one or more of the jurors admissible for the purpose of showing that a verdict was arrived at in the manner claimed in this case. The affidavits of two jurors who served in the cause were considered ⁴⁴¹ upon the hearing of the motion. In one of them it is stated that, "As soon as ten jurors in the cause agreed upon a verdict in favor of the plaintiff, the jury proceeded to ascertain and fix the amount of such verdict. The foreman of said jury suggested that each juror write down on a slip of paper the amount he deemed plaintiff entitled to; that said several amounts be added together and the sum so ascertained be divided by twelve; that each of the twelve jurors did so, and the sum of the several amounts was divided by twelve which gave a quotient of about one hundred and sixty-three dollars."

It is further stated: "That there was no agreement on the part of any of said jurors to return a verdict for the amount ascertained in the manner above stated, but that said method of ascertaining the amount was resorted to for the sole purpose of ascertaining the average sense of the jury on the question of damages; that the sum of one hundred and sixty-five dollars was the final and only amount agreed upon by the jury in said cause, and none of the jurors in said cause ever agreed to be bound by, or to return into court, a verdict for any other or different amount, or to be bound by the result of any lot or chance in arriving at the amount of said verdict."

Section 1 of the act of March 8, 1895 (Sess. Laws, p. 59), authorizes the return of a verdict in a civil action by ten or more jurors. We think the showing made was insufficient to authorize the setting aside of the verdict. The case differs from that of *Gordon v. Trevathan*, 13 Mont. 387, 40 Am. St. Rep. 452,

wherein it appeared that an agreement was entered into by the jury to arrive at the result by a quotient verdict, and it appeared that at least one juror was induced to assent to the verdict because of the agreement so reached. And so too in *Pawnee Ditch etc. Co. v. Adams*, 1 Colo. App. 250, the ⁴⁴² verdict was obtained by averaging the estimates of the individual jurors under an agreement to be bound by the result. In the present case, it appears that a requisite number of jurors had concluded that the plaintiff was entitled to a verdict, and the marking was for the purpose of getting the average sense of the jury as to the amount of the recovery as a basis of discussion or further consideration, but there was no agreement or understanding that the average so obtained should be the sum of their verdict. In other words, the jurors and each of them were free to act on the result of the general average unrestricted and unembarrassed by any previous arrangement or agreement to be bound by the general average; and we agree with counsel for the appellant that there is no impropriety in a jury's resorting to this method for the sole purpose of arriving at an agreement, when the minds of the jurors are free to deliberate and act upon the result. And this view we think is sustained by the authorities: *Grinnell v. Phillips*, 1 Mass. 530; *Dorr v. Fenno*, 12 Pick. 521; *Dana v. Tucker*, 4 Johns. 487; *Hayne on New Trial and Appeal*, sec. 71; *Hilliard on New Trials*, 2d ed., sec. 13, p. 161.

The cause will be remanded and the lower court is directed to vacate its order awarding a new trial and to enter judgment upon the verdict in accordance with this opinion.

Hoyt, C. J., and Dunbar, Scott, and Anders, JJ., concur.

TRIAL—QUOTIENT VERDICTS.—If jurors agree to write various sums, and add them together and divide the aggregate sum by twelve, and that the result so ascertained shall be their verdict, such verdict is bad and will be set aside. On the other hand, if, without any previous agreement, the amounts suggested by each juror are added, and the aggregate divided by twelve and the result accepted by the jurors as their verdict, such verdict is not objectionable: *Gordon v. Trevarthton*, 13 Mont. 387; 40 Am. St. Rep. 452, and note with the cases collected. See, further, the extended note to *Hilton v. Southwick*, 35 Am. Dec. 259.

WASHINGTON BANK v. FIDELITY ABSTRACT ETC. Co.

[15 WASHINGTON, 487.]

EXECUTION, PROPERTY SUBJECT TO.—A SET OF ABSTRACT BOOKS and indexes made by the judgment debtor are subject to execution under a statute declaring that all property, real and personal, of the judgment debtor not exempt by law shall be liable to execution.

Thomas & Dovell, for the appellant.

Thomas H. Brents and Wellington Clark, for the respondent.

487 DUNBAR, J. The appellant corporation, by its secretary, S. E. Dean, applied to the respondent, a corporation, for a loan of two thousand dollars, offering as security a chattel mortgage on a set of abstract records, maps, and indices of lands in Walla Walla county. The particular description was as follows: 488 “The abstract records of all lands in Walla Walla county, state of Washington, and all maps, plats, and indices thereunto belonging, or in any wise appertaining, now in the office of said mortgagor.”

The loan was made, appellant made default in payment, and respondent brought suit to foreclose the mortgage. The defendant answered, setting up as an affirmative defense that the property described in the mortgage was a copy of the financial records of Walla Walla county, arranged in a certain and peculiar manner by appellant, together with certain peculiar indices to said records made and arranged by appellant; that without a knowledge of the arrangement of said copies and said indices the said property was of no value whatever; that the property described was the product of the work and mind of the said Dean, secretary, and of no other, and that the same were made and arranged for the use of said corporation, and none of the property was of any value whatever, unless the party having possession thereof had the right to publish and copy the same. The cause was referred to a referee, and, after trial, the referee returned a report recommending the decree as asked in the complaint.

The defendant below excepted and asked the court to make finding in accordance with the answer just above quoted. Only one question is brought to the attention of this court, namely, the contention that on account of the peculiar nature of the property described in the mortgage, the court erred in decreeing its sale. The appellant relies on the case of *Dart v. Woodhouse*, 40 Mich. 399, 29 Am. Rep. 544. This case holds that a set of abstract books, such as those in suit, is but the unpublished manuscript

of an author, valuable only on account of its literary contents, ⁴⁸⁹ and belongs to the class of unleviable property, such as a patent right or a copyright, which are held by most of the courts to be unassignable privileges, or incorporeal and intangible rights.

We cannot indorse the conclusion or the reasoning of the case just cited. It seems to us that these abstract books were not so intangible or incorporeal that they could not be the subject of levy or of sale, and such was the holding in *Leon Loan etc. Co. v. Equalization Board*, 86 Iowa, 127, 41 Am. St. Rep. 486, where the case of *Dart v. Woodhouse*, 40 Mich. 399, 29 Am. Rep. 544, was reviewed. That case was also unfavorably commented upon by Freeman on Executions, second edition, section 110, where the author, in reviewing the case, says: "In a set of abstract books, or in any other manuscripts, we see nothing intangible, nothing which makes it difficult or improper to subject them to execution. Confessedly, they are property, and as such may be valuable to their compiler or owner, and doubtless he may, by his voluntary transfer, divest himself of title, and vest it in another. His transfer may not divest him of the information contained in them, and certainly will not impair the skill required in their compilation or use. The fact that he does not and cannot transfer his information and skill constitutes no ground for denying his ability to transfer so much as is transferable. In a state whose statutes in general terms declare all property subject to execution, we can perceive no reason for holding abstract books or other valuable writings not subject to executions."

It will be observed in this connection that section 479 of the Code of Procedure provides that "all property, real and personal, of the judgment debtor, not exempt by law, shall be liable to execution."

⁴⁹⁰ This was also the view taken by this court in *Booth etc. Abstract Co. v. Phelps*, 8 Wash. 549, 40 Am. St. Rep. 921, where it was said: "There is a conflict in the authorities as to whether abstract books are subject to taxation. We think the better rule is that they are subject thereto": Citing *Leon Loan etc. Co. v. Equalization Board*, 86 Iowa, 127; 41 Am. St. Rep. 486.

Many of the cases are cases where the question arose on the right to tax such property, but in this case a more rigid rule should be adopted against the claim of appellant. By his own contract he treated these abstract books as property of value, and obtained a valuable consideration for them in the nature of a

loan, and it would be unconscionable to allow him to plead their worthlessness in a court of equity.

The judgment will be affirmed.

Hoyt, C. J., and Scott, Anders, and Gordon, JJ., concur.

TAXATION—ABSTRACT BOOKS.—A set of books containing written abstracts of the titles to real estate, used as a means of profit and having a market value, are not exempt from taxation because of their being in manuscript: *Leon Loan etc. Co. v. Equalization Board*, 86 Iowa, 127; 41 Am. St. Rep. 486, and note.

IN RE KOHLER'S ESTATE.

[15 WASHINGTON, 613.]

AN EXECUTOR OR ADMINISTRATOR WHO DEPOSITS THE MONEYS OF THE ESTATE in good faith in a then solvent bank of good repute to the trust account, and not to his own account or credit, is not liable for the loss of such money, or some part thereof, through the subsequent insolvency or failure of the bank.

EXECUTORS AND ADMINISTRATORS ARE NOT BOUND TO EXERCISE ANY HIGHER RESPONSIBILITY than that which is imposed upon any other agent or trustee

Relfe & McCutcheon, for the appellant.

Elder & Harger and Sidney Moore Heath, for the respondent.

615 GORDON, J. Appellant is the executor of the estate of Hugo A. Kohler, deceased. As such executor he received on March 28, 1893, a sum of money amounting to upward of three thousand dollars, the proceeds of certain insurance upon the life of the testator, and, on the same day, he deposited in the Washington Savings Bank of Seattle the sum of two thousand five hundred dollars, taking certificates of deposit therefor payable to himself as such executor with interest at six per cent per annum. Subsequently, the bank suspended and passed into the hands of a receiver, whose certificates for said sum of two thousand five hundred dollars the appellant, as executor, holds in lieu of **616** cash, and for which sum he sought in the lower court to be allowed credit on his account. The lower court having disallowed his claim in this respect, the cause comes here upon appeal.

Respondents contend that the executor is not authorized by law to invest the funds of an estate in his hands pending settlement of the estate; that it is his duty to retain in his hands the money thus received until it can be applied and distributed in the order and mode prescribed by law.

It is conceded that, in making the deposit in question, the executor acted in good faith, and that the bank was then solvent and of good repute. In *Fairchild v. Hedges*, 14 Wash. 117, this court held that a county treasurer was liable for the funds of the county deposited by him in a bank which afterward became insolvent. Counsel for the treasurer in that case cited numerous cases in which it had been held that executors, administrators, and guardians were not liable under such circumstances, and in referring to the line of authorities thus relied upon, this court said: "The distinction is very clear between the liability and duty of one receiving moneys as a guardian, for the benefit of a private individual, and the liability imposed by statute and by express undertaking upon a public officer as in the case at bar. As to the former, he is merely the trustee or agent of the private parties interested in the money, and no greater or higher responsibility should be imposed upon him than would be imposed upon any agent or trustee": *People v. Faulkner*, 107 N. Y. 488."

It is true that this court was not called upon in that case to decide the question involved in the present case, but it is nevertheless true that we recognize that a distinction existed between the liability of ⁶¹⁷ a public officer dealing with public moneys and that of an executor or guardian who deals with the funds of individuals, and this recognition was not simply mere dictum.

The uniform holding of courts has been that executors, administrators, and guardians are bound by no greater or higher responsibility than that which is imposed upon any agent or trustee, and, where such a one in good faith deposits money in a bank of good repute to the trust account, he ought not to be held liable for its loss in consequence of the failure of the bank: *Jacobus v. Jacobus*, 37 N. J. Eq. 17; *Twitty v. Houser*, 7 S. C. 153; *Cox v. Roome*, 38 N. J. Eq. 259; *Norwood v. Harness*, 98 Ind. 134; 49 Am. Rep. 739; *In re Law's Estate*, 144 Pa. St. 499; *People v. Faulkner*, 107 N. Y. 488; *Moore v. Kure*, 101 N. C. 11; 9 Am. St. Rep. 17; *State v. Walsen*, 17 Colo. 170; *Ex Parte Jones*, 4 Cranch C. C. 185; 2 *Pomeroy's Equity Jurisprudence*, sec. 1067; *Schouler on Executors and Administrators*, sec. 313; 2 *Woerner's American Law of Administration*, 711; 3 *Redfield on Wills*, 394; 1 *Perry on Trusts*, sec. 443.

While many of the courts, from whose decisions we have cited, hold public officers, such as state, county, and township treasurers, to be absolutely liable for all public money received by them, none of them (so far as we have been able to discover) have

held that executors or trustees are bound by a similar obligation. We do not think the general rule is displaced by the statute in this state. Section 1052 of the Code of Procedure (volume 2 of the code) provides that an administrator (or executor) shall not make profit by the increase, nor suffer loss by the decrease or destruction without his fault of any part of the estate, and, in the event of ⁶¹⁸ the sale of any portion of the estate for less than the appraisement, he shall not be responsible for any loss "if the sale has been justly made." The succeeding section, 1053, provides that he shall not be "accountable for any debts due the estate if it shall appear that they remain uncollected without his fault."

It further appears from the record that on March 28, 1893 (the day upon which he received the money), the appellant made an application to the superior court for an order directing him to invest the sum of two thousand five hundred dollars, and thereupon the court ordered him to deposit that amount in some secure bank in the city of Seattle, and the deposit in question was actually made on that day. Without deciding whether this order constituted in itself a sufficient justification, we think that appellant has not been guilty of any misfeasance or neglect, and that he should be credited on his account with the amount of the deposit.

The judgment will be reversed and the cause remanded for further proceedings in accordance with this opinion.

Hoyt, C. J., and Scott, Anders, and Dunbar, JJ., concur.

EXECUTORS AND ADMINISTRATORS—LIABILITY FOR MONEY LOST THROUGH INSOLVENCY OF BANK.—An administrator is not liable for the loss of estate funds deposited by him in a bank generally reputed and supposed by him to be solvent by the subsequent failure of the bank: *Norwood v. Harness*, 98 Ind. 134; 49 Am. Rep. 739; notes to *Rubottom v. Morrow*, 87 Am. Dec. 326, and *Tarver v. Torrance*, 12 Am. St. Rep. 316.

EXECUTORS AND ADMINISTRATORS—RESPONSIBILITY OF.—Executors and administrators are subject to liability only for want of due care and skill, and the measure required of them is the same demanded of bailees for hire, or that which prudent men exercise in the direction of their affairs: *State v. Meagher*, 44 Mo. 356; 100 Am. Dec. 298, and note. They are only required to exercise ordinary care and diligence in managing the estate they represent: *Moore v. Eure*, 101 N. C. 11; 9 Am. St. Rep. 17, and note. See, also, the extended note to *Tarver v. Torrance*, 12 Am. St. Rep. 311, and the notes to *Thomas v. White*, 14 Am. Dec. 65, and *Rubottom v. Morrow*, 87 Am. Dec. 326.

STATE v. SUPERIOR COURT.

[15 WASHINGTON 668.]

PROHIBITION, POWER TO ISSUE WRIT OF.—A constitution giving the supreme court power to issue writs of mandamus, quo warranto, certiorari, prohibition, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction, does not confine the issue of those writs to cases in which they are necessary for the exercise of its appellate power. That court may, therefore, issue a writ to prohibit an inferior court from acting in cases of which it has no jurisdiction or from acting in excess of its jurisdiction in cases over which it has jurisdiction.

CODE, CONFLICTING PROVISIONS.—If there is a section of the code relating to the appointment of receivers, and another section providing for receivers of corporations, the latter controls all proceedings for the appointment of receivers of corporations; and such appointment cannot be justified, unless made under the circumstances specified in the section relating to corporations.

CORPORATIONS, RECEIVERS OF.—Under a statute providing that if judgment is rendered against any corporation, the court may cause the costs to be collected by execution against the persons claiming to be a corporation, or by attachment against the directors or other officers, and shall restrain the corporation, appoint a receiver of its property and effects, take an account and make distribution thereof among the creditors, and the court is not authorized to appoint such receiver before the entry of a judgment against the corporation, though the action or proceeding is one in which it is alleged that the defendants are acting as a corporation without being legally incorporated, and the object of the action is to dissolve the alleged corporation, or to exclude the defendants from the exercise of corporate rights.

PROHIBITION, CORPORATIONS DE FACTO MAY BE ENTITLED TO WRIT OF.—A proceeding for a writ of prohibition to prevent a court from appointing a receiver in a case, if it was without jurisdiction to do so, cannot be defeated or suspended by denying that the relator is a corporation or that it has taken the steps necessary to authorize it to do business within the state. Whether it be a corporation de facto or de jure, it is entitled to protect its property from the unauthorized acts of the inferior court.

Brinkley, Taylor & McLaren, and Graves, Wolf & Graves, for the relators.

Cyrus Happy, for the respondents.

668 ANDERS, J. On September 5, 1896, the prosecuting attorney of Spokane county, upon his own relation, filed an information in the superior court of that county against Simon Oppenheimer and others, including **669** the relator herein, alleging that the defendants were acting as a corporation within this state, under the name and style of the Northwestern Milling & Power Company, without being legally incorporated, and setting up certain facts showing that they had failed to comply

with the law in relation to corporations, and had no right to act as a corporation within the state, and praying, among other things, for the appointment of a receiver of the property, effects, and assets held, or at any time claimed to be held, by said alleged corporation, with the usual powers of receivers in such cases. Upon the filing of the information, the court, pursuant to the prayer of the relator, appointed one Fowle as receiver of the property described therein. By the terms of the order, all persons in possession of any of said property were commanded to deliver the same to the receiver so appointed, "in fear of the pains and penalties attached to the contempt of this court, upon whatever pretense of authority, court, or judicial action, such persons may claim the right to, or interest in, the premises, and any person or persons asserting any lien or claim to or interest therein are hereby remanded to this court herein for the assertion or protection of any alleged claim or rights in the premises."

The relator herein, claiming to be in possession of certain of the property over which the receiver was appointed, and of which he was directed to take possession, and claiming to hold the same as a purchaser at a judicial sale under a decree of the superior court of Spokane county, appeared specially by counsel and suggested to the court that the order for a receiver was void and of no effect in so far as it directed the receiver to take possession of the property alleged in ⁶⁷⁰ the information to have been transferred to the Northwestern Milling & Power Company by the Spokane Water Power Company, on May 20, 1895, and thereafter, by said company, mortgaged to the relator herein, and by it purchased at a sale on foreclosure of said mortgage, for the reason that the relator was not a party to the suit in which the receiver was appointed, save by virtue of its being an alleged stockholder in said alleged corporation, and in this action could not plead and protect its rights as owner of said property, or be heard in respect thereto; that it was entitled to the possession thereof pending the time for redemption, under the laws of this state, and could not be divested thereof save by judicial proceedings instituted for that purpose, and that a receiver could not be appointed without notice.

The court declined to vacate or modify the order appointing the receiver as requested, or in any manner whatsoever. The relator thereupon applied to this court and obtained therefrom an alternative writ of prohibition directed to said superior court and Hon. Norman Buck, judge thereof, commanding it and him to desist and refrain from any further proceedings in the matter

of the appointment of said receiver, so far as it relates to the property described in the writ, or so far as the same relates to this relator, until the further order of this court, and to show cause before this court, at a specified time, why they should not be absolutely prohibited and restrained from further proceeding in said matter. Upon the return day of the writ, the respondent, the superior judge, appeared specially by counsel and moved the court to vacate the alternative writ heretofore issued and to dismiss this proceeding, on various grounds, the principal ⁶⁷¹ one of which is, that this court is without jurisdiction herein.

It is earnestly contended on behalf of the respondent that, under the constitution and laws of this state, the superior court had exclusive jurisdiction of the action instituted therein by the prosecuting attorney, and was fully authorized to appoint a receiver therein, and that this court had no power or authority to interfere with, or control, the action of the superior court in respect thereto. That the superior court had jurisdiction of that action must be conceded, and, if it had authority to make the order complained of, the respondent's contention must prevail, even though this court has jurisdiction generally to issue writs of prohibition, for this court would, under no circumstances, undertake to interfere with the lawful acts of a subordinate tribunal.

The first question for our determination is, whether this court has jurisdiction of the matter now before it. In section 4 of article 4 of the state constitution, it is provided that: "The supreme court shall have original jurisdiction in habeas corpus and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars (\$200), unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction."

And in section 6 of the same article it is provided that: ⁶⁷² "The superior court shall have original jurisdiction in all cases in equity, and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assess-

ment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to one hundred dollars, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law. . . . The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court. . . . Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties."

It thus appears that the jurisdiction of the supreme court and of the superior courts of this state is expressly defined by the constitution, and reference must therefore be had to that instrument in order to determine the question of jurisdiction, in any particular case; and it will be observed that by the terms of the constitution both this court and the superior courts are empowered to issue writs of prohibition.

But it is claimed on behalf of the respondent that the supreme court can issue such writs only when necessary to the exercise of its appellate jurisdiction. This contention of the respondent seems to be based upon the assumption that the very language of the constitution, "all other writs," etc., clearly shows an intention to limit the power, granted to this court in the preceding portion of the sentence, to issue writs of prohibition, to cases where such writs are necessary to the exercise of its appellate power. If that be true, the power granted to this court in that regard is of little or no practical value, for it is difficult to conceive ⁶⁷³ a case in which it would be necessary to issue the writ solely for that purpose. Indeed, it has been held, and not without reason, that the granting a writ of prohibition is not the exercise of appellate jurisdiction, nor in aid of such jurisdiction: *Memphis v. Halsey*, 12 Heisk. 210; *High on Extraordinary Legal Remedies*, 2d ed., sec. 785 a.

But we do not think that the words referred to were intended to restrict or limit the power to issue the writs specifically mentioned, but rather to confer upon the supreme court the additional power to issue all other writs, whatever they may be, which may be necessary to the complete exercise of its appellate and revisory jurisdiction.

Under a provision of the constitution of California, relating to prohibition, which the framers of our constitution substantially copied, the supreme court of that state, so far as we have been

able to ascertain, has always held that it had the power, by prohibition, to restrain the superior courts from proceeding in matters over which they have no jurisdiction, as well as to prevent them from proceeding in excess of their jurisdiction; and the decisions of that court construing this provision of the constitution are especially entitled to the favorable consideration of this court. In fact, it may, and probably should, be presumed that the construction placed upon the provision of the constitution now under consideration by that court was adopted by the framers of our own constitution: Black on Interpretation of Laws, 32.

Section 4 of article 6 of the constitution of California, after defining the powers of the supreme court, proceeds as follows: "The court shall also have power to issue writs of ⁶⁷⁴ mandamus, certiorari, prohibition, and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction": Deering's Pol. Code, tit. "Constitution."

Under that provision, and a statute relating to the office of prohibition similar to ours, the supreme court seems never to have hesitated to prohibit the superior courts from proceeding without, or in excess of, their jurisdiction. Among the numerous decisions of that court wherein this question is more or less discussed we need cite only the following: Maurer v. Mitchell, 53 Cal. 289; Camron v. Kenfield, 57 Cal. 550; Farmers' etc. Union v. Thresher, 62 Cal. 407; Hobart v. Tillson, 66 Cal. 210; Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192.

The last of the above-cited cases is particularly instructive as to the question of the purpose and office of the writ of prohibition. Entertaining the same views as to the jurisdiction and power of this court with reference to the remedy of prohibition that are held by the supreme court of California, we have, in numerous instances, issued the writ where the object sought to be attained was the prevention of unauthorized acts on the part of the superior courts, and the practice of this court in that regard must now be deemed settled.

The objection to the jurisdiction of this court is not well taken. Nor do we think that the alternative writ fails to state facts entitling the relator to relief. Some other objections to the writ are made by the respondent, but as they do not relate to the jurisdiction of this court, but refer to matters which might be cured by amendment, we will not now stop to consider them in detail, but will proceed to the consideration of the ⁶⁷⁵ question whether the writ was properly issued in this instance.

The statute (Laws 1895, secs. 29, 30, p. 119), provides:

"Sec. 29. The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board, or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person.

"Sec. 30. It may be issued by any court except police or justice's courts, to an inferior tribunal, or to a corporation, board, or person, in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It is issued upon affidavit, on the application of the person beneficially interested."

And the question then is, whether or not the superior court, in appointing a receiver in the quo warranto proceeding, proceeded "without or in excess of its jurisdiction." If it did, it should be prohibited from taking any further action therein, and especially from enforcing the order complained of.

As justifying the action of the superior court, the respondent relies on subdivisions 3 and 5 of section 326 of the Code of Procedure. But, in our opinion, those provisions are inapplicable here, for the reason that there is a special provision of the code with reference to the appointment of receivers in actions like that in which this receiver was appointed, by which the courts should be governed. We refer to section 689, which is as follows: "If judgment be rendered against any corporation, or against any persons claiming to be a corporation, the court may cause the costs to be collected by executions against the persons claiming to be a corporation, or by attachment against the directors or other ⁶⁷⁶ officers of the corporation, and shall restrain the corporation, appoint a receiver of its property and effects, take an account, and make a distribution thereof among the creditors. The prosecuting attorney shall immediately institute proceedings for that purpose."

And it would seem reasonably plain from this provision that the superior court had no right or power to appoint a receiver before trial and judgment in the action instituted on behalf of the state. The sole object of the action was to dissolve an alleged corporation, or, at least, to exclude the defendants from corporate rights and franchises, and no judgment could be rendered therein except that prescribed by section 688 of the code. The state had no interest or right whatever in or to the property of the defendants, and the court had no authority, under the general provisions of the statute referred to by the respondent, or by virtue of any supposed equity power vested in it, to take prop-

erty from the possession of the defendants, or either of them, and place it in the hands and under the control of a receiver. After such a judgment has been rendered against the defendants as is provided for by section 688, proceedings may be instituted by the prosecuting attorney by virtue of section 689, in which it may be proper to appoint a receiver to take an account and distribute the property of the alleged corporation among its creditors, if any it may have. But, pending the action in the superior court, the defendants, so far as the state is concerned, have the same right to possess and manage their property that they had before the institution of the suit against them by the prosecuting attorney. "Property rights cannot be confiscated by the state" in such an action as is now being waged in the superior court: 2 Morawetz on Private Corporations, 2d ed., sec. 1033.

⁶⁷⁷ Nor, on the same principle, can such rights be suspended or interfered with except by express authority of law, and therefore the point made by the respondent, that the superior court at least had power to appoint a receiver temporarily, cannot be sustained.

In addition to the motion or demurrer which we have above considered, the learned superior judge filed an answer in which he denies any knowledge or information sufficient to form a belief as to whether the relator is a foreign corporation, or as to whether it has complied with the laws of this state relating to foreign corporations, so as to be entitled to transact business in the state. He thus seeks to put in issue the corporate existence of the relator, and, having done so, claims: 1. That until the question thus raised is determined, the relator has no standing in this court; and 2. That this court cannot determine the question without prejudging a matter to be litigated in the action now pending in the superior court of Spokane county. Now, the only effect that issue could have on the present proceeding would be to postpone its further consideration until after the trial in the superior court. It can neither discharge the alternative writ heretofore issued, nor impair its force or effect upon the defendants, and the only object of the writ is to prevent the further action of the court in the matter of the appointment of a receiver, during the pendency of the action now before the court. The question, therefore, according to our view of the law applicable to this particular case, is not so essential to the determination of this application as to require this court, in its discretion, to refer it to a jury, or even to await the rendition of judgment in the

superior court, before proceeding further: Laws 1895, sec. 21, p. 118.

678 The statute provides that the writ of prohibition is issued on the application of the person beneficially interested, and it seems plain to us that the relator, whether it is a *de jure* or only a *de facto* corporation, is sufficiently interested to be entitled to the possession of its property until deprived of it by a proper proceeding in a court of competent jurisdiction.

Some other minor questions of fact are sought to be raised by the answer, but what we have already said completely disposes of them.

As it appears to us that the relator is entitled to the benefit of the writ, and that it has no other plain, speedy and adequate remedy in the ordinary course of law, it follows that the peremptory writ should issue, and it is so ordered.

Hoyt, C. J., and Scott, J., concur.

PROHIBITION—POWER TO ISSUE WRIT OF.—A court that proceeds in the trial of a cause against an express prohibition of a statute is exceeding its jurisdiction, and may be prevented by prohibition from the supreme court: *Hayne v. Justice's Court*, 82 Cal. 284; 16 Am. St. Rep. 114, and note. See, also, the extended note to *State v. Commissioners of Roads*, 12 Am. Dec. 604.

A WRIT OF PROHIBITION may issue though there is a remedy by appeal, if that remedy is not adequate, as where a court, without authority to do so, appointed a receiver and directed him to take possession of the property, and then determined that no appeal could operate to stay proceedings or to divest the receiver of the right to take possession of such property: *Havemeyer v. Superior Court*, 84 Cal. 327; 18 Am. St. Rep. 192.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

POWELL v. WADE.

[109 ALABAMA, 95.]

AGENCY—RIGHTS OF UNDISCLOSED PRINCIPAL. — An undisclosed principal may maintain an action on a written contract made by his agent in his name alone, on proof that in making the contract, the agent was acting for such principal.

AGENCY—RIGHTS OF UNDISCLOSED PRINCIPAL—BURDEN OF PROOF.—In an action by an undisclosed principal to recover on a contract made by his agent in the name of the latter alone, the burden of proof is upon the principal to show the agency, and that, in making the contract, the agent was acting for him.

PLEADINGS—EVIDENCE.—A count, upon an account stated, may be supported by evidence that the account was stated with the agent of the plaintiff, or by admissions made to an agent.

Action upon a complaint containing the common counts, and a special count in which the amount sued for was claimed on a contract alleged to have been executed for plaintiff, by his agent, with the defendant. Plaintiff introduced evidence tending to show that his son, R. L. Powell, as his agent, sold certain trees on his land as they stood; that the contract was in writing and made by plaintiff's direction and with his consent; that defendant knew the plaintiff owned the land and the trees, and that R. L. Powell was acting as agent for plaintiff. Defendant introduced evidence tending to show that the contract was made with R. L. Powell for himself, and that he gave receipts in his own name for payments made under the contract; that plaintiff never claimed any of the money as due him until after garnishment of the defendant in a suit against R. L. Powell, and that the balance due under the contract had been paid by the defendant on such garnishment. It was shown that the amount due under the contract was agreed upon at a settlement made

on August 10, 1891, at the residence of the plaintiff, when he, and R. L. Powell, and the defendant were present. Judgment for the defendant and the plaintiff appealed.

J. F. Ashcraft, for the appellant.

J. B. Weakley, and Simpson & Jones, for the appellee.

97 BRICKELL, C. J. A principal, whether disclosed or undisclosed, is bound by the acts or contracts of the agent, within the scope of the authority conferred. As he is bound by the contracts, whether oral or written, though made by and with the agent, in his own name, he may, in his own name, maintain an action thereon. If the contract is in writing, in the name of the agent alone, it is permissible by parol to show that in the making of the contract the agent was acting for the principal. Such proof does not contradict the writing; it only explains the transaction: *Ford v. Williams*, 21 How. 287; *Bishop on Contracts*, sec. 1080; *Mechem on Agency*, sec. 769. In such action, the burden of proof lies on the principal to show the agency, and that in the making of the contract the agent was acting for him. This is the proposition asserted in the second instruction given at the instance of the defendant, and in the giving of it there was no error.

But the first instruction was erroneous. A count upon an account stated may be supported by evidence that the account was stated with the agent of the plaintiff, or by admissions made to an agent: 2 *Greenleaf on Evidence*, sec. 126.

The third instruction contravenes the principle we have stated—that the plaintiff, though undisclosed as the principal and though the agent may have contracted in his own name, may, in his own name, maintain an action on the contract. The instruction was erroneous.

For the errors pointed out, the judgment must be reversed, and the cause remanded.

Suits by Undisclosed Principals upon Contracts Made with their Agents.

If one person is the agent of another, the latter, as to all matters falling within the scope of the agency, is entitled to the benefits and subject to the burdens of acts done and contracts made by his agent. The fact of the existence of an agency may not be disclosed to the other contracting party. The contract may be in writing, and may appear to be executed by him in favor of the agent without disclosing his agency, and may, upon its face, be a contract apparently enforceable by or against him only. His principal, though undisclosed, is nevertheless entitled to its benefit; and the general principle that a contract in writing may not be

varied by parol is subject to the exception that, if it be made by one of the parties as the agent of another person, the latter may treat it as his own contract, and may maintain an action in his own name thereon, and prove by parol evidence that he is entitled to do so, though there is nothing on the face of the writing indicating that he has any right therein. This general rule has been applied with great frequency, and is subject to very few exceptions: Ruiz v. Norton, 4 Cal. 355; 60 Am. Dec. 618; Parker v. Cochrane, 11 Colo. 363; Woodruff v. McGehee, 30 Ga. 158; Peel v. Shepherd, 58 Ga. 365; Spain v. Beach, 52 Ga. 494; Saladin v. Mitchell, 45 Ill. 79; Conklin v. Leeds, 58 Ill. 178; Warder v. White, 14 Ill. App. 50; Darling v. Noyes, 32 Iowa, 96; St. Louis etc. Ry. v. Thacher, 13 Kan. 564; Tracy v. Gunn, 29 Kan. 512; Carter v. George, 30 Kan. 48; Kansas City etc. R. R. Co. v. Simpson, 30 Kan. 649; 46 Am. Rep. 104; Tutt v. Brown, 5 Litt. 1; 15 Am. Dec. 33; Tharp v. Fargar, 6 B. Mon. 3; Violet v. Powell, 10 B. Mon. 347; 52 Am. Dec. 548; Pitts v. Mower, 18 Me. 361; 36 Am. Dec. 727; Edmond v. Caldwell, 15 Me. 340; Machias Hotel Co. v. Coyle, 35 Me. 405; 58 Am. Dec. 712; Tainter v. Lombard, 53 Me. 369; 87 Am. Dec. 552; Cushing v. Rice, 46 Me. 303; 71 Am. Dec. 579; Ilsley v. Merriam, 7 Cush. 244; 54 Am. Dec. 721; Huntington v. Knox, 7 Cush. 371; Eastern R. R. Co. v. Benedict, 5 Gray, 561; 66 Am. Dec. 384; Winchester v. Howard, 97 Mass. 303; 93 Am. Dec. 93; Hunter v. Giddings, 97 Mass. 41; 93 Am. Dec. 54; National etc. Co. v. Allen, 116 Mass. 398; Foster v. Graham, 166 Mass. 202; Oelrichs v. Ford, 21 Md. 507; York County Bank v. Stein, 24 Md. 447; Miller v. Lea, 35 Md. 396; 6 Am. Rep. 417; Baltimore etc. Co. v. Fletcher, 61 Md. 288; Ames v. First etc. R. R. Co., 12 Minn. 412; Stonewall Mfg. Co. v. Peek, 63 Miss. 342; Odessa Bank v. Jennings, 18 Mo. App. 651; Elkins v. Boston etc. R. R. Co., 19 N. H. 337; 51 Am. Dec. 184; Chandler v. Coe, 54 N. H. 561; Bryant v. Wells, 56 N. H. 152; Taintor v. Prendergast, 3 Hill, 72; 38 Am. Dec. 618; Nicoll v. Burke, 78 N. Y. 580; Brown v. Morris, 83 N. C. 254; Barham v. Bell, 112 N. C. 131; Gilpin v. Howell, 5 Pa. St. 41; 45 Am. Dec. 720; Dupont v. Mt. Pleasant etc. Co., 9 Rich. 258; Munroe v. Williams, 35 S. C. 572; Foster v. Smith, 2 Cold. 474; 88 Am. Dec. 604; Edwards v. Golding, 20 Vt. 30; Culver v. Bigelow, 43 Vt. 249; Waddell v. Seabee, 88 Va. 1012; 29 Am. St. Rep. 766; Deitz v. Providence Ins. Co., 31 W. Va. 851; 13 Am. St. Rep. 909; Salmon Falls etc. Co. v. Goddard, 14 How. 446-455; Ford v. Williams, 21 How. 287; New Jersey etc. Co. v. Merchants' Bank, 6 How. 381; Darrow v. Home etc. Co., 57 Fed. Rep. 463; The Cheesbrough, 3 Blatchf. 305; Skinner v. Stocks, 4 Barn. & Ald. 437; Humphrey v. Lucas, 2 Car. & K. 152; Crojan v. Wade, 2 Stark. 443; Mildred v. Maspens, L. R. 8 App. Cas. 874; Phelps v. Prothero, 16 Com. B. 393; Langton v. Waite, L. R. 6 Eq. 165; Sims v. Pond, 5 Barn. & Ald. 389; 2 Nev. & M. 608; Nicoll v. Burke, 8 Abb. N. C. 213.

There are, indeed, a few cases which we cannot reconcile with the rule stated above, but we think they were determined without a sufficient appreciation of the rule, and do not manifest any purpose

to overthrow or to deny its existence. Thus in *Cocke v. Dickens*, 4 Yerg. 35, 26 Am. Dec. 214, which was an action upon a promissory note, which on its face purported to be payable to C. E. McEwen, agent for other persons named therein, it was held that the latter could not maintain any action thereon, for the reason that the legal interest was vested only in the person named as payee. The court referred to the cases holding that where there is an express contract under seal with an agent, he alone can sue thereon, but seemed to overlook the many cases applicable to contracts not under seal. So the case of *Kelly v. Thuey*, 102 Mo. 522, which was an action for specific performance of a contract made by an agent in his own name by which he agreed to buy land and to give a trust deed thereon to secure the unpaid purchase money, it was decided that he alone could sue for specific performance of the contract, though the vendor knew the agent was acting for an unnamed principal. The court did not deny the general rule that in the great majority of cases it might be shown that a contract apparently in favor of one of the parties named therein was made by him as an agent of a third person, and that the latter might sue thereon, but said: "This broad doctrine that where an agent makes a contract in his own name only, the known or unknown principal may sue or be sued thereon, may be applied in many cases with safety, and especially in cases of informal commercial contracts. But it is certain that it cannot be applied where exclusive credit is given to the agent, and it is intended by both parties that no resort shall be had by or against the principal (Story on Agency, sec. 160 a), nor does it apply to those cases where skill, solvency, or any personal quality of one of the parties to the contract is a material ingredient in it."

A Contract under Seal, at least in those states in which the distinction between sealed and unsealed writings has not been abolished, cannot be sued upon except by the nominal parties thereto, although it distinctly appears on the face of the contract that one of them was an agent of a third person: *Equitable etc. Co. v. Smith*, 25 Ill. App. 471. In such circumstances, designating him as an agent will be regarded merely as a matter of description where the writing is signed and sealed by him. Though the instrument in question is a lease, it cannot be shown in an action thereon by a third person that he was the owner of the property leased, and that the person described as the agent executed the lease in his interest and for his benefit, but without disclosing the name of any principal. "The rule seems to be quite well established that, in general, an action upon a sealed instrument of this description must be brought by and in the name of a person who is a party to such instrument, and that a third person or a stranger to the instrument cannot maintain an action upon the same. The question presented has been the subject of frequent consideration in the courts, and I think it is established in this state that where it distinctly appears from the instrument executed that the seal affixed is the seal of the person subscribing, who designates himself as agent, and not the seal of the

principal, the former only is the real party who can maintain an action on the same. He alone enters into the covenants, and is liable for any failure to fulfill them, and he only can prosecute the other party. He is named in the indenture as a party, and an action will not lie on behalf of or against any person who is not a party to the instrument, or who does not fairly represent or occupy the place of such party": *Schaefer v. Henkel*, 75 N. Y. 378; *Spencer v. Field*, 10 Wend. 88.

There are Cases Indicating that Negotiable Instruments form an exception to the general rule that a contract made with a person as agent may not be sued upon by his principal, and that only the person named therein as payee can maintain an action thereon: President etc. Bank of United States v. Lyman, 20 Vt. 666. The cases upon this subject are infrequent, but in our judgment the better opinion is, even in the case of a negotiable instrument, that if it be in the possession of the principal when the action is brought, he is entitled to recover thereon, though his name does not appear therein, and his agent is designated as the payee thereof: *Rutland etc. Co. v. Cole*, 24 Vt. 33, 39; *Daniel on Negotiable Instruments*, sec. 1187.

If the right of an undisclosed principal to treat and sue upon contracts as his own, though made in the name of his agent, be conceded, (and that it must be conceded the decisions affirm with substantial unanimity), then the only exceptions to the rule which ought to prevail should be limited to those contracts in which their assertion as contracts of an undisclosed principal must be to impair their effect in favor of the other contractor, either by giving him something less than, or substantially different from, what he contracted for, or by depriving him of some privilege or defense which he had the right to believe himself entitled to when contracting with the agent, without knowledge of the agency. Subject to these limitations, the principal should be permitted to maintain an action as though he had been named in the contract as a party thereto: *Mechem on Agency*, sec. 769. If an agent has sold the principal's property, he may, in his own name, recover the purchase price remaining unpaid: *Winchester v. Howard*, 97 Mass. 303; 93 Am. Dec. 93; *Merrick's Estate*, 5 Watts. & S. 9. If his property has been insured in the name of an agent having no insurable interest therein, the principal may recover the insurance: *New Orleans etc. Co. v. Spruance*, 18 Ill. App. 576; *De Vignier v. Swanson*, 1 Bos. & P. 346. If his personal property has been exchanged by the agent for other property, the title thus acquired vests at once in the principal, though the bill of sale or other evidence of the transfer was taken in the name of the agent and the principal may maintain an action for a breach of any warranty involved in the sale or to recover because of fraudulent representations made to his agent: *Cushing v. Rice*, 46 Me. 303; 71 Am. Dec. 579; *Odessa Bank v. Jennings*, 18 Mo. App. 651.

Exception, where Party is Affirmed by the Contract to be a Principal. Perhaps if the contract necessarily affirms that the party who is claimed to have been an agent was a principal, or excludes by its

terms the idea of his acting as agent, the principal may not recover thereon. It is said that either party to the contract has the right to deal with the person known to him as principal in that capacity only, and if he does so, that another principal cannot be substituted, and therefore if the contract or the attendant circumstances show that this subject was in the minds of the parties, and that one of them wished to contract, and did contract, with the other as principal only, the latter cannot be shown to have acted as an agent, and therefore his principal cannot recover on the contract. Thus, where in a charter party, H, one of the parties thereto, was described as the owner of the vessel, it was held that the true owner could not in his name maintain an action upon such contract: *Humble v. Hunter*, 12 Q. B. 310. In another case it was held that a defendant, sued upon a contract to purchase certain oxen, the plaintiff claiming that the contract for their sale had been made by his agent, ought to be permitted to prove that he would not have knowingly dealt with the plaintiff, that he made proper inquiries at the time to ascertain he was dealing only with the person offering the oxen for sale, and that the latter, in effect, represented them to be his own property, and thus excluded the idea that he was acting for an undisclosed principal: *Winchester v. Howard*, 97 Mass. 363; 93 Am. Dec. 93.

Contracts Based on Solvency, Skill, or Special Confidence.—If a contract remains unexecuted, and was entered into by one of the parties as the undisclosed agent of a third person, the other contracting party cannot be compelled to accept such third person as the principal, if the further performance of the contract is dependent upon the solvency or skill of the alleged agent or upon some special confidence reposed in him. In such a case it is clear that to substitute for one who appears by the terms of the contract to be a principal some third person, not mentioned therein, and not in contemplation of the parties at the time, would be to substantially change the terms of the contract. Therefore no action can be maintained by the undisclosed principal unless the contract has been fully executed, so no doubt can arise that, permitting the undisclosed principal to recover, cannot work a prejudice to the other party to the contract by compelling him to accept something either different or less valuable from that which he contemplated in entering into the contract: *Mechem on Agency*, sec. 770; *Warder v. White*, 14 Ill. App. 50; *King v. Batterson*, 13 R. I. 17; 43 Am. Rep. 13. Therefore, if an agent, though acting for an undisclosed principal, contracts for the purchase of real property, agreeing as to part of the purchase price, to give his note or other obligation secured by a deed of trust thereon, such undisclosed principal cannot, by a suit in his own name, compel a specific performance of the contract, because he cannot compel the vendor to accept his personal obligation in place of that of the agent in whose name the contract of purchase was made: *Kelly v. Thuey*, 102 Mo. 525.

Notice of Election by Principal to Enforce Contract Made with his Agent.—As to the cases in which actions may be maintained by undis-

closed principals upon contracts made with their agents, a right of action appears, in the first instance, to exist in favor either of such principal or of his agent in whose name the contract is made. The principal may, however, at any time elect to bring an action thereon in his own name, and thereupon his right to maintain such action has precedence over any right of the agent, and, after the principal has by any means given notice to the other contracting party that the contract was made by him, for his benefit, and that he, the principal, intends to sue thereon, or demands that payment be made to him, the agent's right to sue thereon is thereby destroyed, unless he has a lien upon the subject-matter of the contract "equal to, or greater than, the claim of the principal": *Mechem on Agency*, sec. 422. Any payment made to the agent after such notice is at the peril of the party making the payment, and cannot prevent a recovery on the obligation by and in the name of the principal thereto, though the fact of his being a principal is not disclosed therein: *Pitts v. Mower*, 18 Me. 361; 36 Am. Dec. 727; *Norcross v. Pease*, 5 Allen, 331; *Jones v. Witter*, 13 Mass. 304; *Eastman v. Wright*, 6 Pick. 322; *Sigourney v. Severy*, 4 Cush. 176; *Rockwood v. Brown*, 1 Gray, 261.

Defenses.—An undisclosed principal who undertakes to treat as his own a contract made with his agent, and in the latter's name, must generally accept the contract subject to the same defenses which might have been asserted in an action thereon brought by and in the name of the agent prior to the becoming known of the real principal in the transaction. Hence the other contracting party may ordinarily assert any setoff existing in his favor and against the agent in whose name the contract was made: *Gardner v. Allen*, 6 Ala. 187; 41 Am. Dec. 45, and note; *Ruiz v. Norton*, 4 Cal. 355; 60 Am. Dec. 618; *Ruan v. Gunn*, 77 Ga. 53; *Stinson v. Gould*, 74 Ill. 80; *Nave v. Hadley*, 74 Ind. 155; *Tutt v. Brown*, 5 Litt. 1; 15 Am. Dec. 34; *Oelrichs v. Ford*, 21 Md. 507; *York County Bank v. Stein*, 24 Md. 447. All statements made by an agent when the other contracting party was in ignorance of the fact of the agent's acting for an undisclosed principal must be respected by the latter: *Saladin v. Mitchell*, 45 Ill. 79; *Fraub v. Milliken*, 57 Me. 63; 2 Am. Rep. 14; *Bernhouse v. Abbott*, 45 N. J. L. 531; 46 Am. Rep. 789; *Crosby v. Hill*, 39 Ohio St. 100; *Baring v. Corrie*, 2 Barn. & Ald. 137; *Gibson v. Winter*, 5 Barn. & Ald. 96. The rule upon the subject was thus correctly stated in *Hsley v. Merriam*, 7 Cush. 242; 54 Am. Dec. 721: "The position taken by the defendant is that Field, the agent, having made the contract in his own name, the name of the principal not being disclosed, the defendant is entitled to be placed in the same situation in all respects as if Field had been the real party in interest. Is this a correct view of the law on this point? There is no doubt that the principal who assumes a contract made by his agent must take it subject to all the equities that would avail the defendant if the agent were the plaintiff; or, to state the principle in other language, the principal must take them with all the attendant burdens, and subject to all the attendant just counterclaims and defenses of

the other contracting party." "The principle is too well settled to be questioned, that where a contract not under seal is made with an agent in his own name, for an undisclosed principal, either the agent or the principal may sue upon it. But in respect to that general doctrine the general rule is equally well settled that if the principal sues upon a contract thus made with his agent in the name of the latter, the defendant is entitled to be placed in the same position at the time of the disclosure of the principal as if the agent had been the real contracting party": *Baltimore etc. Co. v. Fletcher*, 61 Md. 295.

The Principal must Accept all Burdens and Conditions attached to the contract. Therefore, if from any cause, no action could have been sustained upon the contract by the agent because some condition thereof had not been complied with, or because of some fraud, imposition, or other misconduct of the agent, no action can be maintained by the undisclosed principal: *Mechem on Agency*, sec. 775; *Henderson v. Botts*, 56 Mo. App. 141; *Elwell v. Chamberlin*, 31 N. Y. 611; *Miller v. Sullivan*, 39 Ohio St. 79; *Mundorff v. Wickersham*, 63 Pa. St. 87; 3 Am. Rep. 531; *Law v. Grant*, 37 Wis. 548.

If one of the contracting parties knows the other to be acting as an agent, though the name of the principal is not disclosed, no right of setoff can ordinarily be asserted against such undisclosed principal. In overruling a plea of setoff and considering the rule applicable thereto, it was said: "In order to make a valid defense within the rule above stated, it is obvious that the plea should show that the contract was made by a person whom the plaintiff had intrusted with the possession of the goods, that the person sold them as his own goods, in his own name as principal, with the authority of the plaintiff, that defendant dealt with him, and believed him to be the principal in the transaction, and that before the defendant was undeceived in that respect, the setoff accrued": *Fish v. Kempton*, 7 Man. & G. 687; *Semenza v. Brinsley*, 18 Com. B., N. S., 467; *Barring v. Corrie*, 2 Barn. & Ald. 137; *Borries v. Imperial Bank*, L. R. 9 Com. P. 38. "The buyer must be cautious, and not act regardless of the rights of the principal, though undisclosed, if he has any reasonable grounds to believe that the party with whom he deals is but an agent. Hence if the character of the seller is equivocal—if he is known to be in the habit of selling sometimes as principal and sometimes as agent, a purchaser who buys with a view to covering his own debt and availing himself of a setoff, is bound to inquire in what character he acts in the particular transaction; and if the buyer chooses to make no inquiry, and it should turn out that he has bought of an undisclosed principal, he will be denied the benefit of setoff. If by due diligence, the buyer could have known in what character the seller acted, there would be no justice in allowing the former to set off a bad debt at the expense of the principal": *Miller v. Lea*, 35 Md. 396; 6 Am. Rep. 417; *Bernhouse v. Abbott*, 45 N. J. L. 531; 46 Am. Rep. 789. "In order to establish a setoff the defendant must show: 1. That the contract was made with a person whom the plaintiff had in-

trusted with the possession of the goods with power to sell them; 2. That the person sold them as his own goods and his own name as principal; and 3. That the defendant dealt with him, and believed him to be, the principal in the transaction up to the time the setoff accrued": *Mechem on Agency*, sec. 773.

The right of setoff existing against an agent is enforceable against an undisclosed principal only to the extent of protecting third parties who have acquired rights while dealing with the agent as the real principal, in ignorance of any other, "and who would be prejudiced by permitting another person to interpose and appropriate the benefits of the dealing without recognizing their rights. But where the reason of the rule fails, the rule itself does not apply. Hence if before the right accrued which they seek to apply against the principal, the other parties had knowledge, or what is equivalent to knowledge, reasonable ground to believe that the person with whom they were dealing was but an agent, whether the principal was disclosed or not, the right so acquired cannot be interposed against the action of the principal": *Mechem on Agency*, sec. 774; *Miller v. Lea*, 35 Md. 396; 6 Am. Rep. 417; *Frame v. Penn etc. Co.*, 97 Pa. St. 309.

McANALLY v. ALABAMA INSANE HOSPITAL.

[109 ALABAMA, 109.]

MARRIED WOMEN—CONTRACT FOR SUPPORT OF INSANE HUSBAND.—A contract by a married woman made without the consent of her husband, to pay for his support while insane in an asylum is void, and not authorized by statutes giving the wife capacity to contract as if sole "with the assent or concurrence of her husband expressed in writing," and also authorizing her to engage in trade or business without his consent if he has abandoned her or is of unsound mind.

Catherine McAnally and E. F. Euslen entered into a bond whereby they promised to pay the expenses of the keeping of the insane husband of said Catherine while he was confined in the Alabama Insane Hospital. This action is brought to recover for a breach of said bond. Judgment for plaintiff, and Mrs. McAnally appealed.

C. B. Powell and J. G. Crews, for the appellant.

Ward & Campbell and J. E. Webb, for the appellee.

113 HARALSON, J. At common law, marriage vested in the husband the title of the wife to all personal chattels, of which she had actual or legal possession; and to her real estate he gained a title only to the rents and profits during coverture, but the estate itself remained entire to the wife, after the death of

her husband, or to her heirs, if she died before him, unless by the birth of a child, he became tenant for life by the curtesy: 2 Brickell's Digest, secs. 36, 51, pp. 71, 72. At common law the wife was generally incapable of entering into any valid contract, to bind either her person or property, and could not be sued at law in an action *ex contractu*; and, except as modified by statute, this disability continues to exist: 2 Story's Equity Jurisprudence, sec. 1397; Reeve on Domestic Relations, 138; 14 Am. & Eng. Ency. of Law, 604; Davis v. Carrol, 71 Md. 570; Bank v. Partee, 99 U. S. 332; 3 Brickell's Digest, secs. 52, 53, p. 545. This rule of the common law has been modified in this state, and "The wife has full legal capacity ¹¹⁴ to contract in writing, as if she were sole, with the assent or concurrence of her husband expressed in writing": Code, sec. 2346. This statute, as to contracts therein referred to, does not enlarge the capacity of a married woman to contract in all of the usual modes; but, as we have heretofore held, it is enabling and restrictive—enabling, so as to authorize her to contract in any manner that she could do if a feme sole, with the written consent and concurrence of her husband; and restrictive, in that it denies this power, except in the specific mode prescribed in the statute. For the full exercise of the power to contract, two things are necessary—a written contract by the wife, and the written assent or concurrence of the husband for her to make or enter into the contract: Scott v. Cotten, 91 Ala. 628.

One of the exceptions to the common-law rule to which we have referred, disabling the wife to contract, was, that if the husband abandoned her, and departed into another country, without the intention of returning, the law conferred on her the capacity of contracting and suing as though she were sole: Arthur v. Broadnax, 3 Ala. 557; 37 Am. Dec. 707; James v. Stewart, 9 Ala. 855; Mead v. Hughes, 15 Ala. 148; 50 Am. Dec. 123; Roland v. Logan, 18 Ala. 307. Or, when the husband was civilly dead, outlawed, banished, imprisoned for life, etc., the wife had the powers of a feme sole: 14 Am. & Eng. Ency. of Law, 591. The reason for engrafting the exception referred to on the disabilities of the wife to contract at common law was, that without it, oftentimes married women, whose husbands had renounced their wives, families and country, "could obtain no credit on account of their husbands, for no process could reach them; and they could not recover for a trespass on their persons or their property, or for the labor of their hands. They would be left wretched dependents upon charity, or driven to the commission of crimes to obtain a precarious support": Gregory v. Paul, 15

Mass. 31; Mead v. Hughes, 15 Ala. 148; 50 Am. Dec. 123. The same reasons, it is contended for the appellee, apply to engraft an exception in favor of married women, in cases of the insanity of their husbands, and for the further reason, that the husband being insane, no marital right can be affected, and every presumption of possible coercion is removed out of the way: Citing Reeve on Domestic Relations, ¹¹⁵ 138. But, the reasons in the two cases are not the same. It has been held as the common law doctrine, "that the husband must maintain the wife, whenever there is a separation without her fault. Insanity in either is not a fault; therefore, whether he or she is insane, or though both are, he must still provide for her. If she is in the insane asylum, he must support her there. He may be sued for necessities there supplied to her. Or, should he be the one in the asylum, the wife, though sane, may charge him with necessities while he is there confined": Bishop on Marriage and Divorce, sec. 565.

One is not civilly dead who is insane, nor, if not removed beyond his state, can he be said to be where process may not be served on him? He is responsible for contracts made before he became insane, and may be sued on them. And that one insane may be the better taken care of, and not become a charge on his family, the statutes of this state provide for the appointment of a guardian of his person and property: Code, sec. 2390. So far as he is concerned, if a married man, the wife has no occasion to enter into a contract for his support with an asylum. The same reasons, then, for the rule invoked as to the capacity of the wife to contract, whose husband is civilly dead, or who has abandoned his wife and family, and gone to reside in another state, with no intention of returning, do not apply to cases of the mere insanity of the husband. In the American and English Encyclopedia of Law, it is said on this subject, that "as a general rule, the insanity, infancy, or other incapacity of a husband does not affect the personal status of the wife," and the compilers, while stating that there seemed to be no cases on the point, added, that "the proposition is an easy inference from the well-known principles on this subject": 14 Am. & Eng. Ency. of Law, 592.

Said section 2346 of the Code, touching the wife's power in this state to contract with the written consent of her husband, is in derogation of the common law, and it would seem that none of the exceptions to which we have been referring, on the power of the wife to contract at common law, have anything to do with the statutes of this state on the subject. These statutes seem to create their own exceptions to the wife's power to contract. In section 2348 it is provided, that "if the ¹¹⁶ husband be non

compos mentis, or has abandoned the wife, or is a nonresident of the state, or is imprisoned under a conviction for crime for a period exceeding two years, the wife may alienate her lands as if she were sole," and, as to her personal property, "if the husband is living apart from the wife, without fault on her part, or if he be of unsound mind, the wife may convey or dispose of such property in any manner as if she were sole." In the section providing that the wife may, with the consent of the husband expressed in writing, and under the conditions specified, enter into and pursue any lawful trade or business, as if she were sole, it is provided, that "the consent of the husband is not necessary, if he be of unsound mind, or has abandoned his wife, or is a nonresident of the state, or is imprisoned under conviction for crime": Code, sec. 2350. Again, it is provided, that "all property of the wife, held by her previous to the marriage, or to which she may become entitled after the marriage, in any manner, is the separate property of the wife, and is not subject to the liabilities of the husband," and that "the earnings of the wife are her separate property": Code, secs. 2341, 2342. These statutes, regulating the rights and liabilities of husband and wife, were designed to furnish a complete system within itself, not dependent on common law rules for its enforcement. What the wife may do in case of the insanity of her husband, in respect to contracting and taking care of herself and her property, is carefully provided for in the statutes and it would seem, on a common principle of interpretation, she is excluded from doing anything more in this respect than is authorized by statute. Her power to contract under the statute being specified and limited by the terms of the statute, she is restricted to the mode prescribed: *Ashford v. Watkins*, 70 Ala. 160; *Scott v. Cotten*, 91 Ala. 628; *Vincent v. Walker*, 93 Ala. 169. We have no occasion, therefore, in this case to apply any of the common-law rules invoked in favor of the liability of the appellant, on the bond she gave to indemnify the asylum on the liability of her husband to it for his support. If in any case these rules may be made applicable to a married woman and her estate, they are wanting in application to the case in hand. The appellant was without authority to enter into any ¹¹⁷ such obligation as the one here sued on, and it is not binding on her.

Reversed and remanded.

Brickell, C. J., and Coleman, J., dissenting.

MARRIED WOMEN'S CONTRACTS.—A married woman is incapable of contracting unless power is expressly given her by statute

Macfarland v. Heim, 127 Mo. 327; 48 Am. St. Rep. 629, and note. This subject is fully discussed in the extended notes to *Ferguson v. Harris*, 39 Am. St. Rep. 734, and *Kantrowitz v. Prather*, 99 Am. Dec. 599.

ELECTRIC LIGHTING COMPANY v. MOBILE & SPRING HILL RAILWAY COMPANY.

[109 ALABAMA, 190.]

SPECIFIC PERFORMANCE—BILL FOR INJUNCTION.—A prayer, in a bill in equity, for an injunction, to be continued during the term of a contract, restraining the defendants from threatened breaches of the contract, is the equivalent of a prayer for specific performance, converting the bill, if not in form and letter, in substance and spirit, into a bill of that character.

SPECIFIC PERFORMANCE—WHEN REFUSED.—If a contract covers an unexpired term of several years, and imposes on the complainant the rendition of continuous mechanical services, demanding the highest degree of skill and necessitating the expenditure of considerable sums of money, and imposing on the defendant the duty of maintaining costly machinery, keeping it in repair, and the daily use of cars moved by electricity, a court of equity cannot enjoin threatened breaches of the contract or decree its specific performance.

SPECIFIC PERFORMANCE—WHEN GRANTED AND REFUSED.—A court of equity can decree specific performance only when it can dispose of the matter in controversy by a decree capable of present performance, but it cannot decree a party to perform a continuous duty, extending over a series of years, and will leave the aggrieved party to his remedies at law.

Appeal from a decree dissolving an injunction.

Overall, Bestor & Gray, for the appellant.

F. B. Clark, Jr., and L. V. Clark, for the appellee.

193 BRICKELL, C. J. The bill is without a special prayer for the enforcement of the performance of the contract, the subject matter of controversy, but the prayer for an injunction to be continued during the term of the contract, restraining the defendants from threatened breaches of the contract, is the equivalent of a prayer for specific performance, converting the bill, if not in form and letter, in substance and spirit, into a bill of that character: 1 *Beach on Injunctions*, sec. 443; *Joy v. St. Louis*, 138 U. S. 1; *Johnson v. Shrewsbury R. R. Co.*, 3 De Gex, M. & G. 914-922. An injunction in aid of specific performance is merely ancillary. The primary inquiry is, necessarily, whether the contract on which the bill is founded is of the nature and character of which the court is accustomed to decree specific per-

formance. If it is not of this nature and character, or, if for the injury of which complaint is made the law provides an adequate remedy, the bill fails, and the incidental or consequent remedy by injunction must fail: 1 Beach on Injunctions, sec. 7; 2 High on Injunctions, sec. 1109 et seq.

The parties to the contract are corporations, organized ¹⁹⁴ under the laws of the state, having their domicile and place of business in the city of Mobile. As is to be collected from the contract, and from the allegations of the bill, the complainant was engaged in the generation of electric power, and the defendant in the operation of a street railway extending from the city to Spring Hill, a distance of more than six miles. The contract was entered into on the thirteenth day of May, 1893, to take effect on the succeeding first of July, and continue for a term of two years. The complainant had the option or privilege on giving notice, of continuing or extending it for a further and additional term of three years, which had been exercised before the filing of the bill. The contract contains mutual stipulations or promises. The complainant agrees to furnish steam power delivered to the pulley of an electric dynamo, of the power of one hundred kilowatts, and to furnish the power "constant," for eighteen hours per day from 6 o'clock A. M. to 12 o'clock P. M. The defendant agrees to furnish generators and other electrical apparatus, to be placed in the station or power house of the complainant, and to keep them in good repair; connected by belt, ready for the pulley of the engine to be attached to the pulley of the generator. The complainant agrees to furnish all oil, and waste, and attendance for the running of the generator and other apparatus, taking reasonable care of them, without responsibility for ordinary wear and tear, or for accidents. The defendant promises to pay for the services rendered by the complainant twenty-eight dollars per day for four or less motor cars, each car of forty horse power; and every car privileged to tow a passenger trailer; and five dollars per day for an additional motor car with trailer. The contract contains other stipulations, not material in the view we take of the case.

We have a contract which at the time of the filing of the bill had an unexpired term of five years, imposing on the complainant the rendition of continuous mechanical services, demanding the highest degree of skill, and necessitating the expenditure of considerable sums of money; on the defendant imposing the duty of maintaining costly machinery, keeping it in repair, and the daily use of cars moved by electricity on the line of its railway. This duty is to be performed though the necessities ¹⁹⁵ of its

business may not justify it, or may require that some other motive power should be employed.

The general doctrine is that a court of equity will decree specific performance only when it can dispose of the matter in controversy by a decree capable of present performance. It will not decree a party to perform a continuous duty extending over a series of years, but will leave the aggrieved party to his remedies at law: *Pomeroy on Contracts*, secs. 22, 114, 312; *Waterman on Specific Performance*, sec. 49; 1 *Beach on Injunctions*, sec. 443; *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498; 3 *Am. St. Rep.* 758; *South etc. R. R. Co. v. Highland Avenue etc. R. R. Co.*, 98 Ala. 400; 39 *Am. St. Rep.* 74; *Marble Co. v. Ripley*, 10 Wall. 339; *Richmond v. Dubuque etc. R. R. Co.*, 33 Iowa, 422; *Port Clinton R. R. Co. v. Cleveland etc. R. R. Co.*, 13 Ohio St. 544; *Johnson v. Shrewsbury etc. R. R. Co.*, 3 De Gex, M. & G. 914; *Blackett v. Bates*, L. R. 1 Ch. App. 116. Suppose relief was granted the complainant, and the threatened breaches of the contract restrained, can the court retain the case, as the bill proposes, until by its own limitation the contract expires, superintending the conduct of the complainant and of the defendant, in the performance of the duties the contract imposes? There is no precedent or authority for such a decree. Mutuality in the equitable remedy is of the essence of the right to specific performance of a contract. As is said by Mr. Pomeroy, "the remedy must be attainable by both parties": *Pomeroy on Contracts*, sec. 164. The defendant could not have a decree against the complainant for a specific performance of the contract. The complainant could not be compelled to keep and maintain its machinery and skilled employes to operate it; to pursue its business, at a pecuniary loss, it may be. There can be no assurance that the complainant will remain of sufficient pecuniary ability to continue its business, to keep and perform its part of the contract. These, and like considerations, have induced the courts, in cases like the present, to abstain from all interference by injunction, or a decree for specific performance.

What is a further satisfactory reason for withholding equitable interference is that the complainant has an adequate remedy at law for all breaches of the contract; and by the terms of the contract, because of the defaults ¹⁹⁶ of the defendant in making payments of the compensation, has the unqualified right to terminate it.

We find no error in the decree of the chancellor, and it must be affirmed.

SPECIFIC PERFORMANCE—PERSONAL SERVICES—INJUNCTION.—If a contract implies the performance of personal services, requiring special skill, judgment, and discretion, a court of equity will not undertake its specific performance: *South etc. R. R. Co. v. Highland Ave. etc. R. R. Co.*, 98 Ala. 400; 39 Am. St. Rep. 74. Courts of equity will decline to decree specific performance of a contract for personal services involving the exercise of special skill, judgment, and discretion, continuous in their nature and running through an indefinite period of time; and injunctions to prevent the breach of such contracts are granted with great caution: *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498; 3 Am. St. Rep. 758. Courts of equity will not undertake to enforce the specific performance of a contract for personal services which are mechanical and not individual; but where the contract stipulates for special, unique, or extraordinary personal services, or services intellectual in their character, the courts will grant an injunction in aid of a specific performance: *William Rogers Mfg. Co. v. Rogers*, 58 Conn. 356; 18 Am. St. Rep. 278, and note. See, also, the note to *Clark's Case*, 12 Am. Dec. 216.

SOUTHERN BELL TELEPHONE COMPANY v. FRANCIS.

[109 ALABAMA, 224.]

MUNICIPAL CORPORATIONS—STREETS—RIGHTS OF ABUTTING OWNERS.—The owner of property abutting on a public street in a city, in the absence of statutory provisions to the contrary at the time of the dedication, or of a different intention appearing from the instrument or act of dedication, owns the fee in the land to the center of such street subject to the public easement.

MUNICIPAL CORPORATIONS—STREETS—RIGHT OF TELEPHONE LINE IN STREET.—Although posts and wire comprising a telephone line are an additional burden on the street, for which compensation must be made to the owner of the abutting property, yet concurrent legislative and municipal authority granted to a telephone company to erect its poles and suspend its wires in and over the streets of a city will protect it from being treated as a trespasser, and its works from being declared a nuisance, if they are so constructed as not to obstruct or interfere with the use of the streets by the public, or the owner's right of ingress or egress to and from his abutting property.

MUNICIPAL CORPORATIONS—STREETS—OWNERSHIP OF TREES IN.—An abutting proprietor's ownership of trees in a city street, whether planted by him, or acquired by devolution of title to the adjoining property, is a qualified and limited ownership, subordinate to the public right to safe and convenient passage, and to the rights, powers, and duties of the governing municipality in the protection, promotion and establishing of every public use in and upon the streets of the city.

MUNICIPAL CORPORATIONS—STREETS—ORDINANCE REGULATING PLACING OF TELEPHONE POLES.—An ordinance requiring the removal of telephone poles from that part of the street used by vehicles, and that they be placed on the sidewalk within one foot of the curb, is not an unreasonable or unlawful regulation, and if in its enforcement it becomes necessary for the city or

the telephone company to trim or remove trees in front of an abutting owner's property, it is not a trespasser nor liable as such.

MUNICIPAL CORPORATIONS—STREETS—LIABILITY FOR CUTTING TREES IN.—If a city or other corporation invested with the right of eminent domain acting under municipal authority, proceeds to cut or trim trees planted on a sidewalk of a city street by the owner of abutting property under lawful authority, when no necessity for such cutting exists, or when the cutting clearly exceeds the necessity, the owner can maintain an action for damages arising from the consequential injury, but he cannot maintain an action of trespass therefor.

TRESPASS—RIGHT TO MAINTAIN—CUTTING TREES IN CITY STREET.—If employes of a telephone company are lawfully ordered to remove telephone wires from the streets of a city, and they have authority to cut or trim trees on abutting property in so far as that is necessary to such removal, the fact that they unreasonably cut or trim such trees in the performance of such work, does not render the telephone company liable in trespass to the abutting owners.

Hewitt, Walker & Porter, for the appellant.

Taliaferro & Houghton and Altman and McQueen, for the appellees.

226 THORINGTON, J. These two cases arise from substantially the same state of facts, and were submitted together in this court. Appellees, being owners of property abutting on a public street in the city of Birmingham, brought suit in trespass against appellant to recover damages for injury to their property resulting from the act of appellant's agents or servants in cutting and trimming certain trees growing on the sidewalk in front of appellees' lots, which in one case had been planted by appellee some years ago, and in the other case it does not appear by whom they were planted. Appellant, a corporation invested with the right of eminent domain under the laws of this state, and authorized by law to erect poles and stretch wires thereon through the streets of Birmingham, was required by an ordinance of that city to remove certain of its poles and wires from the street on which appellees' property is situated, and to place them on the sidewalk in front of such property. Appellant claims that, in order to comply with this ordinance, it became necessary to cut and remove many of the limbs of the trees which had entwined themselves about the wires, and also to cut other limbs in order that the trees should not interfere with the wires after the poles were removed to the sidewalk and the wires suspended over the tops of the trees; that, on ascertaining this to be necessary, it so informed the mayor of the city, who promised to obtain the consent of the property owners; that afterwards,

and without having obtained such consent, as appellees were informed at the time, the mayor sent an officer of the city fire department to superintend the trimming of the trees, and under his direction the work was done by appellant's employés. Besides the appellant's wires on the poles, there was also a fire-alarm telegraph wire, which was the property of the city, and ²²⁷ used in connection with the fire department. It was also removed with the poles and appellant's wires. Its position on the poles was underneath appellant's wires, and the testimony tends to show it was this wire mainly that necessitated the cutting of the trees. The cases were tried before a judge of the city court, without a jury, and judgments were rendered in both cases for appellees, who were plaintiffs in the court below. The measure of damages adopted by the city court was the difference between the market value of the lots abutting on the street before the trees were mutilated by the alleged reckless cutting and their value after such cutting. The appeal is taken pursuant to the statute creating said court, and brings the whole case before us for review.

The two controlling questions are: 1. Whether an action of trespass lies in favor of appellees, as owners of the lots abutting on the street where the trees are standing, against appellant for the acts of its employés in cutting the trees; 2. If such liability was incurred, what is the measure of damages?

Appellant's counsel have filed an interesting and elaborate argument in support of the proposition that a telephone service does not constitute an additional burden on the public streets of a city, and they cite numerous cases which are ably reasoned; but, in our opinion, the decision of the cases presented by these appeals for our consideration does not turn on that question, and we therefore leave it undecided. Other principles to which we will presently advert must govern our conclusions.

The owner of property abutting on a public street in a city, in the absence of statutory provisions to the contrary at the time of the dedication, or of a different intention appearing from the instrument or act of dedication, owns the fee in the land to the center of such street subject to the public easement: *Western Ry. Co. v. Alabama etc. Ry. Co.*, 96 Ala. 272; *Evans v. Savannah etc. Ry. Co.*, 90 Ala. 54; *Moore v. Johnston*, 87 Ala. 220; *Columbus etc. Ry. Co. v. Witherow*, 82 Ala. 190; *Perry v. New Orleans etc. R. R. Co.*, 55 Ala. 413; 28 Am. Rep. 740; 5 Am. & Eng. Ency. of Law, 405. And, in absence of proof to the contrary, the presumption of law is, that the fee to the center of the street is in the owner of the abutting property: *Rice v.* ²²⁸

Worcester, 11 Gray, 283, note; *Terre Haute etc. Ry. Co. v. Rodel*, 89 Ind. 128; 46 Am. Rep. 164; *Weller v. McCormick*, 47 N. J. L. 397; 54 Am. Rep. 175; *Boston v. Richardson*, 13 Allen, 146. When such ownership is of the ultimate fee in land constituting a public country road, it has generally been recognized as retaining with it, subject to the easement of passage and its incidents, and for purposes of repairs, the right to the earth, timber, and grass growing between the center line of the road and the boundary of the owners' land along the road, as well as all minerals, quarries, and springs below the surface; and such owner may maintain actions against those who interfere with these rights. But, in respect of streets in populous places, it has been said, and we think with obvious reason, that the public convenience requires more than the mere right to pass over and upon them, and that the uses to which they may be legitimately put are greater and more numerous than those which may be applied to ordinary roads or highways in the country. Mr. Dillon, in his work on *Municipal Corporations*, in speaking of municipal control over public streets, uses the following language: "Whether the municipal corporation holds the fee of the street or not, the true doctrine is that the municipal authorities may, under the usual powers given them, do all acts appropriate or incidental to the beneficial use of the street by the public, of which, when not done in an improper and negligent manner, the adjoining freeholder cannot complain." In this state, however, that doctrine must be accepted as limited and controlled by the constitutional provision requiring municipal and other corporations invested with the right of eminent domain to make just compensation for property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements: *Const. Ala.*, art. 14, sec. 7; *City Council v. Townsend*, 80 Ala. 489; 60 Am. Rep. 112; 84 Ala. 478; *City Council v. Maddox*, 89 Ala. 181. Although it should be conceded that the posts and wires comprising a telegraph and telephone are an additional burden on the street, for which compensation must be made to the owner of the abutting property, the city, if it have legislative authority for that purpose, may grant the right to such a company to use the public streets for its business in common with, and without obstructing, the use ²²⁹ of such street by the public. Concurrent legislative and municipal authority granted to such a company to erect its poles and suspend its wires in and over the streets of a city will protect it from being treated as a trespasser, and its works from being declared

a nuisance, if its works are so constructed as not to obstruct or interfere with the use of the streets by the public or the property owners' right of ingress or egress to and from his abutting property: *Perry v. New Orleans etc. R. R. Co.*, 55 Ala. 413; 28 Am. Rep. 740. If the company, under such circumstances, is not a trespasser in its occupancy of the street, it is competent for the city to exercise whatever legislative authority it may possess in the matter of regulation and control over the streets, in order to render effective the right conferred on the company to plant its poles and suspend its wires in and over the public highway; and it therefore becomes necessary to consider the nature of the property owners' claim to the trees, and the extent of the city's authority in respect thereto, in the exercise of the powers and duties imposed on it to maintain safe and convenient highways throughout the entire width thereof: *City Council v. Wright*, 72 Ala. 411; 47 Am. Rep. 422.

Appellees' ownership of the trees, whether the latter were planted by them on the sidewalk, or acquired by devolution of title to the adjacent property, was and is a qualified and limited ownership, subordinate to the public right to safe and convenient passage, and to the rights, powers, and duties of the governing municipal body in the protection, promotion, and establishing of every public use in and upon the streets in a city: *Baker v. Normal*, 81 Ill. 108. In respect of all such matters, the private right of the owner of the abutting property to maintain the trees must yield to the paramount public right whenever the necessity may arise, although, until such necessity does arise, the owner is clearly entitled to the enjoyment of all the benefits which may result to his property from such trees, and to protection from their destruction or mutilation by others. For instance, if the roots of the trees should cause irregularities or breaks in the pavement upon the sidewalk or street, or if the shade and moisture from the trees should rot or injure a wooden pavement, or if the trees otherwise interfered with vehicles or foot passengers, it would, in our opinion, be clearly within the power and ²³⁰ duty of the city to remove such trees, and without liability to the owner. In principle, we can perceive no substantial difference between the exercise of that right by the city in the cases above suggested and where the removal of the trees may become necessary in locating upon a street a public work authorized by law to be placed upon the street, and especially where such public work is employed by the city in so important and vital a matter as the support of wires used by the city

in connection with its fire department. The location of telegraph and fire alarm wires and poles upon the street is, in the nature of the case, necessarily within the sound discretion of the municipal governing body, who hold the streets in trust for the use of the public, and who are bound in law to so maintain them as to provide safe and convenient passage to vehicles and pedestrians. It may be said to be matter of common knowledge, as well as the result of experience in such governing bodies, that the appropriate location for such poles is near and inside the sidewalk curb, where they interfere with neither pedestrians passing along the sidewalk, nor with vehicles traveling along the roadway, and where falling or trailing wires can do the least injury. The city ordinance, therefore, shown by the record, requiring the removal of telegraph and telephone poles from that part of the street used by vehicles, and to be placed on the sidewalk within six or twelve inches of the curb, was not an unreasonable or unlawful regulation, but a prudent, if not necessary, requirement for a populous city, and in its enforcement, if it became necessary to trim or remove the trees in front of appellees' property, neither the city, nor appellant, acting under the authority of and in obedience to the ordinance, can be regarded as trespassers: *Horr & Bemis on Municipal Ordinances*, sec. 229; 2 *Dillon on Municipal Corporations*, sec. 688; *Bills v. Belknap*, 36 Iowa, 583; *Weller v. McCormick*, 47 N. J. L. 397; 54 Am. Rep. 175.

It is not to be inferred, however, from anything that has been said, that either the city, acting under its police power, or any corporation invested with the right of eminent domain, acting under the city's authority, is absolved from all liability to the owner in such cases; for, if the city or other corporation invested with the right of eminent domain, acting under municipal authority, proceeds to cut or trim trees planted on a sidewalk ²³¹ by the owner of abutting property under lawful authority, when no necessity for such cutting exists, or when the cutting clearly exceeds the necessity, and consequential injury results therefrom to such abutting property, the owner will have his appropriate remedy at law to redress the injury: *Bills v. Belknap*, 36 Iowa, 583; *City Council v. Townsend*, 84 Ala. 478. But the remedy for such injury, as we have shown, is not in trespass, but for the consequential damages resulting to the adjacent property; and the liability exists by reason of the constitutional provision hereinabove quoted, which invests the owner not only with the right to damages for property taken, but also where his property is

injured or destroyed under such circumstances. The injury to the abutting property of appellees in both cases is shown by the proof not to be the direct and immediate result of the cutting of the trees on the sidewalk, but indirect and consequential, and, furthermore, that appellees, in cutting the trees, were proceeding under lawful authority. If there is any liability, it is in case, not trespass. Both suits are in trespass, and it results that the city court erred in its judgment in each case. Both judgments are reversed, and, inasmuch as it appears that neither action can be maintained in the form in which it is brought, judgment for appellant will be here rendered in each case.

It is unnecessary to consider on these appeals the question as to the measure of damages, and we will not anticipate it. Reversed and rendered.

After the filing of this opinion in November, 1892, a rehearing was granted.

In February, 1896, this additional opinion was filed.

HEAD, J. The defendant lawfully put its servants to removing telephone wires in a street in the city. The service, necessarily and lawfully, required the cutting of some of the branches of certain shade trees in the street, in front of plaintiffs' lots, growing upon those parts of the street of which plaintiffs were, respectively, seised in fee. The servants, to state the case most strongly for the plaintiffs, whilst performing the defendant's service, went beyond their ²³² duty and authority, and willfully cut the trees; beyond any necessity to the proper removal of the wires, doing unnecessary damage to the plaintiffs' property. The only question to be considered is whether the defendant is liable in actions of trespass.

We believe it to be an undeniable proposition that a person cannot be a trespasser *vi et armis* who neither commits, authorizes, aids, or abets, nor subsequently ratifies, the wrongful act. It is observable, under this rule, that if one expressly commands another to do the wrongful act, and the same is done in pursuance of the command, he is, under familiar principles, guilty as a principal, and liable as such. Nor is it essential to liability in trespass that there be an express command to do the wrongful act. Thus, if an agent or servant, in and about the business of the principal or master, commits a trespass upon the person or property of another, in the immediate presence of the principal or master, it will be presumed that it was done by the direction of the latter, who will be liable for the trespass,

unless it is affirmatively shown that he did not coerce or direct the act, but did what he lawfully should to prevent it: *Foster v. Essex Bank*, 17 Mass. 479; 9 Am. Dec. 168. So, also, if a principal or master direct his agent or servant to do an act which is, in itself, unlawful, and, in its commission, an injury is done to another; or if the act commanded, if done without injury to another, is, in itself, not unlawful, yet is of such a nature that the natural and probable effect or result of its performance is injury to another, and, in its performance such injury is done, he who gave the command, in either case, is a trespasser. Thus, in *Gregory v. Piper*, 9 Barn. & C. 591, a master ordered his servant to lay down a quantity of rubbish near his neighbor's wall, but so that it might not touch the same. The servant laid the rubbish, and exercised due care in doing so, yet such was the character of the act that some of the rubbish naturally ran against the wall. Held, that the master was liable in trespass. When the wrong done has benefited another, or was done for that purpose and in his interest, such other, with full knowledge of the facts, may make himself a trespasser by ratification. Lord Coke stated this rule thus: "He that agreeth to a trespass after it is done is no trespasser unless the trespass was done to his use ²³³ or for his benefit, and then his agreement subsequent amounteth to a commandment": 4 Inst. 317; *Cooley on Torts*, 127.

To the general rule of nonliability in trespass above announced and explained, we are aware of but one exception, which is that, on principles of public policy, a public officer is liable in that form of action for the trespasses of his deputy, committed *colore officii* whether, under the rules above stated, he would be liable as principal or not: 1 Chitty on Pleading, marg. p. 82. In an early Massachusetts case, it was held that a sheriff, who was not present at the service of a writ, when his deputy committed a trespass, was not jointly liable with the deputy: *Campbell v. Phelps*, 1 Pick. 62; 11 Am. Dec. 139. But the better rule seems to be that the officer is always constructively present, and jointly responsible for the torts of his deputy committed *colore officii*: See the cases collated in note to *Kirkwood v. Miller*, 73 Am. Dec. 134, 141; *Cooley on Torts*, 132, 135; 1 Chitty on Pleading, marg. p. 82.

Since the decision by Lord Kenyon, in the year 1800, in the leading case of *McManus v. Crickett*, 1 East, 106, until a comparatively recent period, the rule of nonliability of the master for the willful act of the servant, there laid down, was carried to

the extent of securing immunity to the master from all liability to compensate the injury, in any form of action. As late as the case of *Cox v. Keahey*, 36 Ala. 340, 76 Am. Dec. 325, decided in 1860, the late Chief Justice Stone, delivering the opinion of the court, vigorously maintained and applied the doctrine of *McManus v. Crickett*, 1 East, 106. It was an action on the case, for negligence of the defendant's servants in operating a steamboat. There was some evidence tending to show that the injury was willfully committed by the servants whilst operating the boat. The trial court was requested to instruct the jury that the defendants were not liable if the collision was willfully caused by the acts of their agents or servants. The instruction was refused, and the ruling was held error, for which the judgment was reversed. After noticing some other cases, the court remarked: "None of them materially unsettle the great distinction ruled in *McManus v. Crickett*, 1 East, 106, between those injuries which are the direct result of intentional or willful fault on the part of the servant, and ²³⁴ those which result from his mere carelessness or want of skill. It seems to be well settled, that if the servant be in the performance of a duty intrusted to him, and, from a want of either skill or diligence, injure another, it will not excuse the master or employer, even if the servant, in the matter complained of, was acting contrary to instructions. Trusting the servant in the given case is an assumption by the master of all responsibility which results from negligence or want of skill in the servant. But this rule does not apply when the servant actually wills and intends the injury, or steps aside from the purpose of the agency committed to him, and inflicts an independent wrong." The learned judge concluded his opinion with this remark: "Whether some of the principles ruled in the case of *McManus v. Crickett*, 1 East, 106, should not be changed so as to accommodate the relation of master and servant to the very useful, yet terrible motive agent, steam, is a question not for us, but for the legislature." But, as is well known, the doctrine of that case has been changed, and that without legislation. Now, it must be accepted that, in promulgating this change, the court did not intend to usurp the functions of the law-maker, and make new law, but to correct the errors of existing doctrines. The change was made upon a principle; and what is that principle? As we have seen, and as every lawyer knows, it has ever been the rule that the master is liable in damages resulting from the negligence or want of skill of the servant, in the performance of the master's service. This is so,

not because the master has himself committed a wrong, but upon the well-recognized principle that in employing a servant to perform a particular duty, he guarantees to the public at large, excepting fellow servants engaged in the common employment, that the servant, so employed, possesses ordinary skill and carefulness, rendering him fit for the work he is appointed to do; and that he, the servant, will characterize the performance of his duties by bringing to bear upon it the exercise of that degree of skill and carefulness. If the servant does not possess these qualifications, or possessing, fails to exercise them, in a given case, with resultant injury to another, the master is responsible, as a consequence of the servant's wrong, for failing to make good that which he ²³⁵ has assumed, for the servant, to the general public. The change of doctrine to which we have referred, effected, as we have said, without legislation, necessarily rests upon the principle that there is no just distinction, so far as the rights of the public are concerned, between the characterization of the servant's performance of his duties, by careless or unskillful acts or omissions, and the characterization thereof by willful or intentional acts of wrong. If it be essential to the public safety that the master shall assume, for his servant, the possession and exercise of skill and diligence, for what reason is it not essential thereto that he shall assume for him the possession of that fitness of character and disposition that will deter him from using the master's service, and the master's means of executing the service, placed in his hands, for the commission of willful and intentional wrong? The stupendous modern advance in industry and commerce, operated through the work and agencies of thousands of irresponsible under-servants, fraught with frightful dangers to the public safety, through the vicious disposition of so many of these servants, opened the eyes of the courts to the want, in reason and justice, of such a distinction; and the result is, that the rule of respondeat superior is applied to the latter, as it has ever been to the former case. But the master is thus liable, not because he, himself, has, by force and arms, directly committed the wrongful act, but because he has failed to make good, to the party injured, his assumption, for the servant, that the latter would execute the master's service in a lawful manner. His liability is, therefore, consequential upon the servant's unauthorized wrongful act. As expressed by Judge Metcalf, in *Parsons v. Wenchall*, 5 Cush. 592, 52 Am. Dec. 745, "the act of a servant is not the act of the master, even in legal intendment or effect, unless the master previously directs or sub-

sequently adopts it. In other cases, he is liable for the acts of his servants, when liable at all, not as if the acts were done by himself, but because the law makes him answerable therefor." It would be repugnant to the plainest principles of law and logic to declare, that a person has directly, *vi et armis*, committed an injury when the wrongful act was done by another, without his presence, authority, knowledge, or consent, or subsequent ratification.

236 We are not without other ample authority for our conclusion. Thus, in 1 Chitty on Pleading, marginal page, 131, we find it stated, that, "Though a master may be liable under the circumstances to compensate an immediate injury committed by his servant, in the course of his employ, with force, yet the action against the master, in general, must be case, though against the servant it might, for the same act, be trespass." And Mr. Redfield, in annotating his edition of Greenleaf on Evidence, uses this language: "An action on the case is an appropriate remedy for injuries caused by the wrongful acts of the servants of defendants, even though such acts were acts of force, and such that trespass would have been the only proper remedy against the servant": Citing *Havens v. Hartford etc. R. R. Co.*, 28 Conn. 69; 2 Greenleaf on Evidence, 203, note to section 226. The above quotation is in the language of the syllabus of that case, and the opinion supports it. He gives also, in a note to section 225, an extract from an English case, wherein the court remarked, "The agent's direct act or trespass is not the direct act of the master. Each blow of the whip, whether skillful and careful or not, is not the blow of the master; it is the voluntary act of the servant." And, in annotating the 5th edition of his admirable work on Railways (1 Redfield on Railways, top p. 534), he states the principle so clearly that we cannot as well express it, as by quoting his language. He says: "It has always seemed to us that the whole class of cases, which hold that the master is not liable for the willful acts of his servant, has grown up under a misconception of the case of *McManus v. Crickett*, 1 East, 106, for they all profess to base themselves upon that case. That case, we apprehend, was never intended to decide more than that the master is not liable, in trespass, for the willful act of the servant. Lord Kenyon, C. J., in delivering his opinion in that case, with which the court concur, expressly says, speaking of actions on the case brought against the master where the servant negligently did a wrong, in the course of his employment for the master: "The form of these actions shows that where the servant is, in

point of law, a trespasser, the master is not liable, as such, though liable to make compensation for the damage consequential from his employment of an unskillful or negligent servant. The act of the master is the employment of the servant.' This reasoning," ²³⁷ continues Judge Redfield, "certainly applies with the same force to that class of cases where the act of the servant is both direct and willful, as where it is only negligent. The master is not liable in either case so much for having impliedly authorized the act as for having employed an unfaithful servant, who did the injury in the course of his employment. And whether done negligently or willfully, seems to be of no possible moment, as to the liability of the master; the only inquiry being whether it was done in the course of the servant's employment. And the argument that when the servant acts willfully, he ipso facto leaves the employment of the master, and if he is driving a coach and six, or a locomotive and train of cars, thereby acquires a special property in the things, and is, pro hac vice, the owner, and doing his own business, may sound plausible enough, perhaps, but we confess it seems to us unsound, although quoted from so ancient a date as Rolle's Abridgment, and adopted by so distinguished a judge as Lord Kenyon. The truth is, the whole argument is only a specious fallacy; and whether Lord Kenyon intended really to say that no action will lie against the master in such case, or only to say that the master is not liable in trespass, it is very obvious the proper distinction, in regard to the master's liability, cannot be made to depend upon the question of the intention of the servant. The master has nothing to do either way with the purpose and intention of his servants. It is with their acts that he is to be affected, and if these come within the range of their employment, the master is liable, whether the act be a misfeasance or a nonfeasance, an omission or commission, carelessly or purposely done. It will happen, doubtless, that when the master is under a positive duty to keep or carry things safely, as bailee, or to carry persons safely, that while he will be liable for the mere nonfeasance of the servant, the servant will not be liable to the same party for such nonfeasance, there being no privity between the servant and such party, no duty owing to such person from the servant. But in such case the servant will be liable for his positive wrongs and willful acts of injury, and the master is also liable for these latter acts, but not in trespass, ordinarily, as the servant is, but in case. . . . This is the view taken of this subject by Judge Reeve (Reeve on Domestic Relations, 358, 359, 360), ²³⁸ and it is, we

think, the only consistent and rational one, and the one which must ultimately prevail."

Judge Reeve, referring to *McManus v. Crickett*, 1 East, 106, says: "The principle adopted in the case in East shows that, when a servant does an injury with violence, the very doing of it is an abandonment of his master's service. It is said that there is a difficulty in framing a proper action to remedy the injury, if one exists; for that the injury was immediate; and, therefore, trespass *vi et armis* was the proper action, if any; and that this action proceeds upon the ground of criminality, which would subject the master to a fine. Certain it is, that the master is not liable criminaliter. It does not follow, because the injury by the servant was an immediate injury, that the action against the master must be trespass. It proves, indeed, if the action had been brought against the servant, it must have been trespass. . . . I take it that when an immediate injury, with force, is done by another, for whom the employer is liable, the action is trespass on the case; and in perfect analogy in this case with that when a man keeps a dog accustomed to bite, and on that account is liable. It is an action of trespass on the case, although the injury is with force, and as immediate as if done by a man. I apprehend that the action on the case reported in 6 Term Rep. 125, was the proper action in which to try the liability of the master." In that case, the servant had committed a trespass *vi et armis* in the course of his employment.

Wood, in his work on Master and Servant, after discussing the master's liability, says: "Thus, it will be seen that the question as to whether the master is liable in trespass or case for an injury inflicted by a servant merely affects the remedy, and not the cause of action itself, and depends upon the question whether the act is a natural, necessary or probable incident of doing the act directed. If so, the master is liable in trespass; if not, then he is not liable in trespass, but only in case": Wood on Master and Servant, 596, 597. Judge Thompson, in his excellent discussion of all these questions, both under the old and the new doctrine, and after contending, in his vigorous style, for the correctness of the new, considers, in section 10 of his observations on *McManus v. Crickett*, 1 East, 106, the question of the proper form of action against the master. He says: "With respect to the form of ²³⁹ the action, whether trespass or case, where the old system of pleading still prevails, the following may be stated as the fair result of the cases: If the command of the master is to do a lawful act, and the servant does it in an unlawful man-

ner, so as to injure another, then case, and not trespass, is the proper remedy." Here, when the context is considered, it is evident the author meant, by the term "unlawful manner," either a willfully unlawful, or a negligent act; for he had just declared the master liable for the willfully unlawful act of the servant. He proceeds: "But, where the act which the master commands the servant to do is unlawful in itself, and the wrong does not result merely from the manner of doing it, trespass will lie. It results that case, and not trespass, is the form of action for all injuries arising from the master's negligence or unskillfulness, not authorized or commanded by the master. To illustrate: If a railway passenger refuses to pay his fare, and the conductor, in ejecting him from the train, which he may lawfully do, puts him off while the train is in motion, or uses excessive force, whereby a cause of action accrues to the passenger, the action against the company will be case. But, if the company directs its conductors to collect illegal fares of passengers, and a passenger resists payment, for which cause the conductor puts him off the train, the action against the company will be trespass; and the use of any excessive force beyond what was necessary to execute the unlawful order, or any carelessness on the part of the conductor, whereby the passenger is specially injured, will go in aggravation of damages": 2 Thompson on Negligence, 890. The learned author's illustration of negligence in the foregoing extract, it seems to us, is subject to the criticism that the acts of the conductor therein stated are acts of direct force, or trespass, and not mere negligence. The conclusion, however, that the master, in the case stated, is liable only in case, is, we think, correct. In *St. Louis etc. R. R. Co. v. Dalby*, 19 Ill. 353, at page 375, the court, after an elaborate discussion of a corporation's liability for the willful trespasses of its servants, and holding to the modern doctrine, says: "Much was said upon the argument of the hardship it would impose upon railroad companies should this action be sustained. It is supposed that it would authorize trespass ²⁴⁰ against the company wherever it could be maintained against the servant, and that the action on the case, which is now the usual remedy, would be superseded by trespass. This apprehension is not well founded. Hereafter, as heretofore, the usual remedy for torts must be case, and not trespass. Wherever the command was to do only a lawful act, and the servant does it in an unlawful way, so as to injure another, there case would still be the proper remedy. But where the act is unlawful in and of itself, and not from the mode of doing it, trespass would lie." And the court

illustrated by the case in hand, which was, where the conductor was required by the company to collect certain illegal fares, and to eject passengers refusing to pay. The court held the ejected passenger entitled to maintain trespass against the company, for the obvious reason, as we have already laid down, that the company itself commanded the commission of the trespass. Under the principle announced by the court, as above quoted, it is clear, that if the conductor had been required by the company to collect only legal fares, and eject those who refused to pay, and the conductor had willfully demanded an illegal fare, and ejected the passenger for his refusal to pay; or, in endeavoring to collect the legal fare, had willfully, or even maliciously, inflicted an unnecessary and unlawful injury upon the passenger, in ejecting him from the train, the remedy against the company would have been case, whilst, against the conductor, trespass would lie. If this be sound law, it is decisive of the question before us.

The correctness of the view we take in this opinion may be tested by a consideration of the law in respect of liability of master and servant to a joint action. It is a familiar rule that there are no accessories in trespass. All who are guilty at all are cotrespassers, and may be jointly sued: See note to *Kirkwood v. Miller*, 73 Am. Dec. 140, 141; *Cooley on Torts*, 133. Judge Thompson, in section 11 of his work, *supra*, page 891, shows clearly that, by the weight of authority, where the liability of the master arises from an unauthorized trespass of the servant, committed in the performance of a lawful duty commanded by the master, a joint action against master and servant will not lie, for the reason that the action against the master is case, while that against the servant ²⁴¹ is trespass; and for the further reason that, the wrong proceeding directly from the servant, and not directly from the master, the latter, if compelled to pay the damages, would have an action over against the former; but he would not, at common law, be entitled to such an action where the judgment went against both as joint tort-feasors.

It is only upon the principle which we here declare that the vast array of decisions in this and other courts can possibly be maintained, where the common law of pleading prevails, which hold that, in actions on the case for negligence of the defendant's servants, the defense of contributory negligence is overcome by showing that the act of the servant, causing the injury, was willful or intentional. It is an admitted rule of pleading that an action on the case cannot be maintained if the defendant's act was a trespass only. So that, if the unauthorized willful act of

the servant constitutes the master a trespasser, and suable as such, a replication to the plea of contributory negligence to an action on the case for the negligence of the servant, setting up that the servant willfully committed the act, would, manifestly, be a complete departure from the declaration. The two remedies are of such different natures that, by common law, they cannot be joined in the same action even in separate counts: *Mobile etc. Ry Co. v. McKellar*, 59 Ala. 458. But, when we consider the master's liability as consequential, and in case, the decisions referred to are entirely reconcilable with this rule of pleading.

The cases which appear to be adverse to our conclusion are either those in states where code systems have abolished common law forms of action, or where the considerations we have adverted to were not in mind. Of the latter class is the case, in our own court, of *Louisville etc. R. R. Co. v. Dancy*, 97 Ala. 338, an opinion delivered by the present writer.

The doctrines in respect of the relations of principal and agent, and master and servant, as applicable to the acts and contracts of corporations, are well established. It is not essential to an act or contract which binds a corporation that it be done or entered into, or authorized, by the corporate entity itself, as represented by the governing board of stockholders. It is well recognized ²⁴² in the law that corporations, in carrying out corporate functions, may, and, of necessity, do, create vice-principals who, in respect of the departments of corporate business intrusted to their general control and management, partake of the corporate entity, and their acts and contracts, in execution of the functions they represent, are of the same effect and import as if done or entered into, or directly authorized, by vote of the governing board or stockholders. Thus, to illustrate: Suppose the defendant has confided to a general manager or superintendent the execution of its telephone business, in the city of Birmingham; endowed him with ample powers and means to carry on the business; to employ and discharge subordinate agents and servants, and generally to do what may be necessary to the general performance of its corporate functions in that district. Such a person, with reference to the public, is more than a mere agent acting under orders of a superior; he is *pro hac vice* a principal; he stands for, and represents, within the sphere of his authority, the corporate entity itself, and his acts are the direct acts of the corporation itself, and if, in his representative character, he commits a trespass, or commands or authorizes its commission by a servant under his orders, the corporation is suable for the wrong

in the action of trespass. Many other illustrations might be given. It is thus, through agencies of this nature, that corporations may commit almost all manner of torts, such as assault and battery, malicious prosecution, libel, etc., and some classes of offenses for which they are indictable. It was never thought that a corporate vote was necessary to bind the corporations to these wrongs. As well might it be said that every contract should receive the express authority or assent of a corporate vote. But it would seem upon plain principles that a mere servant, working under the immediate control and orders of a superior, having no power or authority to do anything but perform the work he is employed and directed to do, can, in no sense, be deemed a vice-principal, for whose tortious acts, as such, the corporation is responsible. The liability of the master, as we have endeavored to show, is not for the tortious act, in such case, but in consequence of the duty he owes the public, except fellow servants, to have in his ²⁴³ employ only servants who will perform the services in a lawful way.

It is not our purpose now to undertake to lay down any general rule to govern all cases, as to what circumstances, or extent of power conferred, are essential to constitute a vice-principal, whose acts will be directly visited upon the corporation, within the principle above declared. Each case, as it arises, will be determined according to its peculiar facts.

With these views, we adhere to the opinion formerly delivered in these cases by Justice Thorington, and reverse the judgments of the city court, and order judgment to be entered in this court in favor of the defendant, in each case.

Reversed and rendered.

MUNICIPAL CORPORATIONS—STREETS—RIGHTS OF ABUTTING OWNERS.—The owner of land abutting on a public street is presumed to own the soil and freehold to the center of the street, encumbered only by the easement and right of passage in the public: *Edmison v. Lowry*, 3 S. Dak. 77; 44 Am. St. Rep. 774. See, also, note to *O'Neal v. City of Sherman*, 19 Am. St. Rep. 747.

STREETS.—As to whether or not telegraph poles are an additional servitude for which an abutting owner can claim compensation, see the monographic note to *Chesapeake etc. Tel. Co. v. Mackenzie*, 28 Am. St. Rep. 229-236.

STREETS—RIGHTS OF TELEPHONE CORPORATIONS THEREIN.—A statutory grant to a corporation of a right to construct telephone lines along a public highway confers the privilege subject to the duty on the part of the corporation of so changing and adjusting, when necessary, its system of operating its telephone lines as not to curtail the enjoyment by the public of the best modes of travel upon the street: *Cincinnati etc. Ry. Co. v. Telegraph Assn.*,

48 Ohio St. 390; 29 Am. St. Rep. 559. See, also, the notes to Chesapeake etc. Tel. Co. v. Mackenzie, 29 Am. St. Rep. 229; Vanderlip v. Grand Rapids, 16 Am. St. Rep. 614, and Julia Building Assn. v. Bell Teleph. Co., 57 Am. Rep. 409.

STREETS—TREES THEREIN—LIABILITY OF ONE INJURING THEM.—If a gas company permits its pipes in the public streets to be out of repair so that gas escaping therefrom kills shade trees standing in such streets the owner thereof is entitled to recover compensation from the gas company: Evans v. Keystone Gas Co., 148 N. Y. 112; 51 Am. St. Rep. 681. See, also, Daily v. State, 51 Ohio St. 348; 46 Am. St. Rep. 578.

WOOTEN v. STEELE.

[109 ALABAMA, 563.]

FRAUDULENT CONVEYANCES.—JUDGMENT CREDITORS without a lien may file a bill in chancery to subject to the payment of their debts any property fraudulently transferred or conveyed, or attempted to be fraudulently transferred or conveyed by their debtor.

FRAUDULENT CONVEYANCES—CREDITOR, WHEN PROTECTED.—A debt evidenced by a written undertaking to pay one-half of the purchase price of lands that may be realized from a future sale thereof, is within the protection of the law against fraudulent conveyances, before as well as after the contemplated sale is made.

JUDGMENTS—RES JUDICATA.—If the plaintiffs in a bill in equity to subject property fraudulently transferred by their debtor to the payment of their demand have recovered a money judgment at law against such debtor on a written undertaking covering the same demand, such judgment is res judicata as to the maturity of the debt, the party to whom it was due, and that it had not been paid, and these questions cannot be raised in the suit in equity.

FRAUDULENT CONVEYANCES—CONSIDERATION—BURDEN OF PROOF.—Averments in a complaint by a creditor in an action to subject to the payment of his debt property fraudulently transferred or conveyed by his debtor, alleging that such conveyance, and also a subsequent conveyance made by his grantee, were made after the maturity of such debt, voluntarily and with intent to hinder, delay and defraud the plaintiffs and other creditors, casts the burden of proof upon the defendant to allege and prove that such conveyances were made upon a valuable consideration, in what it consisted, and how it was paid.

VOLUNTARY CONVEYANCES ARE VOID AS TO EXISTING CREDITORS under all circumstances, and as to such a conveyance the intention of the parties to it, the pecuniary condition of the grantor, the amount of his indebtedness, the value of the property conveyed, and the value of the property reserved by him, are all utterly immaterial matters.

J. C. Anderson, C. K. Abrahams, and W. E. Clarke, for the appellants.

G. W. Taylor, for the appellees.

⁵⁶⁵ McCLELLAN, J. This bill was filed by the appellees, Steele and others, to have certain conveyances executed by C. B. Wooten to other respondents and by the other respondents among themselves declared fraudulent and void as to complainants' debt against said Wooten, on the ground that all of said conveyances were voluntary, and made and accepted to hinder, delay and defraud complainants and other creditors of said Wooten. It is insisted by demurrer that complainants had no right to file the bill because they were neither judgment creditors with a lien, nor creditors without a lien, but only judgment creditors upon whose judgment no execution had been issued and whose judgment itself had not been registered in the office of the probate judge. The statute under which the bill is filed provides: "A creditor without a lien may file a bill in chancery to discover or to subject to the payment of his debt any property which has been fraudulently transferred or conveyed, or attempted to be fraudulently transferred or conveyed by his debtor": Code, sec. 3544. Unless we hold that a judgment creditor without a lien is not "a creditor without a lien," we must concur with the chancellor that this bill was well filed; and we are not to be led into the absurdity of declaring such a proposition by the expressions of this court to which our attention has been called which were made with reference to other questions, and really have no bearing upon this. This ground of demurrer was properly overruled.

⁵⁶⁶ It was objected by demurrer that the bill did not show that complainants' debt existed at the time the alleged fraudulent conveyances were executed. This is equally without merit. The bill shows that Wooten, on a day named, in 1882, undertook and promised in writing to pay the ancestor of complainants one-half of the purchase money he, Wooten, should receive for certain land which the ancestor then conveyed to him; that on the day of the alleged fraudulent conveyances, he sold said land for three thousand dollars, and that complainants have recovered judgment against him for one-half of that amount with interest. For all the purposes of this case that undertaking was the equivalent of a promissory note payable on a contingency, and the debt evidenced by it was fully within the protection of the law against fraudulent conveyances before, as it was after, the land had been sold by Wooten, the debt thereby being rendered certain as to amount, and brought to maturity: *Mobile etc. Ry. Co. v. Gilmer*, 85 Ala. 422, 435; *Fearn v. Ward*, 65 Ala. 33; *Bibb v. Freeman*, 59 Ala. 612; *Anderson v. Anderson*, 64 Ala. 403; *Foote v. Cobb*, 18 Ala. 585.

All which is said in one way or another in the case with reference to this debt not being due to the complainants' ancestor individually, but only as trustee, and, therefore, really to the beneficiaries in a trust deed, etc., and as to complainants, on that account, and for the further reason that, as is contended, it was not sufficiently shown that all the debts of said Steele had not been paid, etc., having no right to maintain this suit as his heirs and distributees, etc., is of no possible consequence. All those questions were forever foreclosed by the judgment at law which these complainants, as plaintiffs, in the capacity and right of heirs and distributees of said Robert Steele, deceased, recovered of said Wooten, and which has been affirmed in this court: *Wooten v. Steele*, 98 Ala. 252.

The complainants having averred that they were creditors prior to and at the time of the execution of the conveyances which they attack, and the respondents having admitted the execution by Wooten of the undertaking to pay one-half the purchase money received by him for certain land, that the land was sold, and he received the purchase money—facts which in law show that Wooten was indebted to complainants at and before the time of ⁵⁶⁷ executing said conveyances on the demand which they now seek to enforce—and complainants having further alleged that said conveyances were purely voluntary, and made with the intent to hinder, delay, and defraud complainants and other creditors—the burden was upon the respondents to both aver and prove that there was a valuable consideration for each of the conveyances, in what it consisted and how it was paid: *Robinson v. Moseley*, 93 Ala. 70. This burden they have wholly failed to meet and discharge either in averment or proof. They neither aver nor prove the facts which alone could emasculate complainant's prima facie right to the relief prayed, resting on the allegation and admission of pre-existing indebtedness and the voluntary character imputed to the deeds by the bill. On this state of case, the intention of the parties to the voluntary conveyances, the pecuniary condition of the grantor—whether solvent or insolvent—the amount of his indebtedness, the value of the property conveyed and the value of the property reserved by him, are utterly immaterial matters. A voluntary conveyance is void as to existing creditors under all circumstances: *Bibb v. Freeman*, 59 Ala. 612. And nothing remained for the chancellor but to render the decree found in the record, and it is affirmed.

FRAUDULENT CONVEYANCES — ATTACKING IN EQUITY.—Property fraudulently conveyed may be subjected to the demands of a creditor in equity: *Thurmond v. Reese*, 3 Ga. 449; 46 Am. Dec. 440. A judgment creditor has the right to have a fraudulent conveyance removed and the title cleared up by a decree in equity before selling the property under his execution: *Cook v. Johnson*, 1 N. J. Eq. 51; 72 Am. Dec. 381, and note; *Wagner v. Law*, 3 Wash. 500; 28 Am. St. Rep. 56, and note. See, further, the extended note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 743.

A VOLUNTARY CONVEYANCE IS CONCLUSIVELY PRESUMED to be fraudulent as against debts existing when it was executed: *Severs v. Dodson*, 53 N. J. Eq. 633; 51 Am. St. Rep. 641, and note; *Rudy v. Austin*, 56 Ark. 73; 35 Am. St. Rep. 85, and note. A sale made to hinder, delay, or defraud creditors is, as to them, absolutely void: *Mason v. Vestal*, 88 Cal. 396; 22 Am. St. Rep. 310; extended note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 747.

JUDGMENTS—CONCLUSIVENESS AS TO DEBT.—A judgment rendered by a court of competent jurisdiction in the regular course of judicial proceedings without fraud or collusion is conclusive evidence of the amount and existence of a debt existing at the time of its rendition: *Yeend v. Weeks*, 104 Ala. 331; 53 Am. St. Rep. 50, and note.

SAMPSON v. Fox.

[109 ALABAMA, 662.]

DEBTOR AND CREDITOR — ASSUMPTION OF DEBT. A creditor may accept or reject the promise of a third person to pay the debt. Without acceptance the original debtor alone has the right to enforce the promise, while with acceptance there is only a change of debtors and not payment of the debt.

DEBTOR AND CREDITOR—PRESUMPTION OF PAYMENT.—It is only when the dual obligation to pay and authority to demand and receive payment of a debt concur and coexist in the same person, that the law conclusively presumes the debt to be paid.

CORPORATIONS.—INDIVIDUAL LIABILITY FOR CORPORATE OBLIGATIONS or debts if not imposed by express statute, is not an incident of membership in a corporation, nor is there any liability upon corporate officers or agents because of contracts into which they lawfully enter on behalf of the corporation.

CORPORATIONS—DUTY OF PRESIDENT TO PAY DEBTS. If the right and duty of the president of a private corporation to pay its debts does not exist by general usage, that duty does not devolve upon him merely by virtue of the office, provided it has not been imposed by statute, or has not been conferred upon him by the corporation.

PAYMENT—PRESUMPTION OF.—No presumption of the payment of the debts of a corporation arises from the fact of the assumption of such debts by another corporation whose president and chief stockholder is a member of a firm to which such debts are due.

PAYMENT—PRESUMPTION OF.—A partnership holding collateral security for notes is not presumed to have received payment merely because one member of the firm is bound to pay the collateral.

PAYMENT—PLEADING—EVIDENCE.—The plea of payment is an affirmative plea and the burden of proof is on the party who pleads it.

PLEDGE OF COLLATERAL SECURITY—DUTY OF PLEDGEE.—A pledgee of collateral security for the payment of a debt with power to sell or collect the collateral at the expense of the pledgor, is bound to exercise only ordinary care and diligence, and is not bound to exercise extraordinary diligence in such sale or collection.

J. B. Moore, for the appellant.

Kirk & Almon and I. Orme, for the appellee.

665 **BRICKELL, C. J.** The action is founded on two promissory notes made by appellee, payable to the order of Hinton E. Carr, at the Tuscumbia Banking Company, Tuscumbia, Alabama; the one of date September 5th, 1892, for the payment of one hundred dollars, thirty days after date; the other of like tenor, of date November 28, 1892, for the payment of \$306, sixty days after date. The first note contains a clause in these words, after the words value received: "having deposited or pledged as collateral for the payment of this note, pledging as collateral security for same, my account against Tuscumbia Electric Light and Water Co., showing a balance due of \$409.22. And I hereby give to the holder full power and authority to sell or collect, at my expense, all or any portion thereof, at any place, either in the city of Tuscumbia, or elsewhere, at public or private sale, at his option, on nonperformance of above promise, and at any time thereafter, and without advertising the same, or otherwise, **666** giving five days' notice, in case of public sale; the holder may purchase, without being liable to account for more than the net proceeds of sale." The second note contains a clause in all respects similar, except that the collateral is described as "all of my claim against the old Electric Light & Water Co."

The defendant pleaded the general issue, nil debet, and four special pleas. The first special plea was payment to Carr, at maturity of notes, and before they were transferred to plaintiff. The second was of payment by the transfer of the collateral to Carr, on the maturity of the notes. The third and fourth purport to be pleas of setoff, and in substance allege the transfer and pledge of the collateral, the negligence of Carr, and of the banking company, in its collection, whereby the same was lost to the defendant.

The issues were, by the consent of the parties, tried by the court, without the intervention of a jury. The plaintiff read the notes in evidence, and proved that they belonged to and were

assets of the Tuscumbia Banking Company, a partnership composed of Hinton E. Carr and Emma Carr, which failed on the 8th day of June, 1893, and on the 10th of June, 1893, made to the plaintiff a general assignment of all its assets. The plaintiff produced the collateral in court, and offered to surrender it. The collateral were accounts due from the Electric Light and Water Company, a corporation; and plaintiff proved that on the 20th of September, 1892, the said corporation sold and transferred all of its property to a new company, called the Tuscumbia Water Company, and thereafter the former company ceased to exist.

The defendant was examined by deposition in his own behalf, and testified that, when the first note was made, Carr who was president of the ice factory, and also of the Tuscumbia Banking Company, said to him that there would be a consolidation of the Tuscumbia Light and Water Company and the Tuscumbia Ice Factory. At that time he got from Ross, the treasurer of the Electric Light and Water Company, a statement of the amount due him from the company, carried it to Carr, and on it as collateral Carr loaned him \$100. In the following November he borrowed from Carr \$300, "or in other words he gave me \$300, and I assigned him over ⁶⁶⁷ my claim for \$400, or maybe a little over \$400, on the Tuscumbia Water Company consolidated, and Mr. Carr told me to assign him my claim, and in 30 days he would have the bonds of the consolidated company sold, and have the money, and he would then cancel my notes, and send them to me; he took my claim in payment of my two notes to the bank." Further he testified: "I made the transfer of my claim against the Tuscumbia Light & Water Company to the banking company, H. E. Carr, at the time and date, simultaneously with the date of my last note of \$300 to the bank, and delivery to me of the money, at which time he agreed to take the claim and pay my two notes." Further, he testified: "Then after, or about two or three months afterwards, I had a conversation with Mr. H. E. Carr, at the bank. I asked him if he had ever sold the bonds; that I did not want the interest on the two notes to be accumulating against me. He then said to me, 'You need not give yourself any uneasiness,' as my claim that I had transferred to him was quite sufficient, and he would and had taken that in payment of my two notes to the bank." Further, he testified: "H. E. Carr was president of the Tuscumbia Banking Company. He was president, superintendent, and general manager of the Tuscumbia Water Company; and he said they, the two companies, would be consolidated in a few days. He said he owned

two-thirds of the Tuscumbia Water Company, and he wanted enough claims and stock to continue him in the control of the consolidated company, and in the consolidation, or agreement of consolidation, he had agreed to pay my claim, and the claim of Thompson & Houston Company, of Atlanta, Ga. He had given his individual notes for the Thompson & Houston Company and, if not mistaken, my claim." He further testified that neither the bank or its officers had returned or offered to return his claim against the Tuscumbia Light & Water Company, and that it could have been collected by the use of due diligence. That the company at the time the notes fell due was solvent.

R. L. Ross, a witness for defendant, testified that the Tuscumbia Water Company was formed as a corporation the 18th or 20th of September, 1892. The Electric Light & Water Company owed the defendant about \$400, and owned the electric light plant and arc lights, and ⁶⁶⁸ had a franchise for a water company. It sold all of its property to the Tuscumbia Water Company, and had no property of any kind left. Carr was not a stockholder in the Electric Light & Water Company; nor was the Tuscumbia Banking Company. He was the principal stockholder in the Tuscumbia Water Company, and made an offer to buy all the property of the Electric Light & Water Company, and the property was sold about the 18th or 20th of September, 1892; the water company assuming to pay the debts (including the debt due the defendant) of the Electric Light & Water Company; the company then owing about \$3,500. The property of the water company cannot be sold for more than \$4,000. Charles Womble, a witness for defendant, testified that he was secretary, treasurer and general manager of the Tuscumbia Water Company, of which Carr is the president and principal stockholder. That the water company has not paid, as it assumed to pay, any of the debts of the Electric Light Company. That it owes in addition fifteen or sixteen hundred dollars; "and its bonds, to the amount of \$7,000, are out, and in the hands of Armstrong, cashier of a bank at Memphis, and there is a mortgage on its property to the amount of twenty-five thousand dollars." Carr, as a witness for the plaintiff, testified that he had not, nor had the Tuscumbia Banking Company, ever collected any part of the collateral mentioned in the notes. That he had made no agreement with respect to the collateral, except that stated in the notes. That he had never said to the defendant to assign him the collateral, and in thirty days he would have the bonds of the consolidated company sold, and have the money, and he would

then cancel the notes, and send them to the defendant. That he did not take the collateral in payment of the notes. That it was taken as collateral security, and has not been paid. That, except as shown in the notes, there was no transfer of the collateral to him, or to the banking company. That he made no agreement with the defendant to take the collateral and pay the notes for the banking company. That he did not have with the defendant any of the conversations to which he testifies. That the collateral had not been taken, or agreed to be taken, in payment of the notes. The plaintiff, as a witness, testified that, since the collateral came ⁶⁶⁹ to his hands, no part thereof, had been collected. That the Electric Light & Water Company, within his knowledge, had not had any property since the sale in 1893 to the water company. This was all the evidence.

The bill of exceptions recites, as the findings and judgment of the court, that "the court held and decided that, as Hinton E. Carr, one of the partners in the Tuscumbia Banking Company, was president of the Tuscumbia Water Company, and its principal stockholder, which company had assumed to pay all the debts of the Electric Light & Water Company, the law presumed that the debt due from the Electric Light & Water Company had been paid. . . . The court further ruled that the presumed payment of the collateral paid the notes sued on, and that plaintiff could not recover." Thereupon the court rendered judgment for the defendant, from which the appeal is taken.

We cannot assent to the theory upon which the court below based the judgment. The promise or obligation of the Tuscumbia Water Company to pay the debts of the Electric Light & Water Company, as matter of fact or of law, raised no presumption of their payment. It created a duty, and primarily a duty owing only to the Electric Light & Water Company, to make payment of the debts, performance of which that company alone could enforce. The debts remained, as they were contracted, the liabilities of the party contracting them. The creditors to whom they were owing had the election to accept or reject the water company as the debtor, as a party may accept or reject any promise made by a third party to another for his benefit. But, without acceptance, the creditors could not enforce the promise. And if they elected not to accept, the promise or obligation was due only to the Electric Light & Water Company, and the company alone had the right to compel performance of it. Whether there was acceptance or rejection, the debts were not paid. If there was acceptance, there was only a change of debtors, not

payment of the debts. The creditors accepting simply became entitled to enforce for their own benefit the promise or obligation which had been made to their debtor: *Henry v. Murphy*, 54 Ala. 246.

The principle on which the court seems to have proceeded is that, when the dual obligation to pay and the ⁶⁷⁰ duty and authority to demand and receive payment of a debt coexist in the same person, the law presumes, and conclusively presumes, the debt to be paid. But there must be concurrence and coexistence of the legal obligation to pay and of the authority and duty to demand and receive payment. If the two do not concur and coexist, there is no room or reason for the presumption. The principle, in this court, has been of most frequent application when a debtor to a testator, or to an intestate, takes probate of the will and qualifies as executor, or obtains a grant of administration. Then his debt is in contemplation of law paid, for the obligation to pay and the duty and authority to demand and receive payment coexist: *Miller v. Irby*, 63 Ala. 477. The obligation to pay the debts of the Electric Light & Water Company was never assumed by or rested on Carr; nor had he the authority to receive payment of them. The obligation to pay was the obligation of the water company, and not in any proper or legal sense the obligation of any of the stockholders, or officers, or agents. Individual liability for corporate obligations or debts, if it be not imposed by express legislative enactment, is not an incident of membership in a corporation: *Smith v. Huckabee*, 53 Ala. 191; *Angell and Ames on Corporations*, secs. 41-591. Nor is there liability upon corporate officers or agents because of contracts into which they lawfully enter on behalf of the corporation: 1 *Beach on Private Corporations*, sec. 267.

In the argument of the counsel for the appellee it is said the decision of the court below was based "on the idea that as Carr had received the \$7,000 from the bonds, out of which the company had agreed to pay the debt, and it being Carr's duty, as one of the parties holding the collateral, to demand and accept payment of the collateral, and it also being his duty as president of the water company to pay the debt, that the law presumes the debt to have been paid." The predicate on which this idea rests is that Carr has received \$7,000 from the bonds. If the predicate is not supported by the evidence, the idea is without basis. All that is said about bonds in the course of the evidence (except declarations imputed to Carr by the defendant, which are denied) is in the testimony of Womble, stating the liabilities of the

Water Company, and is in these words: "And its bonds to the amount of \$7,000 are out, and in the ⁶⁷¹ hands of Armstrong, cashier of a bank at Memphis." Whether the bonds were a mere deposit with Armstrong, or were intrusted to him for negotiation, is not stated. Certainly, there is no fact stated from which it is fair and reasonable to suppose that Carr had received money for them to any amount. It would be as fair and reasonable to suppose that Womble, who was the secretary, treasurer and general manager of the company, had received money for the bonds; a supposition which no trier of facts, in the course of judicial investigation, would be invited to indulge.

Nor is there any foundation for the idea that it was the duty of Carr, as its president, to make payment of the debts of the water company. There is no evidence that such duty had been imposed, or authority had been conferred, by the company; nor that either exists by general usage. In 1 Morawetz on Corporations, section 537, it is said: "The implied powers of the president of a corporation depend upon the nature of the company's business, and the measure of the liability delegated to him by the board of directors. It seems that a president has no greater power, by virtue of his office merely, than any other director of the company, except that he is the presiding officer of the meetings of the board." The supreme court of New Jersey said: "In the absence of anything in the act of incorporation bestowing special power upon the president, he has, from his mere official station, no more control over the corporate property and funds than any other director. The affairs of corporate bodies are within the exclusive control of their boards of directors, from whom authority to dispose of their assets must be derived." What were the duties of the Tuscumbia Banking Company, the holder of the collateral, affected and bound by the acts of Carr, one of the partners, in reference to the collateral, we pass for future consideration. For the reasons we have given, we do not concur in the theory on which the court based its first finding or conclusion.

The second finding of the court, that the presumed payment of the collateral operated a payment of the notes on which the suit is founded, is equally untenable. If there had been the obligation to pay the collateral resting on Carr, it was an individual obligation. It did not rest on the banking company, nor was it assumed ⁶⁷² by him in the relation or capacity of a partner in the company. It is merely elementary to say that partnership assets cannot be appropriated to the payment of the individual

debts of either partner: 1 Bates on Law of Partnership, sec. 410. In *Burwell v. Springfield*, 15 Ala. 273, it was said by Collier, C. J: "One partner cannot release a debt due from the firm, in order to extinguish his individual liability; nor can a debt due to a partnership be discharged by one of the partners applying it in payment of an individual debt, owing by him to the debtor of the firm, without the knowledge and approbation of the other member of the concern." The law never presumes wrongdoing; and cannot presume that a partner has misappropriated assets, or that others dealing with him have participated in the misappropriation. Yet this is the presumption which seems to have been indulged, to reach the conclusion that the notes were paid.

There are other grounds upon which it is insisted the judgment of the court below should be affirmed. The first is that the debt due from the Electric Light & Water Company to the defendant was accepted by the banking company in payment of the notes, on which the suit is founded—the matter of the third and fourth pleas. Payment of a debt is an affirmative plea, the burden of proving which is on the party pleading, "who must prove the payment of money, or something accepted in its stead, made to the plaintiff, or to some person authorized in his stead to receive it": 2 Greenleaf on Evidence, sec. 516. As the rule has been often expressed in our decisions, "A party pleading or relying on payment must prove it; the fact is peculiarly within his knowledge, and though his adversary in pleading negatives it, the negative averment is taken as true until disproved": 3 Brickell's Digest, 698, sec. 1. If it be conceded that the pleas are supported by the evidence of the defendant, the concession must be made that they are disproved by the evidence of Carr, with whom the transactions were had, and by whom it was alleged the payment was accepted. It would serve no useful purpose to analyze and discuss their contradictory evidence, inquiring which is the more consistent with the conduct of men of ordinary prudence, in the course of the transactions they narrate. The court below made no finding in reference to these ⁶⁷³ pleas and the existence of the facts on which they are based. If we resort to presumption, the presumption must be that the finding, in this state of the evidence, would have been that the pleas were not supported—that the defendant had not satisfied the burden of proof resting upon him. In *Lehman v. McQueen*, 65 Ala. 572, considering a question of payment, the court said: "In the consideration of all questions of this character, dependent upon conflicting evidence, it is important to inquire, and bear in mind, upon

which party lies the burden of proving the disputed fact. For, when the law casts the burden of proof upon a party, if he does not offer evidence of the fact, for all the purposes of the particular case, the nonexistence of the fact must be assumed. Or, if the evidence in reference to the fact is equally balanced; or, if it does not generate a rational belief of the existence of the fact, leaving the mind in a state of doubt and uncertainty, the party affirming its existence must fail for want of proof. The burden of proving a disputed fact rests, in all cases, upon the party affirming its existence, and claiming to derive right and benefit from it. . . . A plaintiff proves the existence of a debt which the defendant claims to have paid. In the first instance, proof of the debt would rest on the plaintiff, if it was denied; and if his evidence was insufficient, he would fail for want of proof. But the debt being proved, the burden of proving payment rests upon the defendant; and if his evidence is insufficient, he would fail for want of proof." The defendant has not supported the pleas of payment; the burden of proof resting upon him is not discharged.

The remaining insistence is that the banking company, by its failure to collect the debt of the Electric Light & Water Company, suffering the company to sell and dispose of all its property and franchises, whereby the debt was lost, is answerable to the defendant for the loss. It may well be doubted whether the loss of the debt is shown by the evidence. By the sale, all the property and franchises of the company were charged with a trust for the payment of its debts; a trust which would prevail against all other than bona fide purchasers from the Tuscumbia Water Company, without notice; and the evidence shows that at the time of the trial, the value of the property equaled, if it did not exceed, the ⁶⁷⁴ debts. However this may be, we are not of opinion the insistence can be supported. The question depends materially on the terms of the pledge, as incorporated in the notes, connected with the attending facts. The first pledge of the debt was as collateral security for the payment of a note of one hundred dollars, having thirty days to run. After the maturity of that note, there is a second pledge of the balance of the debt, to secure the payment of a note for three hundred and six dollars, having sixty days to run. The terms of each pledge are the same: "And I hereby give to the holder full power and authority to sell or collect, at my expense, all or any portion thereof, at any place, either in the city of Tuscumbia, or elsewhere, at public or private sale at his option, on nonperformance of above

promise," etc. It is this agreement by which the rights and duties of the parties are to be measured, rather than by any general rule of law which, in the absence of the agreement, would regulate their general rights and duties on a general pledge of negotiable or non-negotiable securities for the payment of debts: *Lawrence v. McCalmont*, 2 How. 426; *Roberts v. Thompson*, 14 Ohio St. 1; 82 Am. Dec. 465. The pledge doubtless contemplates that the holder of the notes would abstain from any and all acts by which the value of the pledge would be deteriorated, keeping it ready for restoration on payment of the notes. This is mere passiveness. And if payment had been tendered, it must have been accepted. But it was not contemplated that the holder should exercise any diligence in the collection, or in the making the sale of the collaterals. The two are conjoined by the agreement, and committed to the mere option of the holder of the notes. There was authority to collect the collateral. At the utmost this would devolve on the holder of the notes the duty and liability of an agent; and as an agent binding him only to ordinary care and diligence. It is apparent that by the exercise of no ordinary diligence, the pursuit of no ordinary legal remedies, there could have been collection of the collateral. Before the maturity of the first note the sale to the water company was effected, and thereafter, as the bill of exceptions recites, the Electric Light & Water Company ceased to exist. The inference is that the company became disorganized, rendering a suit at law ⁴⁷⁵ against it impracticable. If it is suggested that equitable remedies could have been pursued to reach and subject the property conveyed to the water company, the answer is that such remedies are extraordinary, the holder could not be expected to pursue. We find no room in the evidence for the imputation of negligence to the banking company, in reference to the collateral.

The result is, the judgment must be reversed, and a judgment here rendered that the plaintiff have and recover of the defendant the principal of the notes, with the interest computed to this day, together with the costs in the circuit court and the costs of this court.

DEBTOR AND CREDITOR—EFFECT OF PAYMENT BY STRANGER.—The payment of a debt by a stranger if accepted as such by the creditor, discharges the debt so far as the creditor is concerned, and if the debtor ratifies such payment, it also discharges the debt as to him, and he becomes liable to the stranger for the money paid to his use: *Crumlish v. Central Imp. Co.*, 38 W. Va. 390; 45 Am. St. Rep. 872.

PAYMENT—PLEA OF—BURDEN OF PROOF.—The plea of payment is an affirmative defense, and must be supported by a preponderance of the evidence: *Perot v. Cooper*, 17 Colo. 80; 31 Am. St. Rep. 258.

PLEDGE—SALE BY PLEDGEE.—A pledgee on default in the payment of his debt, may sell the pledged property at public auction, giving the pledgor notice of the time and place of sale, but he must exercise reasonable skill and diligence in order to get the value of the property: *Guinzberg v. H. W. Downs Co.*, 165 Mass. 467; 52 Am. St. Rep. 525, and note; *Cooper v. Simpson*, 41 Minn. 46; 16 Am. St. Rep. 667, and note.

STOCKHOLDERS OF A CORPORATION WERE NOT LIABLE for its debts at common law: *Freeland v. McCullough*, 1 Denio, 414; 43 Am. Dec. 685, and extended note.

INDEX TO THE NOTES.

ACTIONS, by undisclosed principals upon contracts made with their agents, 916-923.

ADMINISTRATORS AND EXECUTORS, care required of, 906.

AGENCY, undisclosed principal, when may sue upon contracts made with his agent, 916-923.

ALIMONY, future earnings, husband may be compelled to pay out of, or judgment for makes wife a judgment creditor, 89.
mode in which may be awarded and made payable, 89.
property may be given to wife as, 89.

APOTHECARIES, burden of proving negligence of, 256.

care and skill required of, 255.

clerks and other servants. liability for mistakes of, 257.

contributory negligence of persons obtaining dangerous drugs from, 258.

damages, measure of for carelessness on the part of themselves or of their servants, 257, 258.

liability for labeling poisonous drugs as harmless, 257, 258.

liability for running drugs through a mill in which poisons have been ground, 256.

negligence, liability for, 255.

negligence, no liability in the absence of, 255.

prescriptions, care and skill to be exercised in putting up, 256.

sale by of articles harmless in themselves, but becoming dangerous by combination with others, 258.

sale by of drugs as harmless which are poisonous, 256, 257.

sale of dangerous drugs as harmless, liability for, 255.

APPEAL, judgments, effect of when will not be suspended by, 899.

ATTACHMENT, damages, measure of for wrongful suing out of, 575,
joint liability of several attachment creditors for wrongful levy of, 246.

levy of, what sufficient, 819.

levy of, when abandoned, 819.

ATTORNEYS' FEES, agreement by debtor to pay cannot be enforced unless expense is incurred, 443.

agreement by debtor to pay does not make obligation usurious, 439.

agreement by debtor to pay, if unreasonable, may not be enforced, 439.

amount of is within the discretion of the court, 445.

cases holding agreement of debtor to pay to be void, 444-445.

consideration for agreement by debtor to pay, 440-442.

- ATTORNEYS' FEES**, indorser, contract for payment of by debtor is enforceable against, 443.
 public policy, agreement of debtor to pay is not against, 443.
 specific percentage, agreement of debtor to pay, 446.
 validity of agreement in a note or other obligation to pay if suit is brought thereon, 438-441, 444.
- BANKING**, checks drawn in one state or country, but payable in another 48, 49.
- CARRIERS**, contracts made in one country to be executed in another, 53.
- CLAIMS**, against counties and other municipalities, allowance or rejection of, whether conclusive, 204, 209.
- COMPROMISE**, of doubtful claim cannot be vacated because of ignorance of one's rights, 497.
- CONFLICT OF LAWS**, contracts, enforcement of in a state or country other than that in which they were made, 774-778.
 place of contract, where deemed to be, 44-55.
- CONSTITUTIONAL LAW**, construction of State officers, when binding on the courts, 372.
 municipal corporations, statutes interfering with choice of officers by, 370, 372.
 public officers, statute requiring appointment of veterans, 369-370.
 public officers, statutes restricting appointment to members of a political party, 370, 371.
 public officers, statutes limiting eligibility, 370.
- CONTRACTS**, based upon assumption of facts which did not exist, 512.
 based upon gambling debts will not be enforced in other states, 775.
 bills of exchange, place of acceptance, law of controls, 45.
 contrary to good morals or public policy, 774.
 delivery, law of the place of when controls, 47, 48.
 delivery of is essential to give effect to, 47.
 enforcement of in countries or states other than those in which they were made, 774, 775.
 for prostitution, made in another country, 775.
 for use of property for an immoral purpose, 66.
 foreign, when will be enforced in other states or countries, 776.
 foreign, which the courts of another state or country will not enforce, 774-777.
 guaranties, place of acceptance, law of controls, 47.
 if void, where made, whether may be valid at the place of performance, 778.
 in evasion of the laws of a country, 774, 776.
 legal where made, when will be enforced elsewhere, 775, 777.
 limiting liability of a carrier, 777.
 made on Sunday, when will be enforced in other states, 776, 777.
 marriage, contracted by going into another country to avoid the laws of the domicile of the parties, 776.
 mistake of law inducing, 513.
 personal, valid where made, when valid elsewhere, 774.
 place of acceptance, when controls, 46.
 place of, agreements fixing, validity of, 53.
 place of, agreements fixing, what amount to, 53.

- CONTRACTS**, place of, agreements in contract of carriage from one country to another, 53.
 place of, bill of exchange, acceptance, place of controls, 45.
 place of, borrowing and lending money where the parties reside in, different states or countries, 50, 51.
 place of, check drawn in one place but payable in another, 48, 49.
 place of, circumstances to be considered in determining what is, 46.
 place of, date, place named in is presumed to be, 47.
 place of delivery, when controls, 47.
 place of, final assent, place where given controls, 45.
 place of, guaranties, acceptance, place of controls, 47.
 place of, insurance, last act essential to determine, 52.
 place of, insurance, where deemed to have been perfected, 51, 52.
 place of, intention of the parties is entitled to great consideration, 46.
 place of, last step in making controls, 45.
 place of, letters and telegrams take effect where the sender parts with possession, 47.
 place of, mortgage, property subject to, whether may be considered in determining what was the place of the contract, 50, 51.
 place of, named in may be proved not to have been the place of delivery, 47.
 place of performance, when controls, 48, 49, 778.
 place of, sale of personal property valid in the state where made may be enforced elsewhere, 49.
 place of, sale of personal property, where deemed to have been made, 49.
 place of, statutes of limitation, how affected by, 54, 55.
 place of, when contract made by an agent without authority is ratified by his principal, 45.
 place of, when made by letter or telegram, 47.
 place of, within the meaning of the usury laws, 46.
 reformation for mistake, 512.
 signed in ignorance of their contents, 513.
 to evade the revenue laws, 776.
 validity of, is to be determined by the laws of the country where they were made, 774, 775.
 void by the laws of the state wherein they were made are void elsewhere, 777.
- CORPORATIONS**, president, power of to make contracts, 869.
 stockholders, liability of, enforcing in another state, 416.
 transfer of property of, when deemed fraudulent, 26.
- COTENANTS**, right of one to crop produced by another, 542.
- COUNTIES**, allowance or rejection of claims against and its effect, 207-209.
 claims against, action upon rejected, 207, 208.
 claims against, reconsidering allowance of, 207, 209.
 claims against, rejection or allowance of, 206.
- COUNTY WARRANTS**, purchaser of when they are invalid on their face, 507.
- CRIMINAL LAW**, punishment less than law authorizes, sentence of, whether void or voidable only, 264.
 punishment must be that only which is prescribed by law, 260.
 sentence different from that authorized by law, though less severe, 266.

- CRIMINAL LAW**, sentence excessive, appeal, remedy by, 271, 273.
 sentence excessive, cases holding to be erroneous only, 269.
 sentence excessive, if divisible may be good in part, 269.
 sentence excessive, instances of, 270.
 sentence excessive, power of courts to remit the excess, 268.
 sentence excessive, prisoner having served so much as is valid is entitled to release, 269, 270.
 sentence excessive, what is, 267.
 sentence excessive, whether may be cured by resentencing, 271.
 sentence excessive, whether relief may be had by habeas corpus, 267.
 sentence excessive, whether void, 267, 268.
 sentence less than authorized by law, whether may be complained of on appeal, 265.
 sentence not authorized having been imposed, what redress will be given on appeal, 267.
 sentence, power to vacate one and to impose another, 264.
 sentence, to one penalty when the law exacts another, 265, 266.
 sentence, to hard labor, if unauthorized, does not vitiate the balance of the sentence, 270.
- DAMAGES**, measure of for personal injuries, 711.
 measure of in an action by a parent for the death of his child, 631.
 measure of upon breach of contract to sell personal property, 191.
- DEATH**, dissolution of contract for services by, 379.
 presumption of from absence without being heard from, 545.
- DEFINITION**, of difference between ignorance and error, 494.
 of equity of redemption, 100.
 of ignorance, 494.
 of irreparable injury, 82.
 of libel, 753.
 of mistake of fact, 495.
 of mistake of law, 494.
- DIVORCE**, desertion which will justify granting of, 116.
- DRUGGISTS**, see **APOTHECARIES**.
- EQUITY**, ignorance of one's rights as a ground for relief in, 494-518.
 mistake of law or of fact, when a ground for relief in, 495-518.
 of redemption, waiver or release of, 100-110.
- EVIDENCE**, confessions made under oath, when deemed voluntary and admissible, 24.
 of mistake sufficient to justify the reformation of a deed, 590.
 of threats made by person accused of homicide, 24.
- EXECUTORS**, care required of, 906.
 foreign coming within the state, liability of, 71.
- FIRE**, landowner's liability for permitting building to remain in dangerous condition after, 287.
- FRAUDULENT TRANSFERS**, voluntary conveyances, when are, 216.
- GUARANTIES**, contracts of, place where deemed to take effect and by whose laws they must be controlled, 47.
- HABEAS CORPUS**, sentence greater than prescribed by law, whether authorizes discharge, 267-274.
 sentence less than prescribed by law does not authorize release on, 264.

- HOMESTEAD**, conveyance of not acknowledged by a wife is void, 34.
insane person, conveyance of by, 34.
- HUNTING RIGHTS**, protection of, 82.
- HUSBAND AND WIFE**, may hold real property as tenants in common, 594.
- IGNORANCE OF ONE'S RIGHTS AS A GROUND FOR RELIEF**, bonds and warrants, purchasers of are deemed to know the law, 507.
compromise cannot be avoided because of, 497.
compromise obtained through misrepresentation, 508.
compromise of doubtful right cannot be relieved because of mistake of law, 507.
contracts, based upon assumption of facts which do not exist, 512.
contracts, induced by mutual mistake, 518.
contracts, mistake of law inducing, 513.
contracts, reformation for mistake, 512.
contracts, signed in ignorance of their contents, 513.
county warrants, purchaser of when they are invalid on their face, 507.
criminal acts, ignorance of the law does not excuse, 514.
damages, ignorance of the measure of, 501.
deeds, mistake of law as a ground for reformation of, 514, 515.
deeds, reformation because they do not express the intention of the parties, 515.
definitions of ignorance and error, 494.
definitions of mistake and of ignorance of law, 494.
definitions of mistake of fact, 495, 496.
equity rules respecting ignorance of the law, 501.
exceptions to the rule that relief will not be granted because of mistake of law, 503.
facts, ignorance or mistake of caused by want of diligence, 505.
facts, ignorance or mistake, ratification of cannot arise from an act done under the influence of, 205.
facts, ignorance or mistake, relief because of, 504, 505.
ignorance of the law does not permit of proof, 497.
ignorance of the law is not a sufficient ground for relief, 498.
ignorance of the law or of fact as a defense to a criminal prosecution, 514.
law, foreign, mistake of is a mistake of fact, 506.
law, misrepresentation concerning, when a ground for relief, 500.
law, mutual mistake of, when a ground for relief, 518.
law, presumption of knowledge of is not destroyed by the fact that the passage of an ordinance did not appear on the municipal records, 496.
legal rights, knowledge of, whether imputable to a person, 498.
mistake, mutual of contracting parties, 518.
mistake of fact, crime or tort is not justified by, 514.
mistake of fact, money paid under may be recovered, 517.
mistake of fact, relief because of, 495, 496.
mistake of law, accompanied by improper conduct of adverse party, 502.
mistake of law and of fact combined, 517.
mistake of law caused by the adverse party to the contract, 504.

- IGNORANCE OF ONE'S RIGHTS AS A GROUND FOR RELIEF**, mistake of law, consideration of contract based upon, 504.
 mistake of law, crime or tort is not justified by, 514.
 mistake of law, exceptions to the rule that relief will not be granted because of, 502, 503.
 mistake of law, forfeiture caused by, relief from, 504.
 mistake of law, illustration of cases in which it is not a ground for relief, 506, 507.
 mistake of law, joined with fraud, interposition of courts on account of, 502, 503.
 mistake of law joined with undue influence, 502.
 mistake of law known to the adverse party, 503.
 mistake of law on part of an officer does not excuse him, 506.
 mistake of law, the courts cannot correct, 499.
 mistake of law used to obtain an unconscionable advantage, 503.
 mistake of law, when not a sufficient ground for relief, 499, 500.
 money paid under mutual mistake of law or of fact, 519.
 redemption, permitting time for to pass through a mistake of law, 501.
 release given without knowledge of its contents, 508.
 release obtained by undue influence, 512.
 release of claim for personal injuries given by a person still suffering therefrom, 510, 511.
 release procured by fraud, necessity of offering to return consideration received therefor, 510.
 release procured by misrepresentation, 511.
 release, ratification of, though improperly obtained, 509.
 release to executor from an heir, 512.
 release, vacating or disregarding, 509.
 release, when discharges claims of which the releasor was ignorant, 510.
 release, when may be avoided for want of knowledge of its contents, 508.
 release, whether resort must be had to equity for purpose of vacating, 511.
 relief in equity because of, 497.
 rescission of release, returning of consideration, whether essential, 510.
 statutes of limitation cannot be avoided because of, 515.
 statutes of limitation, ignorance of one's rights does not prevent the running of, 515.
 torts, mistake of law or of facts does not excuse, 514.
 votes cast for ineligible candidate from a mistake of fact, 506.
- INHERITANCE TRANSFER TAX**, bonds issued by corporations, whether subject to when not within the state, 638.
- INJUNCTION**, against trespass, 82.
 against unauthorized interference with graves and the bodies therein, 319.
- INSOLVENCY**, courts of, jurisdiction and power of, 425.
 courts of, jurisdiction over debt held by several creditors, some of whom are nonresidents, 426.
 courts of, nonresidents are not within jurisdiction of, 426.

INSURANCE, by what laws controlled, 51.

- contract of, where deemed to have been perfected, 51, 52.
- estoppel against asserting want of insurable interest, 741.
- estoppel against denying authority of agents, 741.
- foreign corporation doing business within the state without complying with its laws, 460, 461.
- mortgagee, suits by, to enforce, 395.
- waiver of arbitration, 237.

IRREPARABLE INJURY, what is, 82.

JURY TRIAL, quotient verdicts, what are, 901.

LANDLORD AND TENANT, guests of tenant, landlord, when not liable for injuries to, 325.

- immoral purpose, leasing of property for, 66.

LAW, ignorance of, criminal acts cannot be justified by, 514.

- ignorance of, does not admit of proof, 496.
- ignorance of, is not alone a sufficient ground for relief, 498.

LETTERS, contract effected by, takes effect when the senders part with their possession, 47.

LIBEL AND SLANDER, damages, mitigating by proving that the defendant did not originate the false charge, 611, 612.

- evidence of prior publication of the same libelous charge, when admissible, 611-613.
- general reports of the false charge, whether admissible, 611-613.
- prior publication of the false charge, whether admissible in mitigation of damages, 611, 612.
- rumors prior to a false charge do not justify its republication, 611, 612.
- words which do not appear on their face to be spoken upon the authority of another, 612.

LIMITATIONS, absence from state, when suspends statute of, 756.

LOTTERIES, town lots, disposition of by, what is, 174.

LUNATICS, conveyance by, whether void or voidable, 34.

MARRIAGE, contracted by going to another country to avoid the laws of the domicile of the parties, 778.

MECHANIC'S LIEN, assignment of, 823.

- claim of, defects in which are fatal, 833.
- owner of property, work done without consent of, 85.
- statutes allowing should be liberally construed, 833.
- waiver of, taking and transferring a note, when is not, 833.

MISTAKE OF FACT, caused by want of diligence, 505.

- criminal acts and torts cannot be excused by, 514.
- definition of, 495, 496.
- difference between and ignorance of law, 495.
- ratification based upon, 505.
- relief because of, 495, 496.
- relief because of ignorance of fact, 504, 505.

MISTAKE OF LAW, accompanied by fraud, imposition, etc., 502, 503.

- accompanied by improper conduct of the contracting parties, 502.
- accompanied by undue influence, 502.
- caused by misrepresentations of the other contracting party, 504.

MISTAKE OF LAW, consideration of contract based upon, 504.

courts will not correct, 499.

definition of, 494.

difference between and ignorance of the law, 495.

exceptions to the rule that relief will not be granted because of, 502, 503.

forfeiture caused by, relief from, 504.

induced by a person seeking to take advantage thereof, 503.

known to the adverse contracting party, 503.

on the part of an officer does not excuse him, 501.

torts and criminal acts cannot be excused by, 514.

used to obtain an unconscionable advantage, 502.

when not a sufficient ground for relief, 499, 500.

MORTGAGE, after-acquired property, when embraced within, 180.

agreement to turn into an absolute deed, 101, 103.

assignment of, whether must be recorded, 851, 869.

by what laws controlled when the property is situate in one state, and the instrument evidencing the indebtedness is executed in another, 51, 52.

conveyance from the mortgagor to the mortgagee, when intended as a mere change in the form of the security, 107.

dealings between mortgagor and mortgagee for release of equity of redemption, 109, 110.

debts, when bind grantee to payment of, 747.

deed absolute in form, when amounts to, 101, 103.

defeasance, surrender of may release the equity of redemption, 106, 108.

effect of, in the United States, 101.

equity of redemption, consideration for release of must be reasonable and fair, 109.

equity of redemption, contract for surrender of, 106, 107.

equity of redemption, contemporaneous waiver of is not permitted, 102, 105.

equity of redemption, covenants against exercising right of, 105.

equity of redemption, definition of, 100.

equity of redemption, forfeiture of cannot be stipulated for, 104.

equity of redemption, forfeiture of, stipulation for is invalid, 104, 105.

equity of redemption is a creature of courts of equity, 100, 101.

equity of redemption, parol release of, when valid, 109, 111.

equity of redemption, release of in subsequent writing, burden of proving fairness of, 110.

equity of redemption, release of, relief against because not fair, 109.

equity of redemption, right of cannot be restricted to the mortgagor personally, 104.

equity of redemption, sale of to the mortgagee, 106.

equity of redemption, stipulation of the parties against the existence of, 103, 104.

equity of redemption, time for exercising cannot be limited by the mortgagor, 104.

equity of redemption, waiver or release of made after the execution of the mortgage, 105.

equity of redemption, waiver or release of should be in writing, 109.

MORTGAGE, nature of at the common law, 100.

nature of the interest retained by the mortgagor, 101.

of chattels, permitting mortgagee to remain in possession and to make sales, 39.

once a mortgage, always a mortgage, 104, 105.

payment of debt, effect of, 101.

possession of premises, mortgagee, when entitled to, 101.

relations of mortgagor and mortgagee, 105, 106.

MUNICIPAL CORPORATIONS, allowance of claims not authorized by law does not justify their payment, 209.

claims against, action upon rejected, 207, 209.

claims against, action upon, whether legislative or judicial, 207.

claims against, allowance of claims not authorized by law, effect of, 204, 208, 209.

claims against, allowance of, effect of where the action is not regarded as judicial, 204.

claims against, allowance of, when binding on municipality, 207, 208.

claims against, allowance of, whether may be reconsidered, 207, 209.

claims against, allowance or rejection, whether a judicial act, 204.

claims against, auditing board, nature of powers and duties of, 204.

claims against, judicial functions, when exercised by auditing boards, 250.

claims against, liability of officers for allowing, 205.

claims against, reconsidering allowance of, 207, 209.

claims against, statutes requiring presentment of, 204.

claims against, when binding on the municipality, 207, 208.

supervisors, functions of when acting upon claims against, 205.

MUTUAL BENEFIT ASSOCIATIONS, construction of certificates of, in connection with constitution and by-laws, 333.

officers of the society cannot prevent the recovery by a member, 333.

NEGLIGENCE, apothecaries and druggists, burden of proving negligence of, 256.

apothecaries and druggists, liability of for, 255.

approximate cause of an accident, when, 733.

child, contributory of, 630, 631.

contributory of person placed in a position of peril by the negligence of another, 631.

evidence of other accidents, when admissible, 716.

when a question for the jury, 620.

NEGOTIABLE INSTRUMENTS, indorsement before delivery, 480.

evidence to prove in what capacity person signed, 843.

interest, provision for additional on contingency, whether affects negotiability, 869.

parol evidence to prove that indorsement was before delivery, 486.

purchasers of before maturity, duty of to inquire, where the attending circumstances ought to excite suspicion, 652.

undisclosed principal, whether may sue upon, 919.

NUISANCES, power of legislature to license, 413.

public, power to enlarge category of, 413.

OFFICIAL BONDS, liability of sureties, whether restricted to one term of office, 280.

PARTNERSHIP, commercial, power of each partner to borrow money and to draw negotiable paper, 243.

noncommercial, power of each partner to borrow money, 244.

PERPETUITIES, gifts to charities are not within the rule against, 602.

PRINCIPAL AND AGENT, actions by undisclosed principals on contracts made with their agents, 916-923.

actions may be brought by the principal or by the agent upon a contract with the agent of an undisclosed principal, 922.

adoption by principal of acts of agent, 223.

election by undisclosed principal to enforce in his own name contracts made with his agent, 920, 921.

evidence, parol, to prove that written contract was made for an undisclosed principal, 917.

exclusive credit being given to agent, principal cannot sue upon contract, 918.

exceptions to the rule that an undisclosed principal may sue upon contract made with his agent, 919, 920.

insurance effected by an agent for an undisclosed principal, 919.

negotiable instruments, undisclosed principal, whether may sue upon, 919.

notice of election by principal to enforce a contract made with an agent, 920, 922.

notice of rights of undisclosed principals, 922.

payment to principal after notice of the agency, 921.

persons contracting with an agent without knowledge of his principal, when will not be compelled to accept principal as the contracting party, 920.

ratification of unauthorized acts, what amounts to, 223.

seal, contracts under cannot be sued upon by an undisclosed principal, 918.

setoff existing against agent, when may be enforced against an undisclosed principal, 921-923.

solvency or skill, contracts requiring, undisclosed principal cannot sue upon, 920.

undisclosed principal cannot sue on the contract of his agent when the latter is by the contract affirmed to be a principal, 919, 920.

undisclosed principal cannot sue upon a contract based upon the solvency or skill of his agent, 920.

undisclosed principal, defenses to actions by, 921.

undisclosed principal is entitled to benefit of contracts, 916, 917.

PRINCIPAL AND SURETY, apparent maker of note may be proved to be a surety, 874.

extension of time for payment, however brief, releases surety, 875.

indulgence of debtor which will not release, 875.

interest, acceptance of in advance releases surety, 874.

PUBLIC LANDS, conveyance or agreement to convey made before perfecting title, 434.

PUBLIC OFFICERS, contracts to secure their acting in a particular manner, when are against public policy and void, 619.

- PUBLIC OFFICERS**, eligibility of, constitutionality of statutes limiting, 370.
 statutes requiring them to be chosen from different political parties, 370, 371.
 veterans, statutes requiring appointment of, 369, 370.
- PUBLIC POLICY**, contracts to influence the acts of public officers are against, 619.
- RAILWAY CORPORATIONS**, damages arising from embankments, when answerable for, 568.
 damages, how to be estimated for taking property for use of, 568.
 passenger, person riding on a pass, when deemed to be a, 422.
 passenger, release by, when does not affect his widow and children after his death, 423.
 physicians or surgeons employed by, they are not liable for negligence of, 608.
 surface waters, duty of to construct ways for, 568.
- RAILWAYS**, crossings, persons at, duty of, 292.
 negligence in not stopping, looking, and listening before crossing, 292.
- REAL PROPERTY**, owner of, care which he must exercise to render premises safe, 62.
 owner of, latent defects in premises for which he is not liable, 62.
- RELEASE**, claims of which releasor was ignorant, whether released thereby, 510.
 given without knowledge of its contents, 508.
 of claim for personal injuries given by person still suffering therefrom, 510, 511.
 procured by fraud, necessity of offering to return consideration received therefor, 510.
 ratification of release improperly obtained, 509.
 relief from, whether may be had without resorting to equity, 511.
 rescission of, return of consideration, whether necessary, 510.
 to executor from an heir, 512.
 vacating and disregarding, 509.
- RELIGIOUS SOCIETIES**, faith, confession of, courts will not overrule the decision of the church authorities respecting, 738.
- SALE** of personal property, where deemed to have been made, 49.
 valid where made may be enforced elsewhere, 49.
- SPECIFIC PERFORMANCE**, of contracts for personal service, 930.
- STATUTE OF LIMITATIONS**, fraud, ignorance of, when prevents running of, 516.
- SUNDAY LAWS**, contracts signed on Sunday, but delivered on a secular day, 47.
- SUPERVISORS**, action of in allowing or rejecting claims, whether judicial, 204-209.
- TAXATION**, of goods brought from one state into another, 356.
- TELEGRAMS**, contract effected by, takes effect when the sender parts with possession, 47.
- VETERANS**, statutes requiring appointment of to office, constitutionality of, 369-372.

WATERS, appropriation of must be for a valuable use, 169.
nature of ownership of irrigation companies, 160.

WAYS OF NECESSITY, extinguishment of, 659, 660.
when arise upon the partition of real property, 662.

WILLS, construction of, rules for, 309.
extrinsic evidence to modify or explain, 534.

INDEX.

ABATEMENT.

See Nuisance, 4-6.

ABSTRACT BOOKS.

See Execution.

ABUTTING OWNERS.

See Municipal Corporations, 1.

ACCIDENT.

See Insurance, 12.

ACCESSORIES AND ACCOMPLICES.

See Arson.

ACCOUNTS.

See Pleading, 2.

ACKNOWLEDGMENT.

ACKNOWLEDGMENT OF A CONVEYANCE, WHAT ESSENTIAL TO CALL THE POWERS OF THE OFFICER INTO EXISTENCE.—Though the acknowledgment of a conveyance by a proper officer is regarded as a judicial act, it is essential that he have jurisdiction, and he cannot have jurisdiction if, at the time he affixes the certificate, the deed had not been signed by anyone. This want of jurisdiction on the part of the officer may be proved by parol. (*Cheney v. Nathan*, 26.)

ACTIONS.

1. THAT AN ACTION IS NEW AND WITHOUT PRECEDENT is not conclusive against plaintiff's right of recovery, if he is shown to have suffered a wrong. (*Kujek v. Goldman*, 670.)

2. ACTIONS—CONSOLIDATION OF.—Separate actions can be consolidated into one only when both actions are pending between the same plaintiff and the same defendants for causes of action which might have been joined. (*Smith v. Smith*, 142.)

See Fraud.

ADVERSE POSSESSION.

See Cotenancy, 2.

AFFIDAVITS.

See Attorney and Client, 1.

AGENCY.

1. **AGENCY—RIGHTS OF UNDISCLOSED PRINCIPAL.**—An undisclosed principal may maintain an action on a written contract made by his agent in his name alone, on proof that in making the contract, the agent was acting for such principal. (*Powell v. Wade*, 915.)

2. **AGENCY—RIGHTS OF UNDISCLOSED PRINCIPAL—BURDEN OF PROOF.**—In an action by an undisclosed principal to recover on a contract made by his agent in the name of the latter alone, the burden of proof is upon the principal to show the agency, and that, in making the contract, the agent was acting for him. (*Powell v. Wade*, 915.)

3. **AGENCY—RATIFICATION OF AGENT'S ACT.**—If an agent performs an act according to his usual course of dealing, and, the act is thereafter ratified by his principal, it is binding upon the latter. (*Brown v. Wilson*, 779.)

4. **NEGLIGENCE—AGENCY.**—A party employing a person who follows a distinct and independent occupation of his own is not responsible for the negligent or improper acts of the latter. (*Myers v. Holborn*, 606.)

See Insurance, 1-3; Negotiable Instruments, 8.

ALIMONY.

See Marriage and Divorce, 10-14.

ANIMALS.

See Game Laws.

APOTHECARIES.

1. **APOTHECARIES—CARE REQUIRED OF.**—Apothecaries, druggists, and all persons engaged in manufacturing, compounding, or vending drugs, poisons, or medicines, are required to be extraordinarily skillful and to use the highest degree of care known to practical men to prevent injury from the use of such articles and compounds. (*Howes v. Rose*, 251.)

2. **APOTHECARIES—NEGLIGENCE.**—A druggist who sells a poisonous drug as harmless is not protected from liability for his negligence by the label of a reputable wholesale house from which he purchased it in an unbroken package, if he has broken such package and handled the drug before he made such sale. (*Howes v. Rose*, 251.)

3. **APOTHECARIES—NEGLIGENCE—EVIDENCE.**—The mere sale of a poisonous drug as harmless does not establish a *prima facie* case of negligence against the druggist thus selling it, and his actual negligence in making such sale must be proved to justify a recovery. (*Howes v. Rose*, 251.)

APPEAL.

1. **APPELLATE PRACTICE—SUFFICIENCY OF EVIDENCE.** If under the evidence the complaining party is entitled to recover anything, it must be regarded as sufficient to sustain the verdict, in the absence of an assignment of error, that the damages are excessive or the amount too large. (*Globe etc. Ins. Co. v. Helwig*, 247.)

2. **APPEAL, WHEN DOES NOT SUSPEND PROCEEDINGS.**—If a judgment is entered in a *quo warranto* to the effect that the relator is entitled to an office held by the defendant, an appeal, though accompanied by a stay bond, does not stay the judgment,

nor deprive the relator of the right to the immediate possession of the office. (*Fawcett v. Superior Court*, 894.)

3. APPEAL—WHEN COMPETENCY OF EVIDENCE WILL NOT BE REVIEWED.—If the complaint on a promissory note has a count for money had and received, and certain evidence is admissible under that count, but not under a count on the note, the competency of the evidence, under the count on the note, will not be considered upon appeal, where the defendant, upon the plaintiff's failure to recover upon the count for money had and received, took no steps to have the evidence excluded from the jury. (*Richardson v. Foster*, 481.)

4. APPEAL—REVIEW OF MOTION FOR A NEW TRIAL.—A motion for a new trial, on the ground of "errors in law occurring at the trial" is not addressed to the discretion of the court, but involves only the correctness of the court's rulings upon which error is assigned. Hence, the decision of the trial court will be reviewed as presenting questions of law only, and not of discretion. (*Aultman etc. Co. v. Gunderson*, 837.)

5. APPEAL—TRIAL UPON NEW THEORY.—The question of defendant's liability cannot be tried in the court below upon one definite theory, as alleged in the plaintiff's complaint, and in the supreme court, on appeal, upon an entirely new and different theory, not indicated in the complaint. Hence, if the only issue presented by the pleadings is defendant's liability as maker of a note, the plaintiff cannot, on appeal, rely upon evidence of a guaranty. (*Aultman etc. Co. v. Gunderson*, 837.)

6. APPEAL—REVIEW OF ORDER DIRECTING VERDICT.—If the court, at the close of the testimony, erroneously directs a verdict, the order may, if properly excepted to, be reviewed on appeal, without a motion for a new trial, as the error is one of law occurring on the trial. (*Jones Lumber etc. Company v. Faris*, 814.)

7. APPEAL—DISBARMENT OF ATTORNEY—CONFLICTING EVIDENCE.—If the evidence in proceedings for the disbarment of an attorney, though conflicting, lends support to the findings of the court, such findings will not be disturbed upon appeal. (*In re Wharton*, 71.)

8. APPEAL—REVERSAL—FINDINGS—NEW TRIAL.—If a judgment is reversed upon findings which were against the plaintiff and appellant, there must be a new trial, as a judgment for him, by the appellate court, would be unsupported by the findings of fact, and that court has no power to make them. (*Kellogg v. King*, 74.)

9. APPELLATE PROCEDURE.—THE FAILURE TO ASSESS NOMINAL DAMAGES is not an error affecting the substantial rights of the parties, and therefore does not require the reversal of the judgment on appeal. (*Coffin v. State*, 188.)

10. APPELLATE PROCEDURE—HARMLESS ERROR.—An erroneous order sustaining a demurrer to a complaint does not constitute a sufficient cause for reversing a judgment, when, upon the adding of a paragraph to the complaint, a trial thereon is had and a finding made from which it is clear that the plaintiff had no right of recovery, and therefore could have sustained no injury from the order sustaining the demurrer to the original complaint. (*Gilliland v. Jones*, 210.)

11. APPELLATE PRACTICE—JOINT ASSIGNMENT OF ERROR.—A joint assignment of error in giving a series of instructions can only be maintained by showing that all of the instructions are

erroneous, for, if one of the instructions is correct, the assignment of error must fail. (*Globe etc. Ins. Co. v. Helwig*, 247.)

12. APPELLATE PRACTICE.—APPELLANT CANNOT ASSIGN FOR ERROR matters that do not prejudice him, but affect other parties not before the court. (*Brown v. Wilson*, 779.)

13. PRACTICE—FINDINGS.—The refusal of a trial judge to find upon material issues involved in the evidence is error. (*Farmers' Loan etc. Co. v. New York etc. Ry. Co.*, 689.)

See Judgments, 4; Mandamus.

APPROPRIATIONS.

See States, 2, 3.

ARBITRATION.

See Insurance, 9.

ARCHITECT.

See Building Contracts.

ARREST.

ARREST—PRIVILEGE FROM WHILE ATTENDING COURT.—A defendant in a criminal case is not privileged from arrest on civil process while attending court to answer the criminal charge. (*Wood v. Boyle*, 747.)

ARSON.

1. ARSON—BURNING ONE'S OWN HOUSE.—A person who has burned his own dwellinghouse, with intent to defraud an insurer thereof, is not subject to an indictment for arson or any other felony, unless expressly made so by statute. (*State v. Sarvis*, 806.)

2. ARSON—BURNING ONE'S OWN HOUSE—ACCESSORY.—It is not arson for a man to burn his own dwellinghouse or to procure or demand it to be done by another, for the purpose of defrauding an insurer thereof, unless expressly made so by statute. (*State v. Sarvis*, 806.)

ASSESSMENTS.

See Taxes, 1.

ASSIGNMENT.

See Insurance, 7, 15-20; Mechanic's Lien, 6, 12; Mortgages, 1-3, 6; Negotiable Instruments, 12.

ASSOCIATIONS.

SOCIAL CLUBS—SALE OF LIQUOR.—If an incorporated club is organized and conducted in good faith with a limited and selected membership, really owning its property in common, and formed for social, literary, or other purposes to which the furnishing of liquors to its members is merely incidental and without profit, the furnishing of liquors to members is not a sale within the meaning of a liquor license statute restraining and regulating the sale of intoxicating liquors. (*Klein v. Livingston Club*, 717.)

ASSUMPSIT.

ACTION FOR MONEYS HAD AND RECEIVED—WANT OF PRIVITY.—An action for moneys had and received lies against any one who has money in his hands which he is not entitled to retain

as against the plaintiff. Want of privity between the parties is no obstacle to the action. (*Soderberg v. King County*, 878.)

ATTACHMENT.

1. ATTACHMENT--GARNISHMENT--CONTRACT PRICE AS "WAGES."—If one contracts to build a house for a certain amount, and employs laborers to work under him, the contract price is not "wages" within the meaning of a statute exempting, to a specified amount, "the wages of every laborer or person working for wages," although the contractor does some unascertained portion of the work himself. (*Heard v. Crum*, 520.)

2. ATTACHMENT AND GARNISHMENT--WAGES--EXEMPTION.—Under a statute exempting from garnishment the wages of a laborer or other person working for wages, who is the head of a family, to the amount of one hundred dollars, the laborer has the right, on the first of each month, or whenever, by the contract of employment, the wages, not exceeding one hundred dollars, are due and payable, to demand and receive them, notwithstanding his employer may have been garnished. The amount of monthly wages for several months, less one hundred dollars, cannot be tied up, either by successive writs of garnishment, or by a single writ returnable to a term of court long subsequent to its execution, and the garnishee should be discharged. (*Chapman v. Berry*, 546.)

3. ATTACHMENT.—A STATUTE EXEMPTING WAGES FROM GARNISHMENT is designed to secure to laborers and their families the small fruits of their toil, and must be given such construction as will carry its beneficent design into effect. (*Chapman v. Berry*, 546.)

4. ATTACHMENT--WHAT IS A VALID LEVY.—To constitute a valid levy of an attachment, the officer levying it must take actual possession of the property attached as far as, under the circumstances, practicable. He must put himself in position to, and must, in fact, assert and enforce a dominion over the property adverse to, and exclusive of, the attachment debtor, and such property must be in his substantial presence. (*Jones Lumber etc. Co. v. Faris*, 814.)

5. ATTACHMENT--KEEPING LEVY GOOD--SUBSEQUENT PURCHASER.—To keep a levy of an attachment good as against a subsequent purchaser of the attached property, the officer must retain it in his possession and exercise an adverse dominion and control over it, either by a keeper in custody, or by keeping it under lock and key, or by some other equivalent act of exclusive possession and control. (*Jones Lumber etc. Co. v. Faris*, 814.)

6. ATTACHMENT--ABANDONMENT OF LEVY--RIGHT OF PURCHASER.—It is an abandonment of an attachment, as to third persons, where the officer, after levying the writ, leaves the property in a room occupied and used by the debtor, surrenders the key of the room to the latter, and, for about three months and a half, neither sees nor gives any attention to the property, which, during that time, has nothing about it, or its surroundings, to indicate that the officer claims possession of it; and one who purchases the attached property from the attachment debtor, at the end of that time, takes it free from the lien of the attachment, although he knew of the original levy. (*Jones Lumber etc. Co. v. Faris*, 814.)

7. ATTACHMENT--ACTION ON BOND FOR EXPENSES OF SUIT.—A defendant in an attachment suit, after defeating the action upon its merits, cannot recover upon the attachment bond, for

attorney's fees and expenses incurred by him in defending the main suit, where he did not own the property attached as his. (*Tebo v. Betancourt*, 573.)

ATTORNEY AND CLIENT.

1. **ATTORNEYS—DISBARMENT—FALSE AND FRAUDULENT AFFIDAVITS.**—It is sufficient to disbar an attorney that he has been found guilty of knowingly exhibiting to the court false and fraudulent affidavits of service of summons, and inducing the court to accept such affidavits as genuine. (*In re Wharton*, 72.)

2. **ATTORNEYS—DISBARMENT—JURY TRIAL.**—An accused attorney, in disbarment proceedings, is not entitled to a trial by jury. The constitutionality of a statute providing for a trial by the court, in such cases, is beyond question. (*In re Wharton*, 72.)

3. **ATTORNEYS—DISBARMENT—RESORT TO CRIMINAL COURTS.**—It is not a prerequisite to the disbarment of an attorney that resort should first be had to the criminal courts, where the charge against him for a violation of his obligations involves a felony. (*In re Wharton*, 72.)

4. **ATTORNEY AND CLIENT—FEES.**—An agreement for attorney fees in an instrument is void unless expressly sanctioned by statute, and a court of equity has no inherent power to enforce such an agreement. (*Kittermaster v. Brossard*, 437.)

5. **ATTORNEY AND CLIENT—POWER TO RELEASE LIEN.** An attorney at law, to whom a claim is sent for collection, has no power to release a lien upon property held by his principal, and take a lien upon other property, without express authority from his principal. Want of such authority may always be shown. (*Ludden v. Sumter*, 761.)

ATTORNEYS AT LAW.

See Appeal, 7; Damages, 22, 23.

ATTORNEY'S FEES.

See Attachment, 7; Attorney and Client, 4.

BAILMENT.

BAILMENT—LOAN—LOSS OF SUBJECT—BAILEE'S RIGHT OF ACTION.—One who borrows a horse is entitled to bring an action for its value against one whose negligence has caused the death of the animal, the recovery being in trust for the owner. (*Baggett v. McCormack*, 554.)

See Banks, 1.

BANKS.

1. **BANKS AND BANKING.—RELATION BETWEEN BANK AND DEPOSITOR** arising from an ordinary deposit is that of debtor and creditor and in case of special deposit, the relation of bailor and bailee, unless by special stipulations these relations are altered or modified in either case. (*Leaphart v. Commercial Bank*, 800.)

2. **BANKS AND BANKING.—RELATION BETWEEN BANK AND DEPOSITOR.**—A deposit of money made with a bank corporation, or association, to be used by it for the purpose of making profit therefrom, with an agreement on its part to repay the amount with interest, becomes at once the property of the depositor, and creates the ordinary relation of debtor and creditor between the depositor and the depositor, with nothing in the nature of a trust or fiduciary character in or growing out of the transaction. (*Leaphart v. Commercial Bank*, 800.)

3. BANKS AND BANKING—RELATION BETWEEN BANK AND DEPOSITOR.—In the absence of stipulations to the contrary, ordinary deposits, when received, by a bank, corporation, or other association, for the purpose of deriving profit therefrom, become at once the property of the depositor, and a part of its general funds that can be loaned by it as other moneys. The liability on the part of the depositor in regard to such deposits is as a debtor, not as a trustee. (*Leaphart v. Commercial Bank*, 800.)

4. BANKS AND BANKING—POWER TO BORROW MONEY—CONTRACTS ULTRA VIRES—ESTOPPEL.—Ordinary depositors, who are stockholders in a savings bank, and who, with full knowledge of the facts, have enjoyed the full benefit of money loaned to the bank by special depositors under contract, are estopped from alleging that such contracts are ultra vires. (*Heironimus v. Sweeney*, 333.)

5. BANKS AND BANKING—POWER TO BORROW MONEY.—A savings bank has power, without express authority therefor, to borrow money for the proper conduct of its business, and to pay interest on the money thus borrowed. (*Heironimus v. Sweeney*, 333.)

6. BANKS AND BANKING—SPECIAL DEPOSITS—COMPOUND INTEREST ON.—A contract between a savings bank and a special depositor, that the interest on his deposit shall remain in the bank and draw interest as new principal, is valid. (*Heironimus v. Sweeney*, 333.)

7. BANKS AND BANKING—LIENS.—A bank has a lien on all moneys, notes, and funds of a customer in its possession, for any indebtedness of such customer to the bank which is due and unpaid. (*Gibbons v. Hecox*, 463.)

8. BANKS AND BANKING—LIENS—PRIORITY.—A note in the hands of a bank for collection is subject to a lien by the bank for the payment of a note owned by it and made by the payee of the first note, and which matures while the latter note is in its hands for collection. Such lien is superior to the rights of the assignee of the note left for collection, whose assignment is not made until after the maturity of the note owned by the bank. (*Gibbons v. Hecox*, 463.)

9. BANKS AND BANKING—INSOLVENCY—SPECIAL DEPOSITS—DISTRIBUTION OF ASSETS.—A special depositor in a savings bank, whose deposit draws interest, is, in the event of the insolvency of the institution, entitled to be paid in full, both principal and interest, before any distribution is made to regular and ordinary depositors, who are stockholders in the institution. (*Heironimus v. Sweeney*, 333.)

BASTARDY.

A BASTARD HAS BY THE COMMON LAW no father, and is considered the child of nobody. He cannot be the heir of anyone; neither can he have "heirs," but of his own body. (*McDonald v. Pittsburgh etc. Ry. Co.*, 185.)

See Parent and Child, 3.

BILLS OF PARTICULARS.

PRACTICE—BILL OF PARTICULARS.—The granting or refusing of a motion for a bill of particulars is within the sound discretion of the trial court, and its ruling in that regard will not be reviewed on appeal, unless there has been a palpable abuse of such discretion. The refusal, in an action against the railway corporation, wherein the plaintiff seeks to recover a sum specified for loss of time, worry, trouble, and annoyance, and anxiety of mind, to compel his filing a bill of particulars to designate the sum which

he claims for each of those causes separately, is not an abuse of discretion justifying the reversal of a judgment subsequently rendered against the defendant. (*Turner v. Great Northern Ry. Co.*, 883.)

BONDS.

1. **BONDS AND OTHER CHOSSES IN ACTION FOLLOW THE PERSON** of their owner, and cannot be regarded as situated in the state of which the debtor is a resident, when they and their holder are both within another state. (*Matter of Bronson*, 632.)

2. **MORTGAGE BONDS.**—A SUIT TO FORECLOSE MORTGAGE BONDS purporting to be brought by a trustee upon the request of persons owning such bonds cannot be sustained on the ground that the trustee had authority to bring such suit without any request, if he acted upon the request made instead of upon his own judgment and discretion, and the persons making the request were not owners of the bonds which they professed to represent. (*Farmers' Loan etc. Co. v. New York etc. Ry. Co.*, 689.)

See Counties, 8, 9; Damages, 25; Railroads, 18, 24; Taxes, 4-6.

BOOKS.

See Depositions; Evidence, 5.

BUILDING CONTRACTS.

1. **ARCHITECT, LIABILITY OF, FOR FALSE CERTIFICATE.**—A complaint charging that an architect, falsely, negligently, and acting in collusion with the builder, gave a certificate under a contract, and represented the value of labor and materials which had gone into the construction of a building would amount to the sum specified, in reliance upon which the owner paid such sum, whereas the value of such materials and labor amounted to a less sum, naming it, states a cause of action against such architect. (*Corey v. Eastman*, 401.)

2. **ARCHITECTS, DUTIES AND LIABILITIES OF.**—If an architect under contract with the owner of property to supervise the construction of a building and to make statements, or a certificate, showing the value or progress of the work, negligently erroneous statements made, and imprudent advice given by him become torts on the same principle that under a warranty an erroneous statement was a deceit by the old common law even without negligence. (*Corey v. Eastman*, 401.)

BURDEN OF PROOF.

See Agency, 2.

CARRIERS.

See Damages, 20; Railroads, 10-14.

CEMETERIES.

CEMETERIES — SEPULTURE — ESTOPPEL — INJUNCTION.—If the remains of deceased relatives are placed in a tomb upon the strength of a promise by the owner of the tomb that they shall remain there forever, neither the tomb-owner in life, nor his widow and legatee, after his death, can recall that promise and require the removal of the remains deposited on the faith of this pledge of future sepulture; and an injunction will issue against disturbing them. (*Choppin v. Dauphin*, 313.)

CERTIORARI.

See Habeas Corpus, 2.

CHARITIES.

1. TRUSTS.—THE RULE AGAINST PERPETUITIES does not apply to gifts for charitable uses. (*Mills v. Davison*, 594.)

2. TRUSTS.—GIFTS TO CHARITABLE USES, with direction that no part thereof shall at any time be alienated, does not create a perpetuity in the sense forbidden by law, but only a perpetuity allowed by law and equity in cases of charitable trusts. (*Mills v. Davison*, 594.)

3. TRUSTS—CHARITABLE USES—INTENT.—The object for which the donee of a charity was incorporated is always an important element in the construction of the instrument by which the charity is created. (*Mills v. Davison*, 594.)

4. TRUSTS—CHARITABLE USE.—A deed of gift to a certain religious corporation with habendum to the grantees and their successors forever, with express condition and limitation that no building shall be kept, maintained, or erected on the premises except for the purpose of public worship and teaching in accordance with the usages, rites, and ceremonies of a certain religious sect, and with an express interdict that neither the grantee nor its successors shall at any time sell, mortgage, or in any way convey the premises, or any part thereof, donates the whole estate exclusively to the use named in the grant. (*Mills v. Davison*, 594.)

5. TRUSTS—CHARITABLE USE.—It is sufficient to create charitable use if it appears from the construction of the instrument that the property was intended to be held subject only to the execution of certain charitable trusts or the performance of certain conditions in favor of charity. (*Mills v. Davison*, 594.)

6. TRUSTS—CHARITABLE USES.—Every conveyance to a charitable use is a conveyance to hold upon the trust declared, and the execution of the trust is the condition upon which the estate is taken and held, to be given effect to, not by forfeiture of the title, but by those methods by means of which a court of equity compels the performance of such trusts. (*Mills v. Davison*, 594.)

7. TRUSTS—CHARITABLE USES—PERPETUITIES.—When a charitable use is created by gift, the donor may impose conditions and limitations which shall prevent the diversion of the trust estate from the uses upon which it is given, either by the voluntary or involuntary act of the donee. (*Mills v. Davison*, 594.)

8. TRUSTS—CHARITABLE USES—RIGHT TO MORTGAGE PROPERTY.—If a deed of gift to a religious corporation for a charitable use contains the consent of the grantor that the grantee may mortgage the property to raise money to complete a church edifice, the effect of such consent is not to destroy the entire trust, but to validate the mortgage, and, upon sale under foreclosure, the surplus belongs to the grantee, to be held upon the original trust. (*Mills v. Davison*, 594.)

See Injunctions, 3; Trusts.

CHATTEL MORTGAGES.

1. CHATTEL MORTGAGE, WHAT IS.—An instrument purporting to bargain and sell a certain electric light plant, providing that the vendor should hold a vendor's lien on such property and all additions thereto to secure an amount specified, and which is assented to by the vendee, who agrees to perform all the obligations therein contained, constitutes a chattel mortgage of the property so specified. (*Lumbert v. Woodward*, 175.)

2. **CHATTEL MORTGAGE, FORM OF.**—Where no particular form for chattel mortgages has been prescribed by statute, a writing which reasonably expresses the intention of the parties to secure a particular debt, indicating the property and conforming to the statutory requirements as to acknowledgment and recording, should be deemed a chattel mortgage. (*Lumbert v. Woodward*, 175.)

3. **MORTGAGE, SUBSEQUENT AGREEMENT, WHEN BECOMES A PART OF IT.**—If, after the execution of a mortgage on a stock of goods, the parties agree in writing that the mortgagor shall have possession of and shall sell them at private sale, paying the proceeds to the mortgagees, receiving for his services a stated sum monthly, to be retained out of the proceeds of the sale, such new agreement becomes a part of the mortgage, and has the same effect as if it had been originally inserted therein and the provisions inconsistent therewith omitted. If not placed on record, it is to be regarded as a secret agreement. (*Birmingham Dry Goods Co. v. Roden*, 35.)

4. **CHATTEL MORTGAGES—EQUITABLE.**—An agreement founded on a valuable consideration to give a mortgage on a chattel constitutes an equitable mortgage. (*Davis v. Childers*, 757.)

5. **CHATTEL MORTGAGES—EQUITABLE—LACK OF WORDS OF ALIENATION.**—If an equitable chattel mortgage contains no words of alienation sufficient to pass the legal title, the mortgagee has no right to seize and sell the property at law, but must seek the aid of a court of equity. (*Davis v. Childers*, 757.)

6. **CHATTEL MORTGAGES—EQUITABLE—EFFECT OF WORDS OF ALIENATION.**—If an equitable chattel mortgage contains words of alienation sufficient to pass the legal title, and the property mentioned therein is not in esse when the mortgage is executed, the mortgagee has the right to take the property into his possession when it comes into existence; but his right to seize it is based solely upon such words of alienation. (*Davis v. Childers*, 757.)

7. **CHATTEL MORTGAGES.—EQUITABLE** chattel mortgages are of two kinds: those which do, and of those which do not contain words of alienation sufficient in form to pass the legal title. (*Davis v. Childers*, 757.)

8. **CHATTEL MORTGAGES.—EQUITABLE** chattel mortgages may be created by parol, and it is not necessary that the agreement to give such mortgage should be in writing. (*Davis v. Childers*, 757.)

9. **MORTGAGE, SECRET RESERVATIONS.**—If, immediately after the execution of a mortgage on a stock of goods, the parties agree in writing that the mortgagor shall have possession thereof, and shall sell them at private sale, paying the proceeds to the mortgagees, reserving from them a stated monthly salary, such agreement, not being recorded, is a secret agreement for a benefit to him, making the mortgage void as to his creditors, if he was in a failing condition at the time and the facts were sufficient to indicate such condition to the mortgagees. (*Birmingham Dry Goods Co. v. Roden*, 35.)

CHILDREN.

See Evidence, 6-8; Habeas Corpus, 2; Negligence, 12.

CHURCHES.

See Religious Societies.

CLAIMS.

See Counties, 2, 3, 6.

CLOUD ON TITLE.

QUIETING TITLE—GRANTING RELIEF TO DEFENDANT.—Under the statutes of Alabama authorizing proceedings to determine claims of title alleged to be made to real property by the defendant, he is not, where he appears only by answer praying no relief except the determination whether he has an estate, interest, or right in the property, entitled to a decree restraining the complainant from asserting any further claim or interest in the property, and directing a reference to ascertain the rents, taxes, insurance, etc. (*Cheney v. Nathan*, 26.)

COLLATERAL SECURITY.

See Pledge.

COMITY.

See Corporations, 18.

COMMISSIONERS.

See Counties, 1, 5-7.

CONFESSIONS.

See Homicide, 1.

CONFLICT OF LAWS.

See Contracts, 3-6; Corporations, 11, 12; Executors and Administrators, 5; Usury, 1-3.

CONSOLIDATION.

See Actions, 2.

CONSTITUTIONS.

CONSTITUTIONAL LAW—CLASS DISCRIMINATION.—A class of persons which can be ascertained only by inquiry into the private opinions of another than the person operated upon by the discrimination is not such as principles of constitutional construction can approve. (*Middleton v. Middleton*, 602.)

See Legislature; Statutes, 1-5.

CONTEMPT.

See Habeas Corpus, 1.

CONTRACTS.

1. **CONTRACTS IN WRITING ARE TO BE CONSTRUED** by the court and not by the jury. (*Leaphart v. Commercial Bank*, 800.)

2. **SEVERAL INSTRUMENTS OF THE SAME DATE**, between the same parties and relating to the same subject, should be construed as parts of one contract. (*Palmer v. Palmer*, 653.)

3. **THE PLACE OF THE CONTRACT.**—The place where a contract is executed is important, but does not necessarily determine the place of the law under which the contract must be performed. The place where the negotiations were had and the details of the contract arranged is also important. The place where the contract is to be executed is of equal importance in determining what must have been the intention and purpose of the parties. (*Wilson v. Lewiston Mill Company*, 680.)

4. **CONTRACT, PLACE OF, EFFECT TO BE GIVEN TO.—THE INTENTION OF THE PARTIES** to a contract, so far as it is disclosed, must control, and, where it appears, should not be overcome by considerations respecting the place where the contract was accepted or executed. (*Wilson v. Lewiston Mill Co.*, 680.)

5. **CONFLICT OF LAWS.—THE VALIDITY OF CONTRACTS IS TO BE DETERMINED** by the law of the forum, in the absence of allegation and proof of what the *lex loci contractus* is. (*Gist v. Western Union Tel. Co.*, 763.)

6. **CONTRACTS—VALIDITY—PUBLIC POLICY—EVIDENCE.** If one party to a contract contrary to public policy makes out a *prima facie* case for a recovery under it, without showing its illegality, the person sued, who is a party to the contract, may show its illegality and defeat such recovery. (*Hope v. Linden Park etc. Assn.*, 614.)

7. **CONTRACTS—VALIDITY—PUBLIC POLICY—EVIDENCE.** In an action by either party to a contract against public policy to recover from the other for his own benefit, such other may show the illegality of the contract. (*Hope v. Linden Park etc. Assn.*, 614.)

8. **CONTRACTS—VALIDITY—PUBLIC POLICY.**—In an action in which either party to a contract contrary to public policy seeks redress from the other for his own benefit, the court must refuse to interfere and leave him in the position in which he has placed himself. (*Hope v. Linden Park etc. Assn.*, 614.)

9. **CONTRACTS—VALIDITY—PUBLIC POLICY.**—An agreement which controls or restricts, or tends or is calculated to control or restrict, the free exercise of a discretion for the public good vested in one acting in a public official capacity, is illegal and so reprobated by the courts that no redress can be given to a party who sues for himself in respect of it. (*Hope v. Linden Park etc. Assn.*, 614.)

10. **CONFLICT OF LAWS—CONTRACTS AGAINST PUBLIC POLICY.**—Contracts which are regarded as *contra bonos mores* in one state cannot be recognized there, although they are regarded as valid in another state where made and to be performed. (*Gist v. Western Union Tel. Co.*, 763.)

11. **CONTRACT FOR SERVICES, WHEN NOT TERMINATED BY DEATH.**—The death of a member of a partnership does not terminate a contract for services entered into between the firm and one of its employés, when the business is carried on by the surviving partner after such death in the same manner as before, and all the parties for some time assumed that the contract had not been terminated. (*Hughes v. Gross*, 375.)

12. **PLEADING—CONTRACTS RELATING TO "FUTURES."**—A complaint in an action to recover for negligent delay or failure in delivering a telegram relating to a contract for the sale of cotton in the future must allege all of the facts enumerated by statute as necessary to render such a contract valid, otherwise the complaint is insufficient. (*Gist v. Western Union Tel. Co.*, 763.)

13. **CONTRACTS FOR SALE OF "FUTURES"** are void as gambling contracts, unless there is a bona fide intention that the article contracted to be sold shall be actually delivered and received in kind at the time appointed by the contract. (*Gist v. Western Union Tel. Co.*, 763.)

See Agency, 1, 2; Damages, 24, 25; Equity, 2; Estoppel, 2; License.

CONTRIBUTION.

See Joint Liability, 1; Judgments, 2.

CORPORATIONS.

1. ONE CORPORATION OWNING A MAJORITY OF THE STOCK OF ANOTHER and competing corporation, and thus having control thereof, may not divert the income from its business or refuse business which would enable it to pay interest on obligations held by the former corporation, for the purpose of obtaining control of its property at less than its value, to the injury of the minority stockholders of the debtor corporation; and if such practices are pursued and a suit is brought to foreclose the mortgage in the interest of the creditor corporation, such foreclosure may be denied. (*Farmers' Loan etc. Co. v. New York etc. Ry. Co.*, 689.)

2. THOUGH ONE CORPORATION IS AUTHORIZED TO PURCHASE STOCK IN ANOTHER, it cannot by such purchase obtain any greater right than would have been obtained by a purchase by a natural person, and, upon acquiring a majority of the stock, it occupies toward the minority stockholders the same relation of trust and the same duty to respect the trust as must have arisen had the purchase been by a natural person. (*Farmers' Loan etc. Co. v. New York etc. Ry. Co.*, 689.)

3. CORPORATIONS, SHARES OF, WHERE DEEMED TO BE. The interest which a shareholder in a corporation has is property which may be deemed as existing within the state of which the corporation is a resident, and, therefore, shares of stock held by a non-resident stockholder of the corporation, though the certificates thereof are at the place of his domicile at the time of his death, are property within the state, and as such subject to the inheritance tax imposed on all property within the state transferred by will or the intestate laws, where the decedent was a nonresident at the time of his death. (*Matter of Bronson*, 632.)

4. NEGOTIABLE INSTRUMENTS, EVIDENCE OF DIVERSION OF TO AN IMPROPER PURPOSE.—If a note is made and issued in due form by a corporation and signed by its president and secretary, the fact that it is indorsed by the payee to a firm of which such president is a member, and is in the possession of the president, who transfers it as collateral security for a loan made to his firm, does not charge the transferee with notice that the note has, by such president, been fraudulently diverted from the purpose for which it was authorized to be issued, when it is not shown that such transferee knew anything about the origin or diversion of the paper. (*Cheever v. Pittsburgh etc. R. R. Co.*, 646.)

5. CORPORATIONS.—INDIVIDUAL LIABILITY FOR CORPORATE OBLIGATIONS or debts if not imposed by express statute, is not an incident of membership in a corporation, nor is there any liability upon corporate officers or agents because of contracts into which they lawfully enter on behalf of the corporation. (*Sampson v. Fox*, 950.)

6. CORPORATIONS—POWER OF PRESIDENT TO INDORSE NOTES—PRESUMPTION.—The managing president of a corporation, engaged in loaning money, and in buying and selling negotiable instruments, is presumed, in the absence of evidence to the contrary, to have authority, as such officer, to transfer, by indorsement, a promissory note made payable to the corporation. (*Merrill v. Hurley*, 859.)

7. CORPORATIONS—DUTY OF PRESIDENT TO PAY DEBTS.—If the right and duty of the president of a private corporation to pay its debts does not exist by general usage, that duty does not devolve upon him merely by virtue of the office, provided it has not been imposed by statute, or has not been conferred upon him by the corporation. (*Sampson v. Fox*, 950.)

8. CORPORATIONS—AUTHORITY OF PRESIDENT.—The president, or other chief executive officer, of a corporation has general authority to appear, to employ counsel, to answer, or to execute a bond on appeal in any suits brought against the corporation. (*Sarmiento v. Davis Boat etc. Co.*, 446.)

9. CORPORATIONS—STOCKHOLDERS' LIABILITY.—The fact that a receiver of a corporation has been appointed, and has taken possession of its assets, constitutes no defense to an action brought by a creditor against the stockholders, if the liability of the defendant is to the creditors, and is not one which the receiver could enforce. (*Hancock Nat. Bank v. Ellis*, 414.)

10. CORPORATIONS, STOCKHOLDERS, LIABILITY OF IN OTHER STATES.—If by the laws of a state a stockholder is liable to judgment creditors of the corporation as upon a contract for an amount equal to the par value of the stock owned by him, which is suable anywhere, such liability may be enforced by an action brought in another state. (*Hancock Nat. Bank v. Ellis*, 414.)

11. CONFLICT OF LAWS.—The liability of stockholders of a corporation to the creditors thereof must be determined according to the law of the state wherein the corporation exists and by whose laws it was organized. (*Hancock Nat. Bank v. Ellis*, 414.)

12. CONFLICT OF LAWS—CONSTRUCTION OF LAWS IN THE STATES WHEREIN THEY WERE ENACTED.—If the courts of a state have construed one of its statutes imposing liability upon stockholders of corporations, such construction must be followed by the courts of another state in actions therein to enforce such liability. (*Hancock Nat. Bank v. Ellis*, 414.)

13. CORPORATIONS—NOTICE OF EQUITABLE TITLE.—Although the holders of the legal title convey to a corporation of which they were the promoters and continue to be its directors and only stockholders, neither they nor the corporation can thereby defeat an equitable title out against them of which they had knowledge at the time of the conveyance. The corporation stands charged with the same equities and knowledge as its grantors. (*Franklin Min. Co. v. O'Brien*, 118.)

14. CORPORATIONS—NOTICE—WHAT IS NOT.—A corporation is not affected with notice or knowledge of facts merely because some of its promoters who organized the corporation had knowledge of such facts, or merely because some of its stockholders had such notice. (*Franklin Mining Co. v. O'Brien*, 118.)

15. CORPORATIONS—NOTICE TO OFFICER—EFFECT ON CORPORATION.—A corporation is not charged with notice of facts known or acquired by its officer or agent in a transaction in which he acts for himself. (*Franklin Mining Co. v. O'Brien*, 118.)

16. CORPORATIONS—FOREIGN—RIGHT TO SUE.—DOCTRINE OF STATE COMITY cannot be invoked in behalf of a foreign corporation seeking to recover upon a claim or contract expressly prohibited by law, or one which is clearly at variance with the settled policy of the state. (*Seamans v. Temple Co.*, 457.)

17. CORPORATIONS—SEAL AS EVIDENCE.—A statute providing that, if the common seal of a corporation is affixed to any instrument purporting to be executed by it, it shall be prima facie proof of the due adoption of such seal, that it was affixed by due authority, and that such instrument was lawfully executed, does not require that the corporate seal shall be affixed to each instrument, but only makes it prima facie proof of due authority whenever it is attached thereto. (*Sarmiento v. Davis Boat etc. Co.*, 446.)

18. CORPORATIONS, RIGHT OF ONE TO PURCHASE STOCK AND BONDS OF ANOTHER FOR THE PURPOSE OF ACQUIRING CONTROL.—One corporation has no right to purchase the stock and bonds of another for the express purpose of obtaining control of the latter and of acquiring its property at less than its actual value, to the injury of a minority of its stockholders, and if, in pursuance of such a purpose, the former corporation acquires a majority of the stock and takes measures to prevent the other being able to meet its obligation, the minority stockholders are not without redress in equity. (*Farmers' Loan etc. Co. v. New York etc. Ry. Co.*, 689.)

19. CORPORATION, DEFAULT OF, DUE TO THE CONDUCT OF A CREDITOR CORPORATION.—He who prevents a thing being done shall not avail himself of the nonperformance he occasioned. This rule is applicable to corporations. (*Farmers' Loan etc. Co. v. New York etc. Ry. Co.*, 689.)

20. ONE CORPORATION OWNING A MAJORITY OF THE STOCK IN ANOTHER, or whose stockholders own such majority, is guilty of fraud in managing the affairs of the second corporation for the benefit of the first. A court of equity will interfere to protect the minority stockholders. (*Farmers' Loan etc. Co. v. New York etc. Ry. Co.*, 689.)

21. STOCKHOLDERS, TRUST RELATIONS BETWEEN.—The law requires of a majority of the stockholders of a corporation good faith in their control and management of the corporation as regards the minority, and, in this respect, the majority stand in much the same attitude toward the minority that the directors sustain toward the stockholders. (*Farmers' Loan etc. Co. v. New York etc. Ry. Co.*, 689.)

22. FRAUDULENT TRANSFER TO A CORPORATION.—If persons doing business as copartners and indebted as such form a corporation for the purpose of defrauding their creditors, and to that end convey all the property of the partnership to the corporation in consideration of its capital stock issued to them and members of their families, their judgment creditors may maintain a suit in equity to have the formation of the corporation declared fraudulent as against the complainants, and that they have a lien on the property so transferred for the satisfaction of their indebtedness. (*Metcalf v. Arnold*, 24.)

See Negotiable Instruments, 15; Payment, 2; Prohibition; Receivers, 1.

COTENANCY.

1. COTENANCY—PURCHASE OF OUTSTANDING TITLE OF MINING CLAIM.—The rule that the purchase of an outstanding title by a tenant in common inures to the benefit of all of the cotenants applies to the purchase by a cotenant in a mining claim of an interest in a senior conflicting claim. (*Franklin Mining Co. v. O'Brien*, 118.)

2. COTENANCY—PURCHASE FROM COTENANT IN ADVERSE POSSESSION—ACCOUNTING.—One who purchases agricultural products of a tenant in common holding adverse possession of lands on which the products are grown cannot be compelled to account to the other cotenants for the value of such products, although the purchaser knew when he bought them of the interest of such other cotenants in the land. (*Morgan v Long*, 541.)

3. A TENANT IN COMMON CANNOT GRANT AN EASEMENT so as to confer a right which can be enforced against the other tenants. (*Palmer v. Palmer*, 653.)

4. COTENANCY—LIEN OF COTENANT—BONA FIDE ENCUMBRANCE OF COTENANT'S INTEREST—PRIORITY.—The lien in favor of one cotenant against the interest of another, which, in the partition of lands held in common, is allowed for what may be found due on an accounting between them touching the receipts and disbursements from and concerning the common estate, is not entitled to priority over a bona fide purchaser or encumbrancer of the interest of one of the cotenants in the common estate. (*Morgan v. Long*, 541.)

See Husband and Wife, 6; Private Ways, 1.

COUNTIES.

1. BOARDS OF COUNTY COMMISSIONERS IN SOME RESPECTS ACT JUDICIALLY and in others ministerially. While rightfully acting in the former character, they are treated as courts, and their judgments and orders cannot be collaterally assailed, and the principles of former adjudication are applicable to them, but, when they act ministerially, their orders are not judicial, and are not binding on the county when not authorized by law. (*Commissioners v. Heaston*, 192.)

2. MISTAKE OF LAW.—MONEYS PAID UPON CLAIMS MADE AGAINST A COUNTY and allowed by its commissioners, but which were not legally chargeable against it, cannot be regarded as voluntary payments made under a mistake of law, the recovery of which cannot be permitted. The payment of such claims cannot be considered as a payment by the county at all, but rather as a misappropriation of money due to the illegal act of its commissioners in allowing claims whose allowance was forbidden by law. (*Commissioners v. Heaston*, 192.)

3. COUNTIES—EVIDENCE.—AN ALLOWANCE OF A CLAIM AGAINST A COUNTY by its board of county commissioners is prima facie evidence of its correctness. Therefore, in a suit by a county to recover moneys paid on an allowed claim, it must assume the burden of proving that it was not a legal charge against it. (*Commissioners v. Heaston*, 192.)

4. A COUNTY MAY MAINTAIN AN ACTION TO RECOVER BACK MONEY PAID to a public officer, though his claim was allowed by the county commissioners, whenever, in equity and good conscience, he ought not to retain such moneys. (*Commissioners v. Heaston*, 192.)

5. COUNTIES, ALLOWANCE AND PAYMENT OF ILLEGAL DEMANDS, RIGHT TO RECOVER BACK.—The county commissioners cannot, by allowing and ordering paid a claim not legally chargeable against the county, bind it as by a judgment, nor does such allowance preclude the county from maintaining an action to recover the moneys so illegally allowed and paid. (*Commissioners v. Heaston*, 192.)

6. COUNTIES, ALLOWANCE OF CLAIM AGAINST, WHEN NOT JUDICIAL.—The county commissioners in hearing and allowing claims against the county do not act in their judicial capacity. The effect of the statute requiring the filing and presenting of claims against counties is merely to deny claimants the right to sue until this has been done, or, in other words, to give the county an opportunity to discharge its legal obligations without the expense of a lawsuit. The fact that the statute grants to claimants a right of appeal to the circuit court does not prove that either acts as a court in allowing claims. (Commissioners v. Heaston, 192.)

7. COUNTIES—LIABILITY FOR WRONGFUL ACT OF OFFICERS.—A county is not liable for the tortious acts of its officers, or for acts clearly beyond their power. (County Commissioners v. Ball, 117.)

8. MUNICIPAL BONDS, AUTHORITY TO MAKE PAYABLE IN GOLD.—County officers authorized to issue bonds are necessarily left with much discretion respecting the condition of such bonds, and may provide that they shall be payable in gold coin, when it has been the usual custom in the state where they are to be issued to make all municipal bonds payable in such coin. (Packwood v. County of Kittitas, 875.)

9. MUNICIPAL BONDS.—A NOTICE OF AN ELECTION to be held for the purpose of validating county warrants is not fatally defective because it does not state the polling places in the county at which the election will be held, nor the hours of the day when the polls will be open, if the voters, by resorting to the notices required by the general election law to be posted in the several precincts, can ascertain where in each precinct the election will be held. (Packwood v. County of Kittitas, 875.)

10. COUNTY, LIABILITY OF FOR MONEYS MISTAKENLY PAID INTO ITS TREASURY.—Where money is received into the county treasury without right or consideration, and which it would be inequitable for the county to retain, assumpsit may be maintained against it to recover such moneys. So held where the sheriff had retained as commission part of the moneys paid at a foreclosure sale, and paid them to the county, he having no right to exact such commissions, nor the county to receive or retain them in its treasury. (Soderberg v. King County, 878.)

See Mortgages, 9.

COVENANTS.

See Deeds, 4, 5.

CRIMINAL LAW.

CRIMINAL LAW—PUNISHMENT—VOID SENTENCE.—A void sentence is as nothing, but a sentence, though erroneous, is not a nullity, where the court had jurisdiction of the subject. (State v. Klock, 259.)

See Arson; Homicide; Injunctions, 2; Intoxicating Liquors.

CROSSINGS.

See Railroads, 6-8.

DAMAGES.

1. CONTRACTS—PENALTY OR LIQUIDATED DAMAGES—AMOUNT OF RECOVERY.—If a sum of money mentioned in a con-

tract is regarded as liquidated damages, the whole sum is recoverable upon default, although the actual damages are nominal, but, if it is regarded as a penalty, only such damages as have been really incurred and are satisfactorily shown can be recovered for a breach of the contract. (*Willson v. Mayor*, 339.)

2. **DAMAGES—LIQUIDATED.**—A reasonable sum stipulated to be paid as liquidated damages for the breach of a contract is to be regarded as such, and not as a penalty, when, from the nature of the covenant, the damages arising from its breach are wholly uncertain and cannot be ascertained upon an issue of fact. (*Willson v. Mayor*, 339.)

3. **DAMAGES—PENALTY.**—A stipulation to pay a specified sum for the nonperformance of a contract is regarded as a penalty, rather than liquidated damages, if the intention of the parties as to its effect is at all doubtful, or is of equivocal interpretation, especially when such damages are easily and exactly ascertainable. (*Willson v. Mayor*, 339.)

4. **DAMAGES—DEPOSIT, AS PENALTY.**—If the intention of the parties is not expressed, and there is nothing in the subject matter of the agreement which imperatively requires that a deposit of money mentioned therein be characterized as liquidated damages, it must be treated merely as a penalty. (*Willson v. Mayor*, 339.)

5. **DAMAGES—DEPOSIT, AS LIQUIDATED DAMAGES.**—If parties contract as a condition of sale of real estate that the deposit money shall be forfeited if the purchaser fail to carry out his contract, neither the whole nor any part of the deposit can be recovered back on the ground that the forfeiture is in the nature of a penalty, and the actual loss to the vendor is less than the amount of the deposit. This rule does not apply with strictness to a contract for the sale of personalty. (*Willson v. Mayor*, 339.)

6. **DAMAGES—DEPOSIT WHETHER PENALTY OR LIQUIDATED DAMAGES.**—If a deposit of money is not made in part performance of a contract, but is collateral thereto and a mere guarantee that its provisions will be observed, and if the deposit is not a part of the thing to be done under or in execution of the contract, but is required solely as a condition precedent to entering into the contract which distinctly relates to something else, it cannot be treated as liquidated damages merely because it is a deposit, and it is either liquidated damages or a penalty as the circumstances of the case indicate. (*Willson v. Mayor*, 339.)

7. **DAMAGES—DEPOSIT AS PENALTY.**—A person to whom is awarded a contract to furnish a city with certain articles of personalty, may recover a certified check deposited with the city under a provision of law requiring all bidders to make such deposit, and providing that if the successful bidder shall enter into contract, with bond, without delay, his deposit shall be returned, when, without fault on his part, such successful bidder to whom the contract is awarded is unable to procure a surety on his bond, and, for this reason, the contract is subsequently awarded by the city to another bidder for a much smaller sum than the former bid. In such case, the deposit must be regarded as a penalty, and not as liquidated damages. (*Willson v. Mayor*, 339.)

8. **DAMAGES—ANTICIPATION OF FUTURE PAYMENTS.**—If future payments are to be anticipated and capitalized in a verdict, the plaintiff is entitled only to their present worth. (*Goodhart v. Pennsylvania R. R. Co.*, 705.)

9. **DAMAGES—INJURY CAUSING DEATH.**—In New Jersey, no action lies for an injury caused by the death of a human being, with the exception of that provided by statute permitting a recovery by the personal representative of the decedent, for the benefit of the widow and next of kin, of the pecuniary loss resulting to them from such death. (Myers v. Holborn, 606.)

10. **DAMAGES FOR PERSONAL INJURY—EARNING POWER—PROFITS OF BUSINESS.**—Evidence of business profits of a person injured, while showing the possession of business qualities, does not fix their value or show earning power; and the admission of evidence for such purpose is error, nor can the value of such earning power be fixed by expert evidence. The basis upon which this calculation must rest is not the possibility, as fixed by expert evidence, but the cold, commonplace facts as proved by those who know them. (Goodhart v. Pennsylvania R. R. Co., 705.)

11. **DAMAGES FOR PERSONAL INJURY.—LOSS OF EARNING POWER** as an element of damages for personal injury involves an inquiry into the value of the labor, physical or intellectual, of the person injured, before the accident happened to him, and his ability to earn money by labor, physical or intellectual, after the injury is received, but profits derived from an investment or the management of a business enterprise are not earnings to be considered. (Goodhart v. Pennsylvania R. R. Co., 705.)

12. **DAMAGES FOR PERSONAL INJURY.**—In computing damages sustained by an injured person, the calculation may include not only loss of time and loss of earning power, but, in proper cases, also an allowance because of suffering. (Goodhart v. Pennsylvania R. R. Co., 705.)

13. **DAMAGES FOR PERSONAL INJURY.—COMPENSATION** for pain and suffering is not to be understood as meaning price, or value, but as describing an allowance looking toward recompense for, or made because of, the suffering consequent upon the injury. (Goodhart v. Pennsylvania R. R. Co., 705.)

14. **DAMAGES FOR PERSONAL INJURY—EARNING POWER—ELEMENTS OF.**—In an action to recover for personal injury, the jury, in settling the question of the plaintiff's earning power, should consider, not only his past earnings, or the fair value of services such as he was able to render, but also his age, state of health, business habits, and manner of living. (Goodhart v. Pennsylvania R. R. Co., 705.)

15. **DAMAGES FOR PERSONAL INJURY—PAIN AND SUFFERING.—INSTRUCTIONS** which leave the jury to regard pain and suffering as an independent item of damages for personal injury, to be compensated by a sum of money that may be regarded as a pecuniary equivalent are not only inexact but erroneous. (Goodhart v. Pennsylvania R. R. Co., 705.)

16. **DAMAGES FOR PERSONAL INJURY.—PAIN AND SUFFERING** as elements of damages for personal injury are not capable of being exactly measured by an equivalent in money and have no market price. The question in any given case is not what it would cost to hire some one to undergo the measure of pain alleged to have been suffered, but what under all the circumstances, should be allowed plaintiff in addition to the other items of damage to which he is entitled, in consideration of the suffering necessarily endured. (Goodhart v. Pennsylvania R. R. Co., 705.)

17. **DAMAGES FOR PERSONAL INJURY.**—Expenses for which a person may recover as an element of damages for personal injury

ry must be such as have been actually paid, or such as, in the judgment of the jury, are reasonably necessary to be incurred, and he cannot recover for the nursing and attendance of the members of his own household, unless they are hired servants. (*Goodhart v. Pennsylvania R. R. Co.*, 705.)

18. **DAMAGES FOR PERSONAL INJURY** consist of the expenses to which the injured person is subjected by reason of the injury complained of, the inconvenience and suffering naturally resulting from it, and the loss of earning power, if any, and whether temporary or permanent, consequent upon the character of the injury. (*Goodhart v. Pennsylvania R. R. Co.*, 705.)

19. **DAMAGES FOR PERSONAL INJURY—EVIDENCE.**—In an action against a railroad company to recover for personal injury, evidence of cruelty, rudeness and incivility on the part of the company's physician in examining the plaintiff to ascertain the extent of his injury and the company's liability, is immaterial and irrelevant. The physician is alone liable for his cruelty. (*Goodhart v. Pennsylvania R. R. Co.*, 705.)

20. **DAMAGES WILL NOT BE GIVEN FOR MERE INCONVENIENCE AND ANNOYANCE**, such as are felt at every disappointment to one's expectations, if there is no actual physical or mental injury. Therefore, damages are not recoverable for anxiety and suspense of mind in consequence of delay caused by the fault of a common carrier. (*Turner v. Great Northern Ry. Co.*, 883.)

21. **EXEMPLARY DAMAGES MAY BE AWARDED** against one who, knowing a woman to be unchaste and then pregnant by him, for the purpose of inducing a man to marry her, represents to him that she is a virtuous and respectable woman. (*Kujek v. Goldman*, 670.)

22. **DAMAGES FOR LOSS OF ATTORNEY'S TIME.**—Where an attorney is entitled to recover from a railway corporation for loss of time occurring through its fault, the jury should be charged to weigh the probability of the attorney's being employed during the time he was thus delayed, even had he reached his point of destination without delay. (*Turner v. Great Northern Ry. Co.*, 883.)

23. **DAMAGES FOR LOSS OF TIME BY AN ATTORNEY—EVIDENCE.**—If an attorney who is a passenger on a railway train is delayed from a cause entitling him to recover damages against a railway corporation, the amount of his damages can only be established by showing what he had actually earned as an attorney either before or after that time. Evidence of what attorneys of his ability and learning were earning in active practice at that time is not admissible, when he does not appear to have been then engaged in such practice. (*Turner v. Great Northern Ry. Co.*, 883.)

24. **DAMAGES.—LOSS OF COLLATERAL ENGAGEMENTS**, depending upon the fulfillment of the principal contract, are too remote to be considered in estimating the damages for a breach of the principal contract. (*Coffin v. State*, 188.)

25. **DAMAGES.—FOR THE BREACH OF A CONTRACT TO SELL STATE BONDS**, the measure of damages is the difference between the market value of the bonds and the price agreed to be paid therefor, and cannot include the loss to a purchaser of the profits to be realized from his resale, when the vendor did not know of the contemplated resale. (*Coffin v. State*, 188.)

See Appeal, 9; Libel, 3; Negligence, 11; Railroads, 2, 3, 11, 12.

DEATH.

See Contracts, 11; Damages, 9; Equity, 1; Evidence, 6; Negligence, 9, 10.

DEBTOR AND CREDITOR.

DEBTOR AND CREDITOR — ASSUMPTION OF DEBT.

A creditor may accept or reject the promise of a third person to pay the debt. Without acceptance the original debtor alone has the right to enforce the promise, while with acceptance there is only a change of debtors and not payment of the debt. (*Sampson v. Fox*, 950.)

See Banks, 1-3; Duress; Fraudulent Conveyances; Payment. 3.

DEEDS.

1. DEEDS—STIPULATION BY GRANTEE TO ASSUME MORTGAGE DEBT.—A stipulation in a deed inter partes, that the grantee is to assume and pay a debt secured by mortgage on the premises for the payment of which the grantor is personally liable, is a contract by the grantee with the grantor for the indemnity of the latter; and the obligation of the grantee to pay the debt inures in equity for the benefit of the mortgagee, and he may enforce it against the grantee to the extent of the unpaid part of the mortgage debt after the proceeds of the mortgaged estate have been applied thereon. The remedy in equity is independent of foreclosure. (*Green v. Stone*, 577.)

2. DEEDS—ASSUMPTION OF MORTGAGE.—A vendee who accepts a deed stipulating that it is made "under and subject to the lien of certain mortgages," and that it is agreed between the parties that the grantee accepts the title subject to the payment of the mortgages, but does not assume the payment of the various outstanding notes given for the debts secured by such mortgages, is personally liable for the payment of the mortgage debt, and, if he fails to pay it, his grantor may maintain an action against him to recover the sum remaining unpaid. (*Blood v. Crew Levick Co.*, 742.)

3. CONVEYANCE, INTENTION OF THE PARTIES, WHEN IMMATERIAL.—Where there is no ambiguity in a conveyance, what the grantors or grantees intended by its terms, or in what manner they subsequently treated it, has no bearing on its construction. (*Wilkins v. Young*, 162.)

4. DEEDS—EFFECT OF ACCEPTANCE—PAROL EVIDENCE TO VARY COVENANTS AND CONDITIONS.—If a vendee of land accepts a deed from his vendor, containing covenants and conditions to be performed by such vendee, the latter is bound by such covenants and conditions in the absence of proof that anything was added to or omitted from the deed by fraud, accident, or mistake, or that it was incorrectly read or explained to the vendee, and, in such case, he cannot introduce parol evidence to vary the stipulations contained in the deed. (*Blood v. Crew Levick Co.*, 742.)

5. DEEDS—COVENANTS—EFFECT OF ACCEPTANCE.—If a grantor conveys land by his deed upon terms and conditions stated therein, the grantee, by accepting the deed, consents to its conditions and is bound by them as fully as he could have bound himself by signing and sealing the covenants and conditions contained in the deed, and they may be enforced by the parties in whose behalf they are made with substantially the same effect. (*Blood v. Crew Levick Co.*, 742.)

6. DEEDS—EFFECT OF ACCEPTANCE—ASSUMPTION OF MORTGAGE.—If a vendee of land accepts a deed therefor from his vendor containing a covenant of general warranty, and also a covenant on the part of the vendee to pay off a mortgage debt, existing against the land, the failure of the grantor to pay off other incum-

branches existing against the land, does not relieve the vendee from liability to pay the amount of the mortgage to the mortgagee. (*Blood v. Crew Levick Co.*, 742.)

See Equity, 1; Evidence, 13, 14.

DEFINITIONS.

Chattel Mortgage. (*Lumbert v. Woodward*, 175.)

"Child or Children." (*McDonald v. Pittsburgh etc. Ry. Co.*, 185.)

"Conveyances." (*Merrill v. Luce*, 844.)

"Drifting in a tunnel." (*Jurgenson v. Diller*, 82.)

Lottery. (*Lynch v. Rosenthal*, 168.)

DEPOSITIONS.

1. DEPOSITIONS—EXHIBITS—BOOKS OF ACCOUNT.—If the original books of entry of accounts are produced before a commissioner who is taking depositions, and correct copies of the entries are taken from such books, the books themselves need not be made exhibits to the answers to the interrogatories, especially where the books are the private property of witnesses who are not interested in the litigation. (*Hauenstein v. Gillespie*, 569.)

2. DEPOSITIONS—EXHIBITS—RECEIPT.—If an original receipt is produced before a commissioner taking a deposition, and the witness furnishes a correct copy of such receipt as the exhibit to his answer to one of the interrogatories, the receipt itself need not be made an exhibit to the deposition, especially where it is the private property of the witness. (*Hauenstein v. Gillespie*, 569.)

DESCRIPTION.

See Mechanics' Liens, 2, 3.

DESERTION.

See Marriage and Divorce, 8, 9.

DEVISE.

See Joint Tenancy, 2, 3.

DIRECTING VERDICT.

See Appeal, 6.

DISBARMENT.

See Appeal, 7; Attorney and Client, 1-3.

DISCRIMINATION.

See Constitutions.

DISTRIBUTION.

DISTRIBUTION—WITHHOLDING FUNDS.—Funds ready for distribution should not be withheld from those entitled to the same under the will. (*Succession of Allen*, 295.)

DITCH COMPANY.

See Irrigation.

DRUGGISTS.

See Apothecaries.

DURESS.

1. DURESS, ACTION TO RECOVER MONEYS PAID UNDER. If a debtor is caused to come within the state by the fraudulent representations of his creditor and for the purpose of having him there arrested, and he is so arrested after coming within such state, and pays an amount of money to obtain his release, he may recover such money as paid under duress, if when he paid it he was a stranger, away from his friends, probably unable to give security, and without counsel, though he might have obtained relief by properly bringing the facts of his case to the attention of the court. (*Sweet v. Kimball*, 406.)

2. DURESS, RECOVERY OF MONEYS PAID TO ANOTHER PERSON THAN THE DEFENDANT.—If a creditor, by false representation, procures his debtor to come within the state for the purpose of arresting and detaining him, and while under such arrest and detention, he pays money under duress to procure his release, he may recover of such creditor all moneys so paid, though part of them were paid upon a demand not held by that creditor, if the evidence warrants the belief that persons other than the defendant who profited by the plaintiff's arrest, did so through the connivance of the defendant. (*Sweet v. Kimball*, 406.)

EASEMENTS

See Cotenancy, 3; Waters, 8.

ELECTIONS.

See Counties, 9.

ENTIRETIES.

See Husband and Wife, 4-6.

EQUITY.

1. ESCROW—DELIVERY OF DEED AFTER DEATH—INTERPOSITION OF EQUITY.—Conceding that a depository may, upon the happening of the condition, deliver a deed held by him in escrow, notwithstanding the death of one of the parties to the escrow agreement, the transaction is not placed beyond the control of a court of equity, if the circumstances of the case require its interposition. (*Bradbury v. Davenport*, 92.)

2. MISTAKE—UNILATERAL—RESCISSION OF CONTRACTS. A court of equity may rescind a contract for a mistake which is unilateral, and in such case the whole contract is set aside and the parties are restored to their original position, and no relief can be granted in such case after the position of the parties has been so changed that their original rights cannot be restored. (*Green v. Stone*, 577.)

3. MISTAKE—REFORMATION OF INSTRUMENT—EVIDENCE.—Courts of equity may grant relief on the ground of mistake, by rescinding the entire contract or reforming it, but such relief is not to be granted in case of a deed, unless upon proof that is entirely satisfactory. (*Green v. Stone*, 577.)

See Chattel Mortgages, 5; Corporations, 20; Marriage and Divorce, 1; Partnership, 8; Pleading, 5; Specific Performance, 1.

ESTATES.

LIFE TENANT AND REMAINDERMAN—INSURANCE. A life tenant is not bound to keep the premises insured for the bene-

fit of the remainderman. Each may insure his own interest, but, in the absence of any agreement, neither has any claim upon the proceeds of the other's policy. Therefore, a remainderman cannot compel a life tenant to place a sum received for insurance upon a building destroyed by fire, in trust so as to be turned over to the remainderman on the death of the life tenant, when the insurance was not effected for the benefit of the remainderman, though the moneys received therefrom may be equal to the whole value of the property destroyed. (*Harrison v. Pepper*, 404.)

ESTATES OF DECEDENTS.

See Executors and Administrators.

ESTOPPEL.

1. **ESTOPPEL BY JUDGMENT—MUTUALITY.**—One of the essential elements of an estoppel by judgment is, that both the litigants must be alike concluded by the judgment, or it binds neither. (*Commissioners v. Heaston*, 192.)

2. **ESTOPPEL, WHO MAY NOT RELY UPON.**—One who attempts to assert a vicious and unlawful contract is in no position to insist that another shall be estopped from urging the illegality of such contract, because before suit was brought against him, he declined to proceed with the contract for another reason than that of its illegality. (*Lynch v. Rosenthal*, 168.)

3. **ESTOPPEL—WITHDRAWAL OF PROMISES.**—The principle of estoppel will not permit the withdrawal of promises or engagements on which another has acted. (*Choppin v. Dauphin*, 313.)

See Banks, 4; Setoff.

EVIDENCE.

1. **NEGOTIABLE INSTRUMENTS—CHARACTER OF INDORSEMENT—PAROL EVIDENCE.**—If the name of a person, and nothing more, appears upon the back of a promissory note by irregular indorsement, parol evidence is admissible to show the character in which he signed. (*Richardson v. Foster*, 481.)

2. **WILLS—PATENT AMBIGUITY NOT REMOVABLE BY PAROL.**—If parol evidence is for the purpose of adding a material term to an instrument, or when the court, having looked to the circumstances of the parties, the subject matter of the instrument, and all proper collateral facts, remains uncertain as to what the meaning of the written words is, a patent ambiguity appears, which parol evidence cannot aid. (*Schlottman v. Hoffman*, 527.)

3. **WILLS—PATENT AMBIGUITY REMOVABLE BY PAROL—ILLUSTRATION.**—If a testator, after disposing of his whole estate, adds a codicil creating pecuniary legacies in favor of persons not otherwise provided for, and the amounts to be paid the legatee are respectively indicated by the figure 5 following a dollar mark, with two ciphers, linked together, following this figure, but without a decimal mark, and so separated from it, and so situated above the line, as to make it uncertain, in the absence of the decimal mark, whether five hundred dollars, or only five dollars, was intended by the testator, a patent ambiguity appears upon the face of the instrument, such as may be removed by parol evidence, for it is not true that an ambiguity appearing on the face of the paper, if that alone be looked to, cannot be explained by parol. (*Schlottman v. Hoffman*, 527.)

4. EVIDENCE OF CONVERSATIONS OCCURRING IN DEFENDANT'S ABSENCE are not admissible against him, although they tend to contradict statements made by his counsel in his opening statement to the jury. (*Munzer v. Stern*, 468.)

5. EVIDENCE—BOOKS—NOTICE TO PRODUCE.—A person cannot be compelled to produce his books for inspection without notice of motion to that effect. (*Globe etc. Ins. Co. v. Helwig*, 247.)

6. EVIDENCE—PRESUMPTION OF DEATH—CHILDREN.—A statute creating a presumption of death of "any person" from seven years' absence, without being heard of, refers only to persons having volition and the right of free locomotion, and does not apply to children incapable, by reason of their tender age, of "absenting" themselves from the state, or of "concealing" themselves within it, as where the eldest is only seven years of age. (*Manley v. Pattison*, 543.)

7. EVIDENCE—DEATH OF CHILDREN—PRESUMPTION—BURDEN OF PROOF.—One who asserts, in an action, that children, such as those not past eleven years of age, are dead, has the burden of proving it, without the aid of a statute raising a presumption of death of "any person" from seven years' absence, without being heard of, as it does not apply to such children. (*Manley v. Pattison*, 543.)

8. EVIDENCE—DEATH OF CHILDREN—SUFFICIENCY.—The fact that persons not related to a family, or associated with it in social or business relations, have not heard from it since its removal from its last known place of residence in the state, about eleven years previous to the trial, is no proof of the death of children of the family, who, at the time of the removal, were of tender years, the eldest being then only seven years old. There must be a sufficient and reasonable effort made to discover under what circumstances the family left, to what place the removal was made, and whether persons acquainted with the family, and who were accustomed to associate with them, have, since the removal, received information which, if properly prosecuted, would lead to the discovery of the children, if alive, or to the fact of death, if they are in truth dead. (*Manley v. Pattison*, 543.)

9. EVIDENCE, SECONDARY, WHEN ADMISSIBLE.—Parol evidence is admissible of the contents of a written lease, where the party in whose favor it is offers testimony that he turned it over to his adversary, who has been called upon to produce it, but testifies that it is not in his possession, and he believes it has been lost or destroyed. (*Lumbert v. Woodward*, 175.)

10. JUDICIAL NOTICE CANNOT BE TAKEN OF THE STATUTES OF ANOTHER STATE nor of their interpretation by its courts. Therefore, averments of such statutes or of their construction in a complaint must be accepted as true upon a demurrer thereto. (*Hancock Nat. Bank v. Ellis*, 414.)

11. MECHANIC'S LIEN—DEFECTIVE JURAT TO AFFIDAVIT OF NOTICE OF CLAIM—PAROL EVIDENCE TO EXPLAIN—NOTICE OF LIEN.—Parol evidence is not admissible to prove that a notice or claim for a mechanic's lien was, in fact, verified, if, upon the trial of an action to foreclose the lien, it appears that the notary, who signed the jurat of the affidavit, attached to the notice or claim, omitted to affix his seal thereto; neither is such evidence competent to show that a claim was, in fact, sworn to, where it appears that the name of the notary is omitted from the jurat, though

his seal is affixed. The defect, in each case, is fatal, and neither claim, when filed, with such verification, is sufficient to constitute constructive notice of the existence of a lien. (*Hill v. Alliance Building Co.*, 819.)

12. **NEGOTIABLE INSTRUMENTS—SIGNATURES—PAROL EVIDENCE.**—If one party signs a promissory note on the lower right-hand corner, where a maker usually signs, and another party signs it on the lower left-hand corner where a witness usually signs, but without any words of attestation, parol testimony is admissible to show that the latter signed as a witness, and not as a maker. (*Aultman etc. Co. v. Gunderson*, 837.)

13. **ACKNOWLEDGMENT OF DEED, IMPEACHING NOTARY'S CERTIFICATE.**—Parol evidence is admissible to prove that the certificate of the acknowledgment of a deed was affixed thereto by the notary, purporting to certify to the acknowledgment of a husband and wife, before either of them had signed it, that the husband at first refused to sign it, and the deed was then delivered to the grantee with a notary's certificate thereon, and that, at a subsequent date, the husband was persuaded by the grantee to sign the deed, but that he did not do so in the presence of the notary, nor did he at any time acknowledge the execution of the deed to the notary, and if the deed was of the separate property of a married woman, and the acknowledgment of the husband was essential to its validity, it is void. (*Cheney v. Nathan*, 26.)

14. **ACKNOWLEDGMENT OF DEEDS, ATTACK UPON BY EXTRINSIC EVIDENCE.**—The certificate of the acknowledgment of a deed is not conclusive evidence of the sanity of the person acknowledging. Therefore, a conveyance of a homestead may be avoided by evidence that the wife when she acknowledged it was insane. (*Thompson v. New England Mortgage etc. Co.*, 29.)

See Appeal, 1, 3; Damages, 10; Deeds, 4; Homicide; Trial; Wills, 13.

EXECUTION.

EXECUTION, PROPERTY SUBJECT TO.—A SET OF ABSTRACT BOOKS and indexes made by the judgment debtor is subject to execution under a statute declaring that all property, real and personal, of the judgment debtor not exempt by law shall be liable to execution. (*Washington Bank v. Fidelity Abstract etc. Co.*, 902.)

See Marriage and Divorce, 14.

EXECUTORS AND ADMINISTRATORS.

1. **EXECUTORS AND ADMINISTRATORS ARE NOT BOUND TO EXERCISE ANY HIGHER RESPONSIBILITY** than that which is imposed upon any other agent or trustee. (*In re Kohler's Estate*, 904.)

2. **AN EXECUTOR OR ADMINISTRATOR WHO DEPOSITS THE MONEYS OF THE ESTATE** in good faith in a then solvent bank of good repute to the trust account, and not to his own account or credit, is not liable for the loss of such money, or some part thereof, through the subsequent insolvency or failure of the bank. (*In re Kohler's Estate*, 904.)

3. **EXECUTORS AND ADMINISTRATORS—PROBATE—JURISDICTION—COLLATERAL ATTACK.**—The failure of a probate judge to comply with a statute requiring him to give notice to foreign heirs of the date for hearing the probate of a will, does not de-

prive him of jurisdiction acquired by petition and otherwise regular proceedings to probate such will, so as to constitute ground for collateral attack on such probate in a suit by the executor to collect assets belonging to the estate. The only parties who can complain of such probate are the foreign heirs. (*Rice v. Hosking*, 448.)

4. **WILLS—DUTY OF EXECUTOR AND HIS RIGHT OF APPEAL.**—It is an executor's duty to see that funds of the estate are distributed according to the intention of the testator. He represents all parties, and has, therefore, a right, especially where he is an heir, to appeal, for the common benefit of all, from a judgment, adverse to the heirs, interpreting the will, which he thinks is contrary to the intention of the testator. On such an appeal, all the beneficiaries, legatees, and heirs are necessarily immediate appellees. (*Succession of Allen*, 295.)

5. **EXECUTORS AND ADMINISTRATORS—POSSESSION OF ASSETS—CONFLICT OF LAWS.**—If a domiciliary administrator happens to be temporarily in this state, with the evidence of a simple contract debt, in the form of a certificate of deposit in an insolvent national bank situated here, the ancillary administrator appointed in this state is entitled, upon demand and refusal, to recover the certificate from the domiciliary administrator, in an action therefor, after its rejection by the receiver as a valid claim against the bank. (*McCully v. Cooper*, 66.)

6. **EXECUTORS AND ADMINISTRATORS—SUBJECTING MORTGAGED PROPERTY COVERED BY DEED TO ADMINISTRATION—PLEADING—CAUSE OF ACTION.**—If a mortgagee claims absolute title to mortgaged property by virtue of a deed, and the administrator of the deceased mortgagor seeks to have the deed set aside as void, or to have it declared a mortgage, and to subject the property to administration as assets of the estate, a complaint by him, as against a general demurrer, states a cause of action, where it is alleged, in substance, that the mortgagor, while sick and financially embarrassed, was persuaded by the mortgagee to sign an agreement and to place a deed in escrow with the cashier of a bank, whereby it was provided that, in default of payment of the mortgage before a given date, the deed should be delivered to the mortgagee, in cancellation and satisfaction of the note secured by the mortgage; that the cashier did deliver the deed to the mortgagee after knowledge of the mortgagor's death, and after notice to him from the administrator not to deliver it; that the deed was recorded by the mortgagee; that it constitutes a cloud upon his title, and his right to subject the property to administration; that the equity in the property is of the value of four thousand dollars; that the estate is largely indebted; and that it is necessary to sell the interest of the estate in the property for the purpose of paying such indebtedness. (*Bradbury v. Davenport*, 92.)

7. **EXECUTORS AND ADMINISTRATORS — SUBJECTING MORTGAGED PROPERTY COVERED BY DEED TO ADMINISTRATION—PLEADING.**—If a mortgagee claims absolute title to mortgaged property, by virtue of a deed placed in escrow to be delivered to him upon the default of the mortgagor, and which was delivered to him, in satisfaction of the debt, after the mortgagor's death, the administrator of the deceased mortgagor, in proceedings to have the deed set aside as void, or to have the deed declared a mortgage, and to subject the property to administration as assets of the estate, need not aver, in his complaint, a tender or offer to pay the mortgage debt, as this would not affect the cause of action to have the deed set aside, and it would be inequitable to require him

to make a tender of the amount due, which could not be raised upon the premises, whatever their value, before a determination that the deed was only a mortgage. (*Bradbury v. Davenport*, 92.)

8. EXECUTORS AND ADMINISTRATORS—PLEADING VALUE OF AN EQUITY IN MORTGAGED PROPERTY COVERED BY A DEED.—If a mortgagee claims absolute title to mortgaged premises by virtue of a deed placed in escrow, to be delivered to him upon the default of the mortgagor, and which was delivered to him, in satisfaction of the debt, after the mortgagor's death, and the administrator of the deceased seeks to subject the property to administration as assets of the estate, an allegation in his complaint that the equity in the property is of the value of four thousand dollars, though subject to a demurrer for uncertainty and ambiguity, will, as against a general demurrer, be construed as an allegation that the interest of the estate in the property described in the deed is of the value of four thousand dollars over and above the indebtedness of the estate to the mortgagee. (*Bradbury v. Davenport*, 92.)

EXPERTS.

See Witnesses.

FINDINGS.

See Appeal, 13.

FORFEITURES.

See Insurance, 8.

FRAUD.

1. FRAUD.—TO INDUCE A MAN TO COME INTO THE STATE BY FRAUDULENT REPRESENTATIONS, with intent to arrest him when he gets here, is actionable. (*Sweet v. Kimball*, 406.)

2. FRAUDULENT REPRESENTATIONS AS TO FUTURE ACTS.—A promise to perform acts in the future, if a mere device resorted to without any intention of performance and for the purpose of inducing a debtor to come within the state, to be there arrested, followed by his coming within the state in reliance upon such promises and by his subsequent arrest, gives rise to a cause of action in his favor. (*Sweet v. Kimball*, 406.)

3. MARRIAGE, INDUCING BY FALSE REPRESENTATIONS, DAMAGES RECOVERABLE FOR.—One who is, by the deceit of another, induced to enter into a marriage contract with a third person may recover for the damages thereby sustained, as where a person who has had meretricious relations with a woman represents to another that she is virtuous, and thereby induces him to marry her. (*Kujek v. Goldman*, 670.)

See Sales, 6.

FRAUDULENT CONVEYANCES.

1. FRAUDULENT CONVEYANCES.—JUDGMENT CREDITORS without a lien may file a bill in chancery to subject to the payment of their debts any property fraudulently transferred or conveyed, or attempted to be fraudulently transferred or conveyed by their debtor. (*Wooten v. Steele*, 947.)

2. FRAUDULENT CONVEYANCES—CREDITOR, WHEN PROTECTED.—A debt evidenced by a written undertaking to pay one-half of the purchase price of lands that may be realized from a fu-

ture sale thereof, is within the protection of the law against fraudulent conveyances, before as well as after the contemplated sale is made. (*Wooten v. Steele*, 947.)

3. **FRAUDULENT CONVEYANCES—INSOLVENCY—SALE TO CREDITOR.**—A person who conducts a livery and sale stable under a sign having on it his own name, with the addition of the word, "proprietor," may, although he is insolvent, sell the property employed in such business to a creditor in satisfaction of his debt, as, in doing so, he makes only such application of the property as the creditor might have enforced by law. (*Columbus Buggy Co. v. Turley*, 550.)

4. **FRAUDULENT TRANSFERS.—IN CASES OF VOLUNTARY CONVEYANCES**, it matters not whether or not the donee had notice of the fraudulent intent of the grantor. (*Gilliland v. Jones*, 210.)

5. **FRAUDULENT TRANSFERS—SUBSEQUENT PURCHASERS.**—A voluntary conveyance, made with intent to hinder, delay, and defraud creditors, is void as against subsequent, as well as prior, creditors, though the grantee did not know of, nor participate in, the fraudulent intent of the grantor. (*Gilliland v. Jones*, 210.)

6. **FRAUDULENT CONVEYANCES—CONSIDERATION—BURDEN OF PROOF.**—Averments in a complaint by a creditor in an action to subject to the payment of his debt property fraudulently transferred or conveyed by his debtor, alleging that such conveyance, and also a subsequent conveyance made by his grantee, were made after the maturity of such debt, voluntarily and with intent to hinder, delay and defraud the plaintiffs and other creditors, casts the burden of proof upon the defendant to allege and prove that such conveyances were made upon a valuable consideration, in what it consisted, and how it was paid. (*Wooten v. Steele*, 947.)

7. **VOLUNTARY CONVEYANCES ARE VOID AS TO EXISTING CREDITORS** under all circumstances, and as to such a conveyance the intention of the parties to it, the pecuniary condition of the grantor, the amount of his indebtedness, the value of the property conveyed, and the value of the property reserved by him, are all utterly immaterial matters. (*Wooten v. Steele*, 947.)

See Corporations, 22.

FUTURES.

See Contracts, 12, 13.

GAME LAWS.

ANIMALS. WILD BY NATURE—PROTECTION OF PROPERTY IN.—In so far as the legislature has given private dominion to individuals over wild game, a person is as much to be protected in the enjoyment of his rights in this species of property as in any other under the law. Hence, under a statute making living animals, wild by nature, the subject of ownership while on the land of the person claiming them, wild birds, such as ducks, geese, rail, and snipe, may be protected, by the owner of property upon which they are found, from the acts of trespassers. (*Kellogg v. King*, 74.)

GARNISHMENT.

See Attachment; Statutes, 8.

GIFTS.

See Husband and Wife, 1, 2.

GUARDIAN AND WARD.

GUARDIAN AND WARD—ESTOPPEL OF SURETIES TO DENY RECITALS OF BOND.—The sureties on a guardian's bond, in a proceeding, after the guardian's death, to recover balances due the estate of the ward, are bound by the terms of their bond, and are, therefore, estopped by the recitals therein to deny the validity of the guardian's appointment, where he, by virtue of his qualification as guardian, had taken possession of his ward's estate and exercised control over it for many years. (*Hauenstein v. Gillespie*, 569.)

HABEAS CORPUS.

1. **HABEAS CORPUS—CONTEMPT.**—One adjudged guilty of contempt and imprisoned is not entitled to release upon habeas corpus, unless the proceedings under which he is imprisoned are void, in whole or in part. (*Ex Parte Keller*, 785.)

2. **HABEAS CORPUS—CUSTODY OF CHILDREN—RES JUDICATA.**—A decision on habeas corpus respecting the custody of a child is conclusive in a subsequent application for the writ, unless some new fact has occurred which has altered the status of the case, but it does not necessarily follow that such determination is not reviewable on error or certiorari. (*In re Sneden*, 435.)

3. **HABEAS CORPUS—DEFICIENCY IN SENTENCE—ILLUSTRATION.**—If the punishment prescribed by statute for an offense is imprisonment, "and" a fine, and the period of imprisonment is a separate portion of the sentence, complete in itself and valid, the prisoner is not entitled to discharge on habeas corpus, because no fine is imposed, as this is a mere irregularity. (*State v. Klock*, 259.)

4. **HABEAS CORPUS—DEFICIENCY OF PUNISHMENT IN SENTENCE.**—A sentence below the minimum is no ground for discharge on habeas corpus, as the relator has nothing to complain of, upon the ground of deficiency in the punishment imposed, (*State v. Klock*, 259.)

5. **HABEAS CORPUS—VALIDITY OF EXCESSIVE SENTENCE.**—A whole sentence is not void, on habeas corpus, because of an excess, where the court had jurisdiction of the person and the offense. It is invalid only as to the excess, when such excess is separable, and may be dealt with without disturbing the valid portion of the sentence. (*State v. Klock*, 259.)

6. **HABEAS CORPUS—REVIEW.**—A petition for a writ of habeas corpus which does not allege that a former determination of the same matter on habeas corpus was contrary to law, nor that the evidence did not support the facts, nor that the evidence was not reported nor any new fact altering the status of the case, is insufficient and must be dismissed. (*In re Sneden*, 435.)

HIGHWAYS.

See Private Ways, 2, 7.

HOMESTEAD.

HOMESTEAD.—A CONVEYANCE OF A HOMESTEAD, NOT ACKNOWLEDGED BY THE WIFE, or acknowledged by her while insane, is void. (*Thompson v. New England Mortgage etc. Co.*, 29.)

HOMICIDE.

1. **EVIDENCE, CONFESSIONS MADE DURING THE EXAMINATION OF A WITNESS.**—If one is called as a witness at an in-

quest before a coroner, or an officer acting as such, held for the purpose of ascertaining the cause of the death of a human being, and whether anyone was guilty of a criminal act in connection therewith, and is sworn, he not then being arrested nor accused of the crime, and testifies as such under oath, his statements are regarded as voluntary, and may be given in evidence against him on a trial for the murder of such deceased person. (*Wilson v. State*, 17.)

2. EVIDENCE—STATEMENTS MADE PRIOR TO A HOMICIDE.—If one, on being warned of the presence of another, replies: "That damned little [naming him] had better not bother me," such reply is admissible in evidence against him on a trial for killing the person thus referred to. (*Wilson v. State*, 17.)

See Husband and Wife, 8; Insane Persons; Public Lands.

HUSBAND AND WIFE.

1. HUSBAND AND WIFE—GIFTS OR CONVEYANCES IN FRAUD OF WIFE.—A husband has power to dispose absolutely of all of his property during his lifetime, independently of the concurrence, and exonerated from any claim, of his wife, provided the transaction is not merely colorable, but bona fide and unattended with circumstances indicative of fraud upon the rights of his wife. (*Smith v. Smith*, 142.)

2. HUSBAND AND WIFE—GIFTS OR CONVEYANCES IN FRAUD OF WIFE.—If a transaction by which a husband disposes of all of his property is colorable only, and resorted to for the purpose of defeating his wife's rights as his heir, but reserving the benefit of such property to himself for life, it is a fraud upon the rights of the wife, from which she is entitled to relief after his death. (*Smith v. Smith*, 142.)

3. JOINT TENANCY BETWEEN A HUSBAND AND WIFE.—The conveyance of real property to a husband and wife, to have and to hold to them in joint tenancy, their heirs and assigns forever, vests an estate in them as joint tenants, and not as tenants by the entireties. (*Wilkins v. Young*, 162.)

4. ENTIRETIES, ESTATES BY.—Where lands are conveyed to a husband and wife, and there are no words of limitation in the deed, or where it does not appear from the tenor thereof that it was intended to create an estate in joint tenancy, they take as tenants by the entireties. (*Wilkins v. Young*, 162.)

5. MARRIED WOMEN—CONTRACT FOR SUPPORT OF INSANE HUSBAND.—A contract by a married woman made without the consent of her husband, to pay for his support while insane in an asylum is void, and not authorized by statutes giving the wife capacity to contract as if sole "with the assent or concurrence of her husband expressed in writing," and also authorized her to engage in trade or business without his consent if he has abandoned her or is of unsound mind. (*McAnally v. Alabama Insane Hospital*, 923.)

6. HUSBAND AND WIFE—COTENANCY.—A conveyance to husband and wife as "tenants in common" creates a tenancy in common between them, and not an estate by the entireties. (*Fulper v. Fulper*, 590.)

7. HUSBAND AND WIFE—COTENANCY.—Whether a husband and wife take as cotenants or as tenants of the entirety is to be gathered from the instrument which passes the estate to them, and, if it appears from such instrument that it is the intention for them to take as cotenants, that intention must prevail. (*Fulper v. Fulper*, 590.)

8. MORTGAGE TO WIFE FROM HUSBAND—HUSBAND'S DECLARATION OF HOMESTEAD.—If a husband executes a mortgage to his wife, he cannot afterward defeat it as a lien, or prevent its foreclosure, by filing a declaration of homestead upon the mortgaged premises. (*Glas v. Glas*, 90.)

See Homesteads; Insane Persons; Insurance, 17.

IGNORANCE.

See Maxims.

INDORSEMENT.

See Negotiable Instruments, 1-3, 7, 10.

INJUNCTIONS.

1. SPECIFIC PERFORMANCE—BILL FOR INJUNCTION.—A prayer, in a bill in equity, for an injunction, to be continued during the term of a contract, restraining the defendants from threatened breaches of the contract, is the equivalent of a prayer for specific performance, converting the bill, if not in form and letter, in substance and spirit, into a bill of that character. (*Electric Lighting Co. v. Mobile etc. Ry. Co.*, 927.)

2. INJUNCTION AGAINST CRIME.—A bill in equity having for its sole purpose an injunction against crime, does not lie; but equity may interfere if the alleged criminal act goes further and operates to the destruction or diminution of the value of property of the complainant. (*Klein v. Livingston Club*, 717.)

3. TRUSTS—CHARITABLE USES—INJUNCTION.—The donor, as founder of a charity, has a standing in court to restrain the diversion of the property donated from the charitable uses for which it was given. (*Mills v. Davison*, 594.)

4. INJUNCTION—NECESSITY OF SHOWING TITLE.—One who has, under a lease, an exclusive right of hunting upon a game preserve, may, by injunction, restrain acts or threatened acts of trespass thereon, without showing a title in fee in plaintiff's lessors. It is enough that they have a bona fide possession of the premises under claim and color of right, as possession is evidence of title, and a party may rely upon his possession as against a mere intruder. (*Kellogg v. King*, 73.)

5. INJUNCTION—MULTIPLICITY OF ACTIONS.—One who has, under a lease, an exclusive right of hunting upon a game preserve, and who has no adequate remedy at law against trespassers who invade the premises and shoot and drive away the game, without bringing a separate action against each individual defendant, is entitled to an injunction, upon the ground that it will avoid a multiplicity of actions. (*Kellogg v. King*, 73.)

6. INJUNCTION—TRESPASSERS HUNTING ON LEASED PREMISES.—One who has, under a lease, an exclusive right of hunting upon a game preserve has a property right of peculiar and exceptional character, and, if others invade the premises and shoot and drive away the game, it is a case of irreparable damage from the destruction of the very substance of the property right which plaintiff holds under his lease, and justifies the issuance of an injunction without regard to the solvency or insolvency of the wrongdoers enjoined. (*Kellogg v. King*, 73.)

7. INJUNCTION—TRESPASSERS HUNTING ON LEASED PREMISES—PARTIES PLAINTIFF.—The trustee of a hunting club, being the trustee of an express trust, and who has leased, in

his own name, from the owner and for such club, the exclusive right of hunting on a game preserve, may sue to enjoin those who trespass by hunting upon the leased premises, without joining with him those for whose benefit the action is prosecuted. (*Kellogg v. King*, 73.)

8. INJUNCTION—IRREPARABLE DAMAGE—ABILITY TO RESPOND IN DAMAGES.—The remedy by injunction may be invoked to restrain acts, or threatened acts, of trespass in any instance where such acts are or may be an irreparable damage to the particular species of property involved. The question of the solvency or insolvency of the wrongdoer is an immaterial factor, and such acts may be enjoined, irrespective of the ability of the defendant to respond in damages. (*Kellogg v. King*, 73.)

See Cemeteries.

INNKEEPERS.

1. INNKEEPERS—LIEN.—If one not a guest delivers an animal to a hotelkeeper under an express agreement for its board, the hotelkeeper has no innkeeper's lien for the keeping and care of the animal. (*Elliott v. Martin*, 461.)

2. INNKEEPERS—LIEN.—If one not a guest and not the owner of an animal delivers it to a hotelkeeper under an express agreement for its board without authority from the owner, the hotelkeeper has no lien for the keeping and care of the horse, under a statute providing that whenever any person shall deliver to another any animal to be kept or cared for, the latter shall have a lien thereon for its keeping and care, and may retain possession thereof until such charges are paid. (*Elliott v. Martin*, 461.)

INSANE PERSONS.

HOMESTEAD.—AN INSANE WIFE IS INCAPABLE of giving her consent to an alienation of the homestead. (*Thompson v. New England Mortgage etc. Co.*, 29.)

INSOLVENCY.

1. INSOLVENCY, NONRESIDENT PARTNER, EFFECT OF DISCHARGE AS AGAINST.—If an insolvent owes a debt to a partnership, some of the members of which are, and others are not, residents of the state wherein the discharge in insolvency is granted, it can have no effect against the nonresident members, and therefore constitutes no defense to an action in the name of the firm for the recovery of its debt, the partnership not having participated in the insolvency proceedings in any way. (*Chase v. Henry*, 423.)

2. A DISCHARGE IN INSOLVENCY GRANTED by a court of a state is of no effect against a creditor residing in another state, who has not submitted himself to the jurisdiction of the court of insolvency. (*Chase v. Henry*, 423.)

See Banks, 9; Receivers.

INSTRUCTIONS.

1. INSTRUCTIONS.—In order to entitle one to have the jury instructed as requested, the request must not only be correct in point of law, but also applicable to the evidence. (*Consolidated Traction Co. v. Scott*, 620.)

2. INSTRUCTIONS—QUESTIONS OF FACT.—An instruction which merely applies the law to hypothetical facts, and submits to

the jury the question whether the facts hypothetically stated are true, is not an instruction as to questions of fact. (*Baddeley v. Shea*, 56.)

See Appeal, 11; Negligence, 7, 8; New Trial

INSURANCE.

1. INSURANCE—ACT OF UNAUTHORIZED AGENT—RATIFICATION.—If an unauthorized person solicits an application for insurance, and the insurer recognizes the regularity of the application and the legitimacy of the channel through which it comes, it thereby places such person upon the same foundation and invests him with the same authority as its commissioned agents. (*Terry v. Provident Fund Society*, 217.)

2. INSURANCE—ACT OF UNAUTHORIZED AGENT—RATIFICATION.—The failure on the part of an insurance company to deny the execution of a policy, and its acceptance of an application therefor, amount to a ratification of the acts of an unauthorized agent, in soliciting the insurance, receiving the application, and conditionally delivering the policy. (*Terry v. Provident Fund Society*, 217.)

3. INSURANCE—ACT OF UNAUTHORIZED AGENT—RATIFICATION—ESTOPPEL.—If an unauthorized person solicits an application for insurance, and the insurance company recognizes the regularity of the application, it thereby recognizes such person as its agent, the payment of the first advance premium to him is payment to the company, and estops it from denying such payment to the home office. (*Terry v. Provident Fund Society*, 217.)

4. INSURANCE AGAINST FIRE, WHAT FIRES INCLUDED WITHIN.—If soot in a chimney is ignited by a fire kindled in a stove, but not for the purpose of igniting the soot, and from the burning of the soot and the obstructed condition of the chimney, smoke is produced, escaping into the rooms occupied by the assured, damaging his goods therein, he is entitled to indemnity under a policy insuring against all loss or damage to such property by fire. (*Way v. Abington etc. Ins. Co.*, 379.)

5. INSURANCE.—Interest is recoverable upon a policy of insurance against loss by fire, unless the policy otherwise provides, from the time when the amount payable has been made certain and has become due. Hence, where a policy stipulates for payment within sixty days after proofs of loss, and that the amount, if not agreed upon, shall be ascertained by an award, and the amount of the loss is ascertained within the sixty days, interest is recoverable from that time, though the insurer claims to be liable for a portion of the loss only. (*Hardy v. Lancashire Ins. Co.*, 395.)

6. INSURANCE, RIDERS OF POLICIES.—A mortgagee in whose favor a loss is made payable as his interest may appear is not affected by additional insurance procured upon the property without his knowledge or consent, though there is a rider attached to the policy to the effect that if other insurance shall exist on the property, the company shall be liable only for such proportion of the loss sustained as the amount insured shall bear to the whole insurance on the property insured, whether the other insurance applies in the same manner or not. The provisions respecting the other insurance affect the interest of the assured only, and not that of the mortgagee, unless additional insurance is obtained for his benefit and with his knowledge. (*Hardy v. Lancashire Ins. Co.*, 395.)

7. INSURANCE—ASSIGNMENT—WAIVER.—If an insurance agent, with full knowledge of all the facts, prepares a policy of insurance and an assignment thereof, this constitutes a waiver of the conditions in the policy, as well as of the right to insist that a portion of the policy cannot be assigned. (*Manchester etc. Assur. Co. v. Glenn*, 225.)

8. INSURANCE — WAIVER OF FORFEITURE.—Issuing or continuing a policy of insurance with full knowledge by the company of existing facts, which, according to a condition of the contract, make it voidable, is a waiver of the condition. (*Manchester etc. Assur. Co. v. Glenn*, 225.)

9. INSURANCE—ARBITRATION—WAIVER.—A provision in a policy of insurance for an appraisal of loss by arbitrators before action is brought is waived by the insurer, when, after selection of arbitrators and their failure to agree, the insurer adjusts the loss and requests the insured to make proof thereof in that amount, and the insured complies with such request. (*Manchester etc. Assur. Co. v. Koerner*, 231.)

10. INSURANCE—CONFLICT OF LAWS.—A foreign insurance company that has not paid the privilege tax and procured the license required to carry on such business in this state, nor otherwise complied with the laws of this state respecting the transaction of its business here, cannot maintain an action for premiums due on a policy of insurance upon property in this state, whether issued in or out of the state. (*Cowan v. London Assur. Corp.*, 535.)

11. INSURANCE, FOREIGN—RIGHT TO SUE.—A foreign insurance corporation, prohibited by statute from issuing policies upon property within the state without express authority, and from doing business or maintaining actions therein without compliance with certain regulations and conditions, cannot, without complying with such requirements, maintain an action in that state on a contract of insurance on property situated therein, no matter whether such contract is made in that state or in the state of the domicile of the corporation. (*Seamans v. Temple Co.*, 457.)

12. INSURANCE, ACCIDENT—EVIDENCE OF SUFFERING.—Under a policy of accident insurance indemnifying against loss of the value of time during disability, evidence of the amount of suffering of the insured, and how he slept during the injury is admissible to show how far his discomfort may have interfered with his capacity to work, but it is not admissible as an element of damages. (*Globe etc. Ins. Co. v. Helwig*, 247.)

13. INSURANCE, ACCIDENT—EVIDENCE OF EXTRAHAZARDOUS RISK.—Evidence that the insured under a policy of accident insurance was in a more hazardous class at the time of the accident than that in which he was insured, is not admissible under a general denial. (*Globe etc. Ins. Co. v. Helwig*, 247.)

14. INSURANCE—SEPARATE CONTRACTS IN SAME POLICY—WAIVER OF CONDITIONS.—A policy of insurance on a building and a stock of merchandise therein, issued to a firm and to one of its members, reciting that the firm are the owners of the building and that such member is the owner of the merchandise, is in effect, two different contracts of insurance, and a provision in the policy, that if the insured is not the sole and unconditional owner of the property at the time of the issue of the policy and of the loss, the policy shall be void, is waived, if the facts as to ownership were known to the insurer at the time of the issue of the policy. (*Manchester etc. Assur. Co. v. Koerner*, 231.)

15. INSURANCE—ASSIGNMENT OF INSURED PROPERTY—ESTOPPEL.—If an insurer of property assigned for the benefit of creditors is, through his authorized agent, informed of the assignment by the assignee, who requests a transfer to himself, and, after being informed by such agent that a transfer before sale and conveyance is not necessary, pays an assessment demanded by the insurer, the latter is estopped from asserting the want of such transfer as a defense to liability for loss happening after the assignee's sale of the property and before a deed is made to the purchaser. (*Highlands v. Lurgan Ins. Co.*, 739.)

16. INSURANCE, ASSIGNMENT.—A stipulation in a policy of insurance against its assignment can be taken advantage of by the insurer only, and does not enable an assignor to avoid his assignment. (*Spencer v. Myers*, 675.)

17. INSURANCE, MARRIED WOMEN, POWER OF TO ASSIGN. A statute declaring that all policies of insurance heretofore or hereafter issued in this state upon the lives of husbands for the benefit of their wives, in pursuance of the laws of this state, shall be assignable by such a wife without the written consent of her husband authorizes such assignment, though the policy was issued in another state. (*Spencer v. Myers*, 675.)

18. INSURANCE—ASSIGNMENT OF PART OF POLICY.—A policy of insurance on a building and a stock of merchandise therein, issued to a partnership and to one of its members, reciting that the former are the owners of the building and that such member is the owner of such merchandise, is, in effect, two different contracts of insurance, and an assignment of the policy by such member affects only his interest in the merchandise. (*Manchester etc. Assur. Co. v. Koerner*, 231.)

19. INSURANCE—ASSIGNMENT—WAIVER.—Conditions in a policy of insurance against assignment are for the benefit of the company, and may be waived by it. (*Manchester etc. Assur. Co. v. Glenn*, 225.)

20. INSURANCE.—ASSIGNMENT of a policy of insurance is the creation of a new contract between the company and the assignee, the terms of the old policy being the basis of the new contract. (*Manchester etc. Assur. Co. v. Glenn*, 225.)

21. INSURANCE—DIVISIBILITY.—If property insured consists of several distinct items, and is so situated that the risk on one item cannot be affected without affecting the risk on the other items, or if the various items are necessarily subject to destruction by the same conflagration and the consideration is entire, the contract is indivisible, and the loss cannot be apportioned. The rule is otherwise if the property is so situated that the risk on each item is separate and distinct from the others. (*Manchester etc. Assur. Co. v. Glenn*, 225.)

22. INSURANCE, ACCIDENT—SALARY DURING DISABILITY. If, by reason of an injury insured against, the insured actually loses time from his business, he is entitled to recover the money value thereof, although his salary is continued during his disability, when, under the policy, he has a right to be indemnified against the loss of the money value of his time during disability arising from accident. (*Globe etc. Ins. Co. v. Helwig*, 247.)

23. INSURANCE IN FAVOR OF MORTGAGEE.—Under what is known as the Massachusetts standard form, a policy of insurance for the benefit of the mortgagee does not become void as to his in-

terest because of any conveyance or other act of the mortgagor made or done after the policy issued. (*Palmer Sav. Bank v. Insurance Co.*, 387.)

24. **INSURANCE, CONDITIONS TO AFFECT MORTGAGEES.** If it is intended to modify the provisions contained in the standard form of policies of insurance either by conditions or riders attached to the policy, such intention must be manifested by unambiguous words. (*Hardy v. Lancashire Ins. Co.*, 395.)

25. **INSURANCE PAYABLE TO MORTGAGEE, WHEN DOES NOT INCLUDE SUBSEQUENT MORTGAGES.**—If the owner of real property obtains insurance thereon, payable in case of a loss to a designated mortgagee as his interest may appear, and such owner afterward conveys the property to another person who conveys to the former owner's wife, who then procures another loan and executes another mortgage to the same mortgagee, the husband joining to release any rights he may have as husband, such second mortgage is not included with the terms of the original insurance, and the mortgagee's recovery may be limited to his interest existing when the policy issued. (*Palmer Sav. Bank v. Insurance Co.*, 387.)

26. **INSURANCE FOR THE BENEFIT OF MORTGAGEE ENTITLES HIM TO SUE IN HIS OWN NAME.**—If a policy of insurance against loss by fire is issued to an owner of real property, payable in case of loss to a designated mortgagee as his interest may appear, he is entitled to maintain in his own name an action upon the policy without joining his mortgagor, whether the amount of the loss is greater or less than the sum due upon the mortgage, but the mortgagor can sue for the whole loss, if the mortgagee consents. (*Palmer Sav. Bank v. Insurance Co.*, 387.)

27. **INSURANCE—FLEADING.**—If, in an action of a policy of insurance, the insured alleges a fulfillment of all of the conditions of the policy on his part, and this is met with a general denial, together with a plea in bar, a demurrer to the plea in bar is properly sustained. (*Manchester etc. Assur. Co. v. Glenn*, 225.)

28. **INSURANCE—MUTUAL BENEFIT ASSOCIATION—SUBSEQUENT BY-LAW—SUICIDE.**—Under a contract of life insurance, issued by a mutual company, conditioned to be subject to any laws thereafter to be enacted, the insured is bound by a subsequent by-law forfeiting the policy on account of suicide. (*Daugherty v. Knights of Pythias*, 310.)

29. **INSURANCE—BENEFIT SOCIETIES—TIME OF PAYMENT OF CERTIFICATES OF MEMBERSHIP.**—If the charter of a benefit society provides that benefits shall be paid as directed either by its by-laws or in the certificate of membership, and there is a conflict as to time of payment between the by-laws and the certificate, the provisions of the latter must govern. (*Failey v. Fee*, 326.)

30. **INSURANCE — BENEFIT SOCIETIES — INSOLVENCY.**—HOLDERS OF MATURED CERTIFICATES in a benefit society are creditors thereof, and remain such, although the society subsequently becomes insolvent. (*Failey v. Fee*, 326.)

31. **INSURANCE—BENEFIT SOCIETIES—RIGHTS OF HOLDERS OF MATURED CERTIFICATES.**—Holders of matured certificates of a benefit society are creditors thereof entitled to priority in payment over unmatured certificates and with the right to attach the funds of the society when it becomes insolvent. (*Failey v. Fee*, 326.)

32. INSURANCE—BENEFIT SOCIETIES—LIABILITY OF CERTIFICATE.—A certificate of membership in a benefit association, under which the holder is entitled to a specified sum of money if he shall pay all lawful assessments and comply with all laws of the association for a certain time, is a valid contract and not impossible of performance, although the plan adopted by the association for the execution of the contract is impracticable. (*Failey v. Fee*, 326.)

33. REAL PROPERTY—DUTY OF OWNER AS TO BUILDING AFTER A FIRE—INSURANCE CONTRACT TO REPAIR—LIABILITY.—Although an owner's building is in the hands of an insurance company for repairs, after a fire, this does not relieve him of his duty to see that it is in a safe condition. It is especially his duty, after the fire, to see how that occurrence has affected the situation; and he cannot, as between himself and the public, shift this responsibility from himself to the insurance company by leaving the latter to determine the necessity and extent of repairs. He is still liable for the condition of the building, and must respond in damages, if anyone is injured by one of its falling walls. (*Steppe v. Alter* 281.)

See Arson, 2; Estates; Judgment, 3; Real Property, 6.

INTOXICATING LIQUORS.

1. INTOXICATING LIQUORS — CONSTITUTIONAL LAW. The provisions of the prohibitory law of the state of South Dakota, so far as they relate to the subject of unlawful sales of intoxicating liquor, are constitutional. (*State v. Sasse*, 834.)

2. CRIMINAL LAW—IGNORANCE OF FACT—OFFENSE—ILLUSTRATION.—One who sells intoxicating liquor to a minor, though innocently ignorant of the fact, violates, and incurs the penalty of a law prohibiting such sales, even where the purchaser makes affidavit that he is over twenty-one years old; but evidence of good faith and honest intention should be considered in mitigation of the penalty. (*State v. Sasse*, 834.)

See Associations.

IRRIGATION.

1. IRRIGATION—WATER COMPANIES OWNING AND OPERATING DITCHES are trustees for their stockholders and bound to protect their interests. (*Farmer's etc. Ditch Co. v. Agricultural Ditch Co.*, 149.)

2. IRRIGATION—DITCH CORPORATIONS ARE QUASI PUBLIC CARRIERS, for the purpose of conveying water from the natural streams to places where it may be applied to beneficial uses. (*Farmers' etc. Ditch Co. v. Agricultural Ditch Co.*, 149.)

3. IRRIGATION—RIGHTS OF WATER COMPANIES.—Under the statutes of Colorado, a ditch company may have a priority of right to take water, which priority may be determined by the statutory method, and, so determined, by a proper decree, is binding upon all parties to the proceedings. (*Farmers' etc. Ditch Co. v. Agricultural Ditch Co.*, 149.)

4. IRRIGATION—RIGHT OF WAY FOR AN IRRIGATION DITCH ON PUBLIC LANDS vests only upon completion of the work of construction and the application of the water to a beneficial use, although it attaches as fast as the ditch is constructed. (*Jarvis v. State Bank*, 129.)

See Judgments, 6; Police Power, 1; Statutes, 2, 3; Waters, 1, 2.

JOINT LIABILITY.

1. **CONTRIBUTION—JOINT TORT FEASORS.**—The rule that there is no contribution nor right of indemnity between joint tortfeasors does not apply to a case where one does the act or creates the nuisance and the other does not join therein, but is thereby exposed to liability. (*Westfield Gas etc. Co. v. Noblesville etc. Road Co.*, 244.)

2. **NEGLIGENCE—QUESTION FOR JURY.**—In an action seeking to charge two persons with negligence, the question of the liability of each is for the jury to determine, if the evidence is conflicting as to whether they were jointly engaged in business, causing the accident. (*Baker v. Hagey*, 712.)

JOINT TENANCY.

1. **A JOINT TENANT MAY MORTGAGE HIS INTEREST** in the property of the cotenancy, and to the extent of the mortgage lien the interest of the survivor will be destroyed or suspended. (*Wilkins v. Young*, 162.)

2. **A JOINT TENANT CANNOT DEVISE** any part of the property, though he may convey any part of it to a stranger and thereby defeat his cotenant's right to survivorship. (*Wilkins v. Young*, 162.)

3. **WILLS—DEVISE BY A JOINT TENANT.**—A statute providing that any person may devise any interest descendible to his heirs which he may have in lands, tenements, etc., does not authorize a joint tenant to devise any part of the subject matter of the tenancy. (*Wilkins v. Young*, 162.)

See Husband and Wife, 3.

JUDGMENTS.

1. **JUDGMENTS—RES JUDICATA.**—If the plaintiffs in a bill in equity to subject property fraudulently transferred by their debtor to the payment of their demand have recovered a money judgment at law against such debtor on a written undertaking covering the same demand, such judgment is *res judicata* as to the maturity of the debt, the party to whom it was due, and that it had not been paid, and these questions cannot be raised in the suit in equity. (*Wooten v. Steele*, 947.)

2. **JUDGMENTS—RES JUDICATA—CONTRIBUTION.**—A judgment against two defendants sued as severable tortfeasors is conclusive of the liability of each defendant to the plaintiff in an action by one of such defendants to recover from the other the sum he has been compelled to pay under such judgment. (*Westfield Gas etc. Co. v. Noblesville etc. Road Co.*, 244.)

3. **JUDGMENTS—RES JUDICATA—SEPARATE CONTRACTS.** A judgment upon one contract in a policy of insurance is not an adjudication upon another separate and distinct contract growing out of the same policy, in which others are interested who had no interest in the former contract or suit, and who filed no cross-action therein, although made parties thereto. Such judgment does not bar their right of action. (*Manchester etc. Assur. Co. v. Koerner*, 231.)

4. **JUDGMENT, WHEN SELF-EXECUTING AND NOT SUSPENDED BY AN APPEAL.**—A judgment of ouster from a public office is self-executing, and deprives the person against whom it is of all official duty, and completely excludes him from the office as long as the judgment remains in force. Its force is not released by the pendency of an appeal, whether accompanied by a stay bond or not. (*Faucett v. Superior Court*, 894.)

5. PRACTICE.—IF PLAINTIFF DIES AFTER VERDICT and before judgment thereon, the judgment may be entered before two terms after the verdict was rendered. (*Wood v. Boyle*, 747.)

6. CONSTITUTIONAL LAW—DECREES UNDER IRRIGATION STATUTES.—Under the irrigation statutes of Colorado, decrees entered in statutory proceedings for the adjudication of priorities to the use of water are *prima facie* evidence of rights between different water districts, and must be enforced by the public officers intrusted with the distribution of water until they are impeached in some appropriate manner by proper proceedings. (*Farmers' etc. Ditch Co. v. Agricultural Ditch Co.*, 149.)

See Estoppel, 1; Limitations of Actions, 1, 2.

JUDICIAL NOTICE.

See Evidence, 10.

JURORS.

See New Trial, 4.

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—DILAPIDATED BUILDING—OWNER IS NOT LIABLE FOR INJURY TO GUEST OF TENANT. If a "surprise party" visits the house of a friend for the purpose of spending the evening in social amusement, and are welcomed as guests, one of them who sustains bodily injuries occasioned by the fall of a gallery, cannot recover damages therefor of the owner of the building, who had leased it as a place of residence to the tenant, especially where the owner had, shortly after renting the premises, made all the repairs considered necessary for the safety and security of the building, and where the guests contributed, in some degree, to the accident, by rushing out upon the gallery to watch a fire-engine pass, upon an alarm of fire, after having been warned of the danger of dancing upon the gallery. (*McConnell v. Lemley*, 319.)

2. LANDLORD AND TENANT—LIABILITY FOR INJURY TO GUESTS OF TENANT—WHAT PRINCIPLE CONTROLS.—The guests of a tenant are not the guests of the landlord. If the tenant is neglectful of the safety of his guests, they have their recourse against him personally, but not against the owner of the building. It is the duty of care the occupant owes his guest, and not the duty the owner of the building owes to the public, that controls the recourse of an injured party. (*McConnell v. Lemley*, 319.)

3. LEASE—EFFECT OF RESERVATION UPON PRIVILEGE GRANTED.—A reservation of pasturage, in a lease, does not affect, or militate against, the exclusiveness of hunting privileges conferred by the lease. (*Kellogg v. King*, 73.)

See Lease; Injunctions, 4-8.

LEGACY.

1. LEGACIES — ENGLISH EDUCATION — CERTAINTY — PAROL EVIDENCE.—The legacy of an English education to two small boys, at the expense of the estate, is reasonably certain, and the court may hear evidence as to the amount necessary for such purpose, because, in doing so, it does not vary or avoid the intention of the testator, or in any way contradict any part of the will. (*Succession of Allen*, 295.)

2. LEGACIES—CASH—RESTRICTIONS AS TO AMOUNT.—RESIDUUM.—Nieces of a testator, to whom a certain sum of money

has been bequeathed in addition to money they have already received, cannot participate in the residuum, as to which the testator dies intestate, where he, in his bequest, wills that they are to have "no interest in any other claim." (Succession of Allen, 295.)

LEGISLATURE.

CONSTITUTIONAL LAW.—THE LEGISLATURE may, as a general principle, do what the state constitution does not prohibit. (In Re State Warrants, 852.)

See Game Laws; Nuisance, 2-4.

LETTERS.

See Negligence, 4

LEVY.

See Attachment, 4-6.

LIBEL.

1. LIBEL—PUBLICATION LIBELOUS PER SE.—A newspaper publication, stating that the manager of a pipe line, engaged in business of a public character, has set himself up as a political boss, without brains, capital, or credit, and has appeared at the head of a gigantic business enterprise requiring liberal bank balances and a large mental endowment, that he has never succeeded in any undertaking because invariably associated with movements that ought not to succeed, and that he has entered into a scheme to steal a pipe line from poor producers, in order to give it to opulent refiners and arrogant exporters, masquerading as a certain pipe line, impeaches the private, individual, and personal, and not the official, character of such manager, and is not a privileged communication, but is libelous per se. (Wood v. Boyle, 747.)

2. LIBEL—DEFAMATION OF CHARACTER.—Any publication, injurious to the social character of another, and not shown to be true, or to have been justifiably made, is actionable as libelous. (Wood v. Boyle, 747.)

3. LIBEL—PRIVILEGED COMMUNICATION.—A newspaper publication directed against a person engaged in business of a public character, and attacking and impeaching his private, individual, and personal character and capacity, is not privileged. (Wood v. Boyle, 747.)

4. LIBEL—EVIDENCE TO MITIGATE DAMAGES.—In an action for libel, the defendant may prove, in mitigation of damages, that he did not originate the calumnious statement. (Hoboken Printing etc. Co. v. Kahn, 609.)

LICENSE.

1. LICENSE BASED ON ILLEGAL CONTRACT.—One who goes into the occupancy of land under a contract to purchase which is contrary to public policy and void, and does not continue such occupancy long enough to acquire a right by prescription, cannot, on the ground that he has acquired a license, maintain and continue to use a dam erected by him upon such land. (Carley v. Gitchell, 428.)

2. LICENSE BASED ON ILLEGAL CONTRACT.—One who goes into occupancy of land under a contract to purchase it which is void as against public policy, and continues such occupancy for

a period of time less than is required to create a right by prescription, cannot claim a license to use the land as long as improvements placed thereon by him are maintained. (*Carley v. Gitchell*, 428.)

See Nuisance, 1-4.

LIENS.

See Attorney and Client, 5; Banks, 7, 8; Cotenancy, 4; Innkeepers; Marriage and Divorce, 4, 7; Mechanics' Liens; Vendor and Purchaser, 6, 7.

LIMITATIONS OF ACTIONS.

1. LIMITATIONS OF ACTIONS—JUDGMENTS.—If the limitation of an action on a judgment is seven years next after its rendition, the right of action upon it is barred after the lapse of that period, notwithstanding the issuance of an execution before the lapse of that time and within seven years preceding the institution of the suit. (*Berkson v. Cox*, 539.)

2. LIMITATIONS OF ACTIONS—JUDGMENT—NEW PROMISE OR ACKNOWLEDGMENT.—A judgment is not a contract, and an action on it is not, therefore, embraced in the terms of a statute whereby actions upon contracts are taken out of the operation of the statute of limitations, when a new promise or an acknowledgment, in writing, signed by the party chargeable thereby, is shown. Hence, a judgment debtor's written acknowledgment of the justice and validity of the debt evidenced by the judgment, does not take the judgment out of the operation of the statute. (*Berkson v. Cox*, 539.)

3. CONSTITUTIONAL LAW—LIMITATIONS — RETROSPECTIVE STATUTE.—A statute depriving nonresidents of the benefit of the statute of limitations when the cause of action arises in the state and the defendant therein subsequently becomes a nonresident of the state, although retrospective in its effect, is not unconstitutional when applied to pre-existing debts and obligations, and applies to a nonresident defendant who, prior to the enactment of such statute, had obtained leave of court to open a judgment, in order to permit him to plead the statute of limitations. In such case, the plaintiff may prove that the defendant became a nonresident after the cause of action had arisen. (*Bates v. Cullum*, 753.)

LIS PENDENS.

1. LIS PENDENS OPERATES AS NOTICE ONLY during the pendency of the suit in which it is filed. (*Pipe v. Jordan*, 138.)

2. LIS PENDENS—PURCHASER WITHOUT NOTICE.—One who purchases after the dismissal of an action without prejudice, and before it is revived or a new action commenced, is not charged with the notice of lis pendens filed in the action previously dismissed. (*Pipe v. Jordan*, 138.)

3. LIS PENDENS—BENEFIT OF, HOW LOST.—By unreasonable delay in the prosecution of a case in which a lis pendens is filed, or in reviving it after its dismissal, the benefit of the lis pendens is lost. (*Pipe v. Jordan*, 138.)

LOTTERIES.

1. LOTTERY CONTRACTS ARE AGAINST PUBLIC POLICY, and those who enter into them shall not have any relief in the courts to enforce those that remain executory, or to recover what has passed under such as have been executed. (*Lynch v. Rosenthal*, 168.)

2. **LOTTERY SCHEME, WHAT IS.**—A scheme by which a number of lots of unequal value are sold at a uniform price and others are given away, the purchasers to determine by lot the particular lot to be awarded to each respectively, and also to determine by some agreement among themselves the manner of awarding the prize lots, is a lottery scheme contrary to public policy, and all agreements for carrying it into effect are void, (*Lynch v. Rosenthal*, 168.)

MAINTENANCE.

See *Marriage and Divorce*, 5, 11.

MANDAMUS.

MANDAMUS TO COMPEL TRIAL OF APPEAL—CERTIORARI.—Mandamus is the more appropriate remedy by which to compel a court to proceed to the trial of an appeal, but the same result may be reached by certiorari. (*Grand Rapids v. Braudy*, 472.)

MARRIAGE AND DIVORCE.

1. **AN ACTION FOR DIVORCE** is treated as a case in equity. (*Gaston v. Gaston*, 86.)

2. **CONSTITUTIONAL LAW—DIVORCE.**—A statute providing for a limited divorce for adultery or desertion, with special consequences as to property rights only when the applicant alleges and proves conscientious scruples against absolute divorce, is unconstitutional and void. (*Middleton v. Middleton*, 602.)

3. **CONSTITUTIONAL LAW—CLASS DISCRIMINATION IN DIVORCE.**—A statute which imposes upon one person a kind of divorce which for the same offense it cannot apply to another, because the consort of the former holds certain opinions which the consort of the latter does not, does not classify in conformity with constitutional requirements, and is void. The fact that the person who suffers from such discrimination is an offender does not change the character of such legislation. (*Middleton v. Middleton*, 602.)

4. **DIVORCE—LIEN ON REAL ESTATE TO SECURE MAINTENANCE—LIMIT AS TO TIME.**—A lien charged by a judgment of divorce, in favor of the wife, upon land which was a part of the community property, but which has been set apart to the husband, to secure installments of alimony awarded as they fall due is not affected by a general statute making a judgment lien expire in two years from the time the judgment is docketed. (*Gaston v. Gaston*, 86.)

5. **DIVORCE—DECREE FOR FUTURE MAINTENANCE—EXISTENCE OF PROPERTY.**—It is not essential to a decree for future maintenance, in a suit by the wife for divorce, that the husband, at the time of the decree, should own either separate or community property, out of which the decree may be enforced. (*Gaston v. Gaston*, 86.)

6. **MARRIAGE AND DIVORCE—CONTESTED ISSUES—PRACTICE.**—Under a statute providing that in all divorce cases where the defendant shall appear and deny the charges alleged, they shall be tried, by a jury, a verdict by a jury in a contested case is absolutely essential as a prerequisite for a decree of divorce; and the rule which prevents appellate courts from overthrowing verdicts based upon a conflict of evidence applies with particular force to divorce proceedings. (*Johnson v. Johnson*, 112.)

7. **DIVORCE—EXTREME CRUELTY—PERMANENT ALIMONY—LIEN ON REAL ESTATE.**—The court is authorized, in a

decree of divorce upon the ground of extreme cruelty, to assign community property to the wife, absolutely, and this includes the power to charge a lien, in favor of the wife, upon land of the husband, which was a part of the community, to secure the payment of permanent alimony awarded by the court. (*Gaston v. Gaston*, 86.)

8. MARRIAGE AND DIVORCE.—DESERTION, WITHIN THE MEANING OF THE LAWS, consists in the actual ceasing of cohabitation, and the intent in the mind of the offending party to desert the other. (*Johnson v. Johnson*, 112.)

9. MARRIAGE AND DIVORCE—DESERTION EVIDENCE OF INTENT.—Intent to desert within the meaning of divorce laws is always largely a matter of inference and presumption; and the subsequent conduct of the parties frequently makes plain the intent with which a previous act was performed. Evidence of such conduct is admissible to ascertain the intent. (*Johnson v. Johnson*, 112.)

10. DIVORCE — ALIMONY — JURISDICTION.— THE PROVISION FOR SUPPORT, in an action for a divorce brought by the wife, is ordinarily an incident of the judgment of divorce, and jurisdiction of the court to make such provision is not dependent upon the averments in the complaint as to the husband's resources. (*Gaston v. Gaston*, 86.)

11. DIVORCE—ALIMONY—SECURITY FOR MAINTENANCE—LIEN ON REAL ESTATE.—A statute authorizing the court, in a divorce proceeding, to require the husband to give reasonable security for providing maintenance, and giving the court power to enforce its order, should not be so construed as to abridge the equitable power of the court to make the maintenance a lien or charge upon the real estate of the husband. (*Gaston v. Gaston*, 86.)

12. MARRIAGE AND DIVORCE—ALIMONY—PLEADING.—After the issues in a divorce case have been found in favor of plaintiff, she may file a supplemental petition relating exclusively to property rights and the question of permanent alimony. (*Johnson v. Johnson*, 112.)

13. MARRIAGE AND DIVORCE—ALIMONY—LIEN.—Alimony awarded in a divorce case may be decreed to be a lien upon the real estate of the defendant, but not upon his personal property. (*Johnson v. Johnson*, 112.)

14. DIVORCE—EXECUTION ON LAND FOR ALIMONY—LIMIT AS TO TIME.—As a court has power, in an action for divorce brought by the wife, to make suitable allowance for her support during life, it may take the form of pecuniary payments, at successive monthly intervals. Hence, as the right to execution for these does not accrue until they respectively fall due, the husband's land, set apart to him out of the community property, and which is charged with a lien for the payment of such maintenance, may be sold to satisfy the lien for any unpaid installments accruing after the expiration of five years from the entry of judgment, notwithstanding a statute prescribing the period of five years from the entry of judgments, in general, as the limit within which execution may issue. (*Gaston v. Gaston*, 86.)

MASTER AND SERVANT.

1. MASTER AND SERVANT, AUTHORITY OF THE LAT-TER TO ENTER UPON A DIFFERENT EMPLOYMENT.—Men are supposed to be skillful in their particular trades and to be employed because of that reason, and when they are sent to do work within their trade, they carry no implied authority from their mas-

ter to engage in any other trade, and, if sent to such work, even by their foreman, do not represent their employer, and hence he is not answerable for their negligence. (*Brown v. Jarvis Engineering Co.*, 382.)

2. MASTER AND SERVANT, ACTS BEYOND THE SCOPE OF EMPLOYMENT.—The foreman of a gang of men employed in constructing a foundation for a printing press in a building has no authority, while such work is suspended because of the presence of a van containing rolls of paper which must be unloaded and rolled into the basement of the building, to direct the men constituting a part of his gang to assist with such paper, though their so doing may expedite their work. Hence, the common employer of the foreman and of the men under him is not answerable for the negligence of any of the latter while assisting in unloading the paper whereby the driver of the van is injured. (*Brown v. Jarvis Engineering Co.*, 382.)

3. MASTER AND SERVANT—CONTRACT LIMITING RIGHT TO DISCHARGE.—If a contract for services for a year provides that the employé may, at her election, continue it for an additional year, provided she indicates her willingness to do so at a time stated, and provided further that her services have been reasonably satisfactory until the date named, and notice is given to her of any cause of dissatisfaction on or before such date, the refusal to employ her cannot be justified because of grounds of dissatisfaction not existing at the date named or not specified in the notice given to the employé. (*Hughes v. Gross*, 375.)

4. MASTER AND SERVANT—LIABILITY OF MASTER FOR TORT OF SERVANT.—The old rule that the master was never liable for the willful or malicious act of his servant is not now the law. He is answerable if the act was done in his master's business, and this is the true test of his liability. (*Richberger v. American Express Co.*, 522.)

5. MASTER AND SERVANT—INJURY CAUSED BY SERVANT'S INFIRMITY OF TEMPER—MASTER'S LIABILITY.—A master who puts his servant in a place of trust or responsibility, or commits to him the management of his business or care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty and authority and inflicts an unjustifiable injury upon another. (*Richberger v. American Express Co.*, 522.)

6. MASTER AND SERVANT—INJURY CAUSED BY SERVANT'S INFIRMITY OF TEMPER—MASTER'S LIABILITY—ILLUSTRATION.—An express company is answerable in damages to one who pays an overcharge on an express package, who complains thereof, and who demands that such excess be refunded, where the local agent, immediately after refunding the excess, while taking a receipt therefor, and while the sender still remains in the office, willfully, wantonly, oppressively, and wrongfully curses, abuses, insults, and maltreats him, and especially where the whole transaction consumes but a few moments and all of its features constitute but one continuous and unbroken occurrence, while the provoking cause of the tort is the lawful demand made for the excess, as the injurious act is not thus so separated by time and logical sequence from the refunding of the excess and taking of the receipt, which are the business of the master, as to relieve the master of liability. (*Richberger v. American Express Co.*, 52.)

MAXIMS.

IGNORANCE OF GENERAL LAW does not excuse, but ignorance of one's personal, private right, under the law, arising out of existing facts, does excuse. (*Alabama Ry. Co. v. Jones*, 488.)

MECHANIC'S LIEN.

1. MECHANICS' LIENS ATTACH TO WHATEVER INTEREST THE OWNER HAD when the work was begun and to another or greater interest whenever acquired before the lien is enforced. (*Jarvis v. State Bank*, 129.)

2. MECHANICS' LIENS—DESCRIPTION.—If the description in a mechanic's lien notice is sufficiently definite to enable a person familiar with the locality to identify the premises intended to be described, the description, though too indefinite to convey title, may be rendered sufficient, if it can be aided by extrinsic evidence under proper averments laid in the complaint. (*Maynard v. East*, 238.)

3. MECHANICS' LIENS—DESCRIPTION.—A mechanic's lien notice describing the property upon which the lien is claimed as "the north part of lot number twenty (20) in Walnut Hills addition to the city of Anderson, Madison county, Indiana, as well as on the one story frame dwelling-house recently erected thereon by you," is insufficient to sustain an action to foreclose the lien, unless aided by averments such as admit extrinsic evidence in aid of such notice. (*Maynard v. East*, 238.)

4. MECHANICS' LIENS—RIGHT OF SUBCONTRACTOR TO—Although the contractor fails to perform his agreement, subcontractors may be entitled to a mechanic's lien for what work done and materials furnished are reasonably worth, after deducting any claim for damages for such nonperformance by the contractor. (*Jarvis v. State Bank*, 129.)

5. MECHANICS' LIENS—RIGHT OF SUBCONTRACTOR TO WAIVER.—A waiver by a contractor of the right to file a mechanic's lien does not extend to or include a subcontractor, in the absence of proof of any express or implied intent on the part of either of them to waive such right, as to the subcontractor. (*Jarvis v. State Bank*, 129.)

6. MECHANIC'S LIEN — WAIVER — ASSIGNMENT OF OWNER'S NOTE GIVEN TO EXTEND TIME OF PAYMENT. The mere assignment of a note, given by the owner, for the purpose of extending the time of payment and suspending the claimant's right, for a given time, to foreclose his lien, does not waive or extinguish the lien, nor prevent the assignee of the note from obtaining a decree of foreclosure, if he has the note and offers to surrender it, upon the trial for cancellation. (*Hill v. Alliance Building Co.*, 819.)

7. MECHANICS' LIEN—WAIVER OF RIGHT—TAKING OWNER'S NOTE.—A mechanic or materialman does not waive his right to file and enforce a mechanic's lien by merely accepting, at the owner's instance and request, the latter's promissory note, payable in sixty days, for the amount of his claim, which note is given for the sole purpose of extending the time of payment for sixty days, and suspending, for that time, the claimant's right to foreclose his lien. (*Hill v. Alliance Building Co.*, 819.)

8. MECHANICS' LIEN LAW—DESIGN—CONSTRUCTION. The design of the mechanics' lien law was to protect materialmen, contractors, and laborers, and it should be liberally construed to carry out the legislative intention and to do substantial justice to all affected by its provisions. (*Hill v. Alliance Building Co.*, 819.)

9. MECHANIC'S LIEN—EFFECT OF FAILURE TO FILE VERIFIED STATEMENT OF CLAIM—BONA FIDE PURCHASERS.—Under a statute making a mechanic's lien, though a claim therefor is not filed within the time specified, good, except as against purchasers or encumbrancers, in good faith, and without notice, after such time, the failure of a person entitled to such a lien to file a verified statement of his claim does not, per se, defeat the lien, but merely postpones it as to purchasers or encumbrancers, in good faith, and without notice, whose rights accrued after the time within which the verified statement should have been filed. Hence, such a failure is not available to one who, with actual notice of the existence of the lien, takes a quitclaim deed to the property, subject to all valid liens, under circumstances failing, as a matter of law, to make him a bona fide purchaser. (*Hill v. Alliance Building Co.*, 819.)

10. MECHANICS' LIENS—PRIORITY OVER MORTGAGE.—A mechanic's lien may attach to a flume constructed for a ditch company, which, though a part of a general system of canals, is an entire structure, entirely disconnected at both ends from other portions or canals theretofore constructed, and such lien is superior to a prior mortgage executed by the ditch company covering all its rights and interests in the property whether the right of way for the canal has become vested in such company and become subject to the lien of the mortgage before the construction of the flume or not. (*Jarvis v. State Bank*, 129.)

11. MECHANICS' LIENS—PRIORITY OVER MORTGAGE.—A mortgage attaches to subsequently acquired property in the condition in which it comes into the mortgagor's hands, and a mechanic's lien for work done and materials furnished on such after-acquired property takes precedence of the mortgage. (*Jarvis v. State Bank*, 129.)

12. MECHANICS' LIEN—EFFECT OF TAKING OWNER'S NOTE TO EXTEND TIME OF PAYMENT—FORECLOSURE BY ASSIGNEE.—A materialman who takes the owner's note for sixty days, and, in consideration therefor, virtually agrees to forbear, for that time, to sue upon a debt secured by a mechanic's lien, though he transfers the note under an agreement, created by his blank indorsement, that he will pay the note, if it is dishonored, still retains such an interest in the debt, as entitles him to file, in his own name, a valid claim for a lien, if it is done within the statutory time limit; and when such lien has been assigned to the holder of the note, it may be foreclosed by him. (*Hill v. Alliance Building Co.*, 819.)

13. MECHANIC'S LIEN—SURRENDER OF OWNER'S NOTE FOR CANCELLATION.—A claimant of a mechanic's lien who has taken the owner's note for the amount of his claim, for the express purpose of extending the time of payment, should surrender it for cancellation before a decree of foreclosure is entered; but its production is excused by proof of its unavoidable loss, while in the hands of an attorney for collection. (*Hill v. Alliance Building Co.*, 819.)

14. MECHANICS' LIEN—MINE—LABORERS' LIEN—AGENT OF OWNER.—Under a statute giving any person performing labor on a mining claim a lien thereon for his work, whether done at the instance of the owner or his agent, and providing that any person having charge thereof shall be held to be the agent of the owner for the purposes of such lien, one who works at "drifting in a tunnel" for one whom he knows does not own the property, and who does not assume to act for the real owner, but who is working the mine

without authority from the owner, is not entitled to a lien thereon upon any theory that his employer is an agent of the owner. (*Jurgenson v. Diller*, 83.)

15. MECHANICS' LIEN—MINE—OWNER'S NOTICE OF NON-LIABILITY.—Though a statute provides that every building or other improvement constructed upon any lands, with the knowledge of the owner, shall be deemed to have been constructed at his instance, and that his interest shall be lienable, accordingly, unless he shall, within three days after obtaining knowledge of the construction, alteration, or repair, post a written notice that he will not be responsible for the same, a person who does work in a mine, by "drifting in a tunnel," at the request of one whom he knows not to be the owner, and who does not assume to act for the owner, is not entitled to a lien therefor, upon the owner's failure to post a notice of nonliability, as such work is not the construction, alteration, or repair of any building or improvement on or in a mine. (*Jurgenson v. Diller*, 83.)

See Evidence, 11.

MINES.

DEFINITIONS.—"DRIFTING IN A TUNNEL" means taking earth, gravel, or ore from ground made accessible by means of the tunnel. It is not, however, the same as "running a tunnel." (*Jurgenson v. Diller*, 82.)

See Cotenancy, 1; Mechanics' Liens, 14, 15.

MISTAKE.

1. MISTAKE -- REFORMATION OF DEED—PARTIES.—THE defense that a clause in a deed assuming to pay a mortgage debt was inserted by mistake, must be set up by cross-bill, and all of the parties interested must be made parties thereto. (*Green v. Stone*, 577.)

2. MISTAKE—REFORMATION OF INSTRUMENT.—In case of the reformation of a contract or deed by altering or expunging some of the terms contained in it on the ground of mistake, the part improperly introduced is altered or expunged, and the instrument stands as reformed. To warrant such reformation, in the absence of fraud, there must be a mutual mistake. (*Green v. Stone*, 577.)

3. MISTAKE—REFORMATION OF CONVEYANCE — EVIDENCE.—To justify the reformation of a deed executed, delivered, accepted, and acted upon, on the ground that it did not correctly express the agreement made by the parties, the proof must be clear and convincing, and upon testimony that is unexceptionable, both with regard to the agreement actually made by the parties, and the mutuality of the mistake through which a different agreement was put in the deed. (*Green v. Stone*, 577.)

4. MISTAKE—RESCISSION OF CONVEYANCE.—If no effort has been made to rescind a conveyance by restoring the parties to their original position until such restoration has become impossible, relief by way of rescission cannot be granted, even if proof of unilateral mistake is entirely satisfactory and convincing. (*Green v. Stone*, 577.)

See Counties, 2; Equity, 2, 3.

MORTGAGES.

1. A MORTGAGE AND ITS ASSIGNMENT ARE "CONVEYANCES," within the meaning of that term, as used in the recording act. (*Merrill v. Luce*, 844.)

2. ASSIGNMENT OF MORTGAGE NOT RECORDED—INVALIDITY OF.—An unrecorded assignment of a real estate mortgage is, under the recording act, void as to subsequent purchasers or encumbrancers of the mortgaged premises, in good faith, and for a valuable consideration, whose conveyances are first recorded. (Merrill v. Luce, 844.)

3. MORTGAGE TO SECURE NON-NEGOTIABLE NOTE.—FAILURE TO RECORD ASSIGNMENT—PRIORITY OF MORTGAGE LIENS.—If a real estate mortgage, given to secure a non-negotiable note, is assigned to a purchaser of the note, who fails to record the assignment, and the mortgagee, disregarding the assignment, forecloses the mortgage, and sells the premises, and a subsequent grantee of the mortgagor redeems them within the statutory time, without notice of the assignment, but in good faith, relying upon the record and the right of the mortgagee to so foreclose, the redemptioner takes title free from the lien of the mortgage; and one who, under the same conditions, furnished money to make such redemption, secured by another mortgage on the same premises, takes his mortgage free of the first mortgage lien. (Merrill v. Luce, 844.)

4. MORTGAGES—CERTIFICATE OF RECORD—SEAL.—A certificate of the record of a mortgage by the recorder, indorsed upon the back of the original instrument, is sufficiently attested by his official signature. It need not be attested by his seal. (Glas v. Glas, 90.)

5. MORTGAGES — DEFAULT — INTEREST — DELAY — OPTION TO FORECLOSE—WAIVER.—A mortgagee, having an option, by the terms of the mortgage, to foreclose immediately upon default in the payment of any installment of interest payable annually, does not, by a delay of eight months, before making a demand and bringing an action, after an installment has become due, waive the default in the payment of interest, or his right of option to foreclose for such default. (Glas v. Glas, 90.)

6. ASSIGNMENT OF MORTGAGE—RECORDING.—The assignment of a real estate mortgage is a proper subject and instrument for record. (Merrill v. Luce, 844.)

7. MORTGAGE—TRUST—INTENT OF PARTIES.—If real property is conveyed to a third person, in trust, as security for a debt, and it is provided that, in case of default, the trust is to be executed by the creditor, the trustee having no authority to perform any act in relation to the trust property, such conveyance is, according to the obvious intent of the parties, a mortgage, and it will be so considered. (Merrill v. Hurley, 859.)

8. MORTGAGE SALE, SURPLUS, WHEN EXISTS.—If the mortgagee at a foreclosure sale bids a sum in excess of the mortgage debt, under the mistaken belief that such sum is necessary to pay the commissions due the sheriff for making the sale, such excess must be regarded as a surplus remaining after the satisfaction of the judgment, to which the mortgagor is entitled. His right to the excess is not lost by its payment into the county treasury under the supposition that the county was entitled thereto as commissions for the services of its sheriff. (Soderberg v. King County, 878.)

9. COUNTY, PAYMENT TO, WHEN NOT VOLUNTARY.—If a sheriff receives at a foreclosure sale moneys in excess of the mortgage debt, in the mistaken belief that it was his duty to exact such excess as commissions and to pay it to the county treasurer, the mortgagors are entitled to such excess, and the disposition made of it by the sheriff cannot be regarded as a voluntary payment to the

county on the part of the mortgagors, and therefore cannot estop them from maintaining an action against the county therefor. (*Soderberg v. King County*, 878.)

10. MORTGAGES—RELEASE OF RIGHT OF REDEMPTION.—A mortgagor cannot, at the time the mortgage is made, preclude himself from redeeming, even by a stipulation to that effect in the mortgage; but he may subsequently make a valid release of his equity of redemption to the mortgagee. (*Bradbury v. Davenport*, 92.)

11. MORTGAGES.—A RELEASE OF THE RIGHT OF REDEMPTION must appear by a writing importing, in terms, to be a transfer of the mortgagor's interest or by facts operating to estop him from asserting any interest in the premises. The burden is upon the creditor to show that the right of redemption was given up deliberately, and for an adequate consideration, as any marked undervaluation of the property, in the price paid, will vitiate the proceeding. (*Bradbury v. Davenport*, 92.)

See Bonds; Charities; Corporations, 1; Deeds, 1, 2, 6; Executors and Administrators, 6-8; Husband and Wife, 8; Insurance, 6, 23-26; Joint Tenancy, 1; Mechanics' Liens, 10, 11; Negotiable Instruments, 4-6; Usury, 4.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS — STREETS — RIGHTS OF ABUTTING OWNERS.—The owner of property abutting on a public street in a city, in the absence of statutory provisions to the contrary at the time of the dedication, or of a different intention appearing from the instrument or act of dedication, owns the fee in the land to the center of such street subject to the public easement. (*Southern Bell Teleph. Co. v. Francis*, 930.)

2. MUNICIPAL CORPORATIONS — STREETS—OWNERSHIP OF TREES IN.—An abutting proprietor's ownership of trees in a city street, whether planted by him, or acquired by devolution of title to the adjoining property, is a qualified and limited ownership, subordinate to the public right to safe and convenient passage, and to the rights, powers, and duties of the governing municipality in the protection, promotion and establishing of every public use in and upon the streets of the city. (*Southern Bell Teleph. Co. v. Francis*, 930.)

3. MUNICIPAL CORPORATIONS — STREETS — LIABILITY FOR CUTTING TREES IN.—If a city or other corporation invested with the right of eminent domain acting under municipal authority, proceeds to cut or trim trees planted on a sidewalk of a city street by the owner of abutting property under lawful authority, when no necessity for such cutting exists, or when the cutting clearly exceeds the necessity, the owner can maintain an action for damages arising from the consequential injury, but he cannot maintain an action of trespass therefor. (*Southern Bell Teleph. Co. v. Francis*, 930.)

4. CONSTITUTIONAL LAW — ORDINANCES.—Courts cannot interfere with legislative discretion, and are slow to declare ordinances invalid because unreasonable, when the power to legislate upon the subject has been conferred upon the common council of a city. (*Grand Rapids v. Braudy*, 472.)

5. PAWNBROKERS.—ORDINANCES REGULATING pawnbrokers, junk dealers, and dealers in secondhand goods and merchandise by requiring them to pay a reasonable license fee and give bond conditioned to comply with such ordinances, and prohibiting them from

purchasing or taking any goods, articles, or things offered by any person under sixteen years of age, or by any intoxicated person or habitual drunkard, and reserving the power in the city council to revoke such license at will, are reasonable and valid. (Grand Rapids v. Brady, 472.)

6. MUNICIPAL CORPORATIONS — STREETS—ORDINANCE REGULATING PLACING OF TELEPHONE POLES.—An ordinance requiring the removal of telephone poles from that part of the street used by vehicles, and that they be placed on the sidewalk within one foot of the curb, is not an unreasonable or unlawful regulation, and if in its enforcement it becomes necessary for the city or the telephone company to trim or remove trees in front of an abutting owner's property, it is not a trespasser nor liable as such (Southern Bell Teleph. Co. v. Francis, 930.)

MUTUAL BENEFIT SOCIETIES.

See Insurance, 28-32; Receivers, 2.

NEGLIGENCE.

1. NEGLIGENCE—PROXIMATE CAUSE.—To warrant a finding that negligence or an act not amounting to wanton wrong, is a proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. (Wood v. Pennsylvania R. R. Co., 728.)

2. NEGLIGENCE—PROXIMATE CAUSE.—If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to others, actually results in injury, through the intervention of other causes not wrongful, the injury must be referred to the wrongful cause. (Wood v. Pennsylvania R. R. Co., 728.)

3. NEGLIGENCE—PRESENCE OF DEFENDANT.—The actual presence of one of two owners of a joint business at the time of an accident is not necessary to render him liable for negligence in the management of the business, if the other facts and circumstances are sufficient to show his liability. (Baker v. Hagey, 712.)

4. NEGLIGENCE—EVIDENCE—LETTERS.—If, in an action to recover for personal injury, it is sought to charge one of two defendants with being actually engaged in the business in which the accident occurred, a letter written by the son of the defendant sought to be charged and signed with the name of the latter, is admissible in evidence, if the son has general authority to sign the name of his father and such letter is part of a large correspondence material to the case. (Baker v. Hagey, 712.)

5. NEGLIGENCE—EVIDENCE.—In an action to recover for personal injury caused by a piece of steel flying from an establishment where steel ingots were being broken up by dynamite, evidence is admissible to show that, prior to the accident, both large and small pieces of steel shattered by blasts had been thrown out and scattered about the building. (Baker v. Hagey, 712.)

6. NEGLIGENCE—WHEN QUESTION OF FACT.—In cases of negligence, whether the facts are disputed or undisputed, if different minds might honestly draw different conclusions from them, the case should properly be left to the jury, and, in order to withdraw it from the jury, the facts should not only be undisputed, but the inferences in respect to negligence, which arise from these facts should be indisputable. (Consolidated Traction Co. v. Scott, 620.)

7. NEGLIGENCE—LIABILITY OF INDEPENDENT DEFENDANTS—INSTRUCTIONS.—If two persons sued for negligence are charged as independent parties, both of whom are liable for a permanent injury inflicted by both, it is proper for the court to charge that, if both are liable under the evidence, the verdict should be against both, and that if one only is liable, while the other is not, the verdict should be against the one liable and in favor of the other, and that, if neither is liable, the verdict should be for the defendants. (*Baker v. Hagey*, 712.)

8. NEGLIGENCE—ERRONEOUS INSTRUCTION.—It is reversible error to charge the jury, in an action to recover for personal injury caused by a piece of steel flying from a building where defendants were breaking up steel ingots by dynamite, that they are liable, no matter what precautions they took, if the missiles flew from their place and caused the injury, although the jury were previously charged that defendants were not liable unless they were guilty of negligence. (*Baker v. Hagey*, 712.)

9. DEATH OF HUMAN BEING. RECOVERY FOR.—As the right to recover for the death of a human being is purely statutory, one seeking to recover for such death must bring himself clearly within the terms of the statute, which will be strictly construed. (*McDonald v. Pittsburg etc. Ry. Co.*, 185.)

10. NEGLIGENCE—SUDDEN DANGER.—A person placed by the negligence of another in a place of sudden danger, and who, under the influence of great terror does an act which may contribute to his injury or death, cannot be charged with contributory negligence, so as to bar a recovery by him. (*Consolidated Traction Co. v. Scott*, 620.)

11. NEGLIGENCE—DAMAGES—LOSS OF ARM.—In an action to recover for personal injury caused by negligence, plaintiff may recover all future expenses, for medical attendance and nursing caused by the loss of an arm in the accident sued for, although, some years before, he had lost his other arm. (*Baker v. Hagey*, 712.)

12. NEGLIGENCE—DEGREE OF CARE REQUIRED OF CHILD.—When a child has reached the age of discretion and is considered sui juris as a matter of law, the degree of care and caution required of him is no greater nor higher than such as is usually exercised by persons of similar age, judgment, and experience; and whether that degree of care and caution has been exercised by the child in a given case, is usually, if not always, a question of fact for the jury. (*Consolidated Traction Co. v. Scott*, 620.)

See *Agency*, 4; *Apothecaries*, 3; *Joint Liability*; *Master and Servant*; *Railroads*, 16, 17.

NEGOTIABLE INSTRUMENTS

1. NEGOTIABLE INSTRUMENTS.—INDORSEMENT of a note made after its delivery in pursuance of a prior agreement is binding upon the indorser. (*Brown v. Wilson*, 779.)

2. NEGOTIABLE INSTRUMENTS.—INDORSEMENT.—If a note payable to order is delivered for value without indorsement, the holder, by proper proceedings, may compel the proper indorsements to be made according to the agreement of the sureties. (*Brown v. Wilson*, 779.)

3. NEGOTIABLE INSTRUMENTS — INDORSEMENT BY AGENT — RATIFICATION.—If a party agrees to indorse a note, and, after his agent has indorsed it without authority, he ratifies the act of the agent, he is bound by the indorsement. (*Brown v. Wilson*, 779.)

4. NEGOTIABLE INSTRUMENTS SECURED BY MORTGAGE—TRANSFER—RECONVEYANCE—INNOCENT PURCHASERS.—If a person, desiring to borrow money, voluntarily executes to the payee and beneficiary, his negotiable promissory note and a trust deed mortgage, as security, without receiving any consideration, and subsequently, knowing that the mortgage is of record, and that the note has been transferred, accepts, in settlement of a suit to procure a redelivery and cancellation of such instruments, a bond, as indemnity against loss from such note and mortgage, and, at the same time, procures a reconveyance from the trustee, he cannot defeat an action for the foreclosure of the mortgage, brought by an innocent purchaser of such note and mortgage, for value, before maturity, though no assignment of such instruments appeared of record at the time the property was, without payment, reconveyed by the trustee. (*Merrill v. Luce*, 859.)

5. NEGOTIABLE INSTRUMENTS SECURED BY MORTGAGE—TRANSFER—RECONVEYANCE—PRIORITY OF MORTGAGE LIENS.—If a note and mortgage have been given without consideration, the mortgage put upon record, and the note and mortgage assigned, without any record of the assignment being made, but the property is afterward reconveyed to the mortgagor, and the deed recorded, thus apparently reinvesting the mortgagor with the unencumbered title to the property, the lien of a third person who makes a loan, and takes a mortgage, upon the property, there being no assignment of the first mortgage on record at the time, is superior to the lien of the purchaser of the note. (*Merrill v. Luce*, 859.)

6. NEGOTIABLE INSTRUMENTS—INDORSEMENT BEFORE DELIVERY.—If a promissory note is indorsed before its delivery, the liability of the indorser is that of an original promisor and co-maker. (*Richardson v. Foster*, 481.)

7. NEGOTIABLE INSTRUMENTS—DUTY OF PURCHASER.—One to whom negotiable paper is presented for discount or sale before due is not bound, at his peril, to be alert for circumstances which may possibly excite suspicion, and does not owe to the party who puts the paper afloat the duty of inquiring in order to avert suspicion of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by speculative views as to his diligence or negligence. (*Cheever v. Pittsburgh etc. R. R. Co.*, 646.)

8. NEGOTIABLE PAPER—ONE TO WHOM NEGOTIABLE PAPER IS PRESENTED FOR DISCOUNT has the right to assume that the relations to the paper of every party whose name appears upon it is precisely what they appear to be, and though the note is made by a corporation to a third person, by whom it is indorsed, and is presented for collection by the president of the corporation, the purchaser is justified in assuming that the note came into the hands of such president as his private property in the regular course of business. (*Cheever v. Pittsburgh etc. R. R. Co.*, 646.)

9. NEGOTIABLE INSTRUMENTS—INDORSEMENT BEFORE DELIVERY—INCONSISTENT WORDS ABOVE INDORSEMENT—PAROL EVIDENCE.—If one member of a firm signs a promissory note as his individually but indorses it with his firm name, parol evidence is admissible to show that the indorsement was contemporaneous with the execution of the note, and made to bind the firm as co-promisors, although the words, "We hereby waive notice, demand, and protest, and all other formalities," appear above the firm name, because, if the note was indorsed before delivery, these words

are inconsistent with the obligation of the firm as co-promisors, and will not be allowed to control or vary it. (*Richardson v. Foster*, 481.)

10. **NEGOTIABLE INSTRUMENTS—INDORSEMENT NOT AFFECTING NEGOTIABILITY.**—A writing on the back of a promissory note, designed for the purpose of transferring title, does not destroy the negotiability of the instrument, unless words apparently intended for that purpose are used. (*Merrill v. Hurley*, 859.)

11. **NEGOTIABLE INSTRUMENTS—CONTRACT OF INDORSEMENT—ASSIGNMENT.**—The words, "For value received, I hereby assign the within bond, together with all our interest in, and all our right under; the mortgage securing the same, to Mary E. Merrill, without recourse," written by the managing president of a corporation, upon the back of a negotiable interest-bearing bond, payable to the corporation, and signed by him in his official capacity, constitute a contract of indorsement, and not a mere assignment of the instrument. (*Merrill v. Hurley*, 859.)

12. **NEGOTIABLE INSTRUMENTS—PROVISIONS NOT AFFECTING NEGOTIABILITY.**—Neither a provision, in a promissory note, for a specified additional rate of interest after maturity, nor a recital therein to the effect that it may, at the holder's option and by reason of the maker's default, become due and payable at a date earlier than that fixed, destroys the character of the note as a negotiable instrument. (*Merrill v. Hurley*, 859.)

13. **NEGOTIABLE INSTRUMENTS—NECESSITY FOR PROTEST.**—Demand and notice is sufficient, and protest is not necessary to make an indorser liable on a promissory note, unless the note is made by a person residing in one state, and payable to a person residing in another. In the latter case, protest is required. (*Brown v. Wilson*, 779.)

14. **NEGOTIABLE INSTRUMENTS—DELIVERY TO CORPORATION—ESCROW.**—The unconditional delivery of promissory notes, together with a mortgage, in the form of a trust deed, securing their payment, at the principal office of a corporation, to its president acting officially for it, as payee and beneficiary, is a delivery to the corporation, and not to a third person in escrow. (*Merrill v. Hurley*, 859.)

See Appeal, 3, 5; Corporations, 4, 6; Evidence, 1, 12; Partnership, 4.

NEW TRIAL.

1. **NEW TRIAL—WANT OF SERVICE OF PROCESS.**—If only one of several defendants is served with process, and a verdict is rendered against all of them, the one served is not entitled to a new trial on the ground that the judgment is void as to the others. (*Brown v. Wilson*, 779.)

2. **VERDICT—DISREGARD OF INSTRUCTIONS.**—If a jury wholly disregards the instructions of the court, the verdict should be set aside, although the instructions are clearly erroneous; but, to justify setting aside the verdict, it must clearly appear that it is not responsive to the charge as given by the court. (*Brown v. Wilson*, 779.)

3. **PRACTICE.—IF A MOTION FOR A NEW TRIAL** is as to the whole cause, if the findings in favor of one of the parties upon the issues joined in his cross-complaint are correct, the motion should be overruled, though the evidence is not sufficient to sustain the findings in favor of the other party. In such a case, the motion should be for a new trial on the issues joined in the cross-complaint of the latter. (*Upland Land Co. v. Ginn*, 181.)

4. NEW TRIAL—INTOXICATION OF JUROR.—If a party proceeds in a trial after knowing that one of the jurors has been under the influence of intoxicants, thus taking a chance of securing a verdict in his favor, this precludes him from making the irregularity the ground of a motion for a new trial. It is not material that the court also knew the fact, and punished the juror. (*Richardson v. Foster*, 481.)

5. EVIDENCE, RESTRICTING SO AS TO BE HARMLESS.—If a plaintiff, in response to a letter urging reasons for dissatisfaction, writes an answer, and such letter and her answer are admitted only for the purpose of the light it may throw on the conduct of the defendants, and not as evidence of admissions made by them, the reception of such evidence can have done no harm, and therefore does not entitle the defendants to a new trial. (*Hughes v. Gross*, 375.)

See Appeal, 4, 8.

NOTICE.

See Corporations, 14, 15; *Lis Pendens*.

NUISANCE.

1. NUISANCE—LICENSE TO MAINTAIN.—If a board is by statute authorized to license the doing of a business, such license is a defense to a bill in equity to enjoin the doing of such business on the ground that as maintained it is a nuisance. (*Murtha v. Lovewell*, 410.)

2. NUISANCE, LEGISLATIVE POWER TO DETERMINE WHAT IS.—When the legislature directs or allows that to be done which would otherwise be a nuisance, it will be valid upon the ground that the legislature is ordinarily the proper judge of what the public good requires, unless carried to such an extent that it can be fairly said to be an unwholesome and unreasonable law. (*Murtha v. Lovewell*, 410.)

3. NUISANCE, LICENSE TO MAINTAIN, WHAT ACTS INCLUDED WITHIN.—A license to carry on that which would, but for the license, be a nuisance includes authority to do whatever is naturally incidental to the ordinary and reasonable performance of the act licensed. Therefore, a license to erect a furnace for the melting of iron, to be provided with a stack and chimney at a specified height above the roof of the building, with a suitable spark arrester upon the top thereof, will protect the licensee in a suit to enjoin his establishment as a nuisance because sparks or small pieces of red hot iron fall on the plaintiff's lot, if the defendant has complied with all the conditions of the order granting the license. (*Murtha v. Lovewell*, 410.)

4. CONSTITUTIONAL LAW—POLICE POWER—NUISANCE. The legislature has power to declare places where liquor is sold contrary to law to be common nuisances and to provide remedies for their abatement by summary proceedings, and such remedies are not rendered unconstitutional by reason of the fact that they deprive the defendant of those rights under the constitution to which he is ordinarily entitled. (*Ex parte Keeler*, 785.)

5. NUISANCE—ABATEMENT BY SUMMARY PROCEEDINGS—JURY TRIAL.—In summary proceedings to abate a nuisance, the defendant has no right to a jury trial. (*Ex parte Keeler*, 785.)

6. NUISANCES—ABATEMENT BY SUMMARY PROCEEDINGS.—To justify the abatement of a nuisance by summary pro-

ceedings, it must appear that the interest of the public requires a stringent remedy, and that such remedy is reasonably necessary to accomplish the purpose, and, in determining whether it is reasonable, consideration must be given to the value and nature of the property involved in the nuisance and the difficulty of its suppression. (Ex parte Keeler, 785.)

OFFICERS.

1. **PUBLIC OFFICERS, WHO ARE.**—Persons appointed to the detective department of a district police force of a state by the governor for the term of three years, and subject to removal by him, and who have and exercise all the powers of constables, police officers, and watchmen, and whose services the governor may at any time command in suppressing riots and preserving the peace, are public officers, and not mere employés of the state. (Brown v. Russell, 357.)

2. **PUBLIC OFFICERS—VETERANS, CONSTITUTIONALITY OF STATUTE REQUIRING APPOINTMENT OF.**—The legislature cannot constitutionally provide that public offices which it has created shall be filled by veterans in preference to other persons, whether the veterans are or are not found or thought to be actually qualified to perform the duties of the offices by some impartial and competent officer or board charged with the duty of making the appointments. (Brown v. Russell, 357.)

3. **PUBLIC OFFICERS—MEASURES FOR ASCERTAINING FITNESS OF.**—The oath of an applicant for appointment to an office that he is qualified to perform its duties, accompanied with a certificate of three citizens of good repute that they know him to be fully competent to perform such duties, cannot be regarded as a reasonable, impartial, and adequate method of determining the qualifications of applicants for appointment to a public office, if it be necessary, under the constitution of the state, that all persons appointed to such office shall be adjudged by somebody to be qualified to perform its duties. (Brown v. Russell, 357.)

4. **OFFICERS—ACTION AGAINST SURETIES ON BOND—PROOF NECESSARY.**—In a suit against the sureties on an official bond, to hold them liable for a deficit of public or trust funds, the plaintiff must allege and prove that the deficit occurred during the term of office covered by the bond, where such term is fixed by law. (Board of Administrators v. McKowen, 275.)

5. **OFFICERS—NEW TERM AND BOND—EXTENDING LIABILITY OF SURETIES.**—If an officer elected for a fixed term succeeds himself, the fact that no second bond is exacted cannot extend the liability of the sureties on the first bond. (Board of Administrators v. McKowen, 275.)

6. **OFFICERS—APPLICATION OF FUNDS—LIABILITY OF SURETIES.**—If an officer elected for a fixed term succeeds himself, and a deficit of funds intrusted to him, and for which he was chargeable, is shown to have occurred during the first term, he will not be allowed to apply moneys subsequently received toward closing up past accounts, thus leaving a deficit at the end of the second term. The fixed liability of the sureties cannot be lifted from them and transferred to others by reason of the fact that a new term has commenced with new sureties. (Board of Administrators v. McKowen, 275.)

See Acknowledgment; Appeal, 2; Counties, 4, 7.

ORDINANCES.

See Municipal Corporations, 4; Trial, 4.

PARENT AND CHILD.

1. THE WORD "CHILD" OR "CHILDREN," when used in a statute, means legitimate child or children. (*McDonald v. Pittsburgh, etc. Ry. Co., 185.*)

2. ILLEGITIMATE CHILD, FATHER CANNOT RECOVER FOR DEATH OF.—Under a statute providing that a father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a child, a father cannot recover for the injury or death of an illegitimate son, of whom such father has had the care and custody since his early infancy. (*McDonald v. Pittsburgh, etc. Ry. Co., 185.*)

PARTIES.

1. PARTIES.—EXECUTIVE OFFICERS of the state distributing water in violation of statute to plaintiff's injury, are properly made parties defendant in an action by him to prevent such injury. (*Farmers' etc. Ditch Co. v. Agricultural Ditch Co., 148.*)

2. PRACTICE—DISCONTINUING AS TO A PARTY IMPROPERLY JOINED.—If an employé sues the surviving partners of a firm and a new partner on a contract of employment made by the former when consisting of such survivors and a partner now deceased, the plaintiff may be allowed a discontinuance as against such new partner, and to take a judgment against the other defendants. (*Hughes v. Gross, 375.*)

See Mistake, 1.

PARTNERSHIP.

1. PARTNERSHIP—COMMERCIAL—POWER OF PARTNER In trading or commercial partnerships, each partner has authority to execute negotiable notes and bills of exchange in the firm name. (*Schellenbeck v. Studebaker, 240.*)

2. PARTNERSHIP—COMMERCIAL.—If the business, according to the usual mode of conducting it, imports, in its nature, the necessity of buying and selling, the firm is properly regarded as a trading or commercial partnership, otherwise it is nontrading or noncommercial. (*Schellenbeck v. Studebaker, 240.*)

3. PARTNERSHIP—NONTRADING—POWER OF PARTNER A partner in a nontrading or noncommercial partnership has no implied authority to execute negotiable paper in the firm name, unless it is the common custom or usage, or necessary for the transaction of the business of such firm. (*Schellenbeck v. Studebaker, 240.*)

4. PARTNERSHIP—NONTRADING — RECOVERY OF NOTE OF—BURDEN OF PROOF.—To justify a recovery over the plea of non est factum on a note executed by a partner in a nontrading firm, in the name of the partnership, not only is the burden of proof upon the creditor to show that the execution of the note was within the scope of the partnership business, but he must also go further and show that the note was executed under authority from the partnership, either directly by proof of express authority, or inferentially by proof of usage, custom or necessity. (*Schellenbeck v. Studebaker, 240.*)

5. PARTNERSHIP—NONCOMMERCIAL.—It is not sufficient to constitute a commercial partnership that the firm, in the course of its business, buys certain articles, not to sell again, but simply to use in its business. Such a partnership is noncommercial. (*Schellenbeck v. Studebaker, 240.*)

6. CONTRACT FOR SERVICE, NEW MEMBER OF PARTNERSHIP NOT BOUND BY.—If a contract of employment is entered into between a business firm and one of its employes, after which one of the members dies, and another person is admitted to his place in the firm, and with the surviving partners continues the business, the new partner is not liable to such employé for a breach of the contract to continue in employment for a fixed period. (*Hughes v. Gross*, 375.)

7. PARTNERSHIP FOR IMMORAL PURPOSE—ACCOUNTING.—A contract of partnership to let furnished apartments for the purposes of prostitution is illegal and immoral, contrary to public policy, and against the express mandate of a statute declaring every person who lets any apartment or tenement, knowing that it is to be used for the purpose of assignation or prostitution, to be guilty of a misdemeanor. Hence, neither partner can maintain an action against the other for an accounting of the business. (*Chateau v. Singla*, 63.)

8. PARTNERSHIP—FRAUDULENT SALE BY PARTNER—REMEDY.—An action at law cannot be maintained by one partner in his name alone or in the joint name of the partners to recover his interest in property transferred by his copartner to defraud him. His only remedy is in equity. (*Reed v. Gould*, 453.)

See Insolvency, 1; Parties, 2; Payment, 1.

PAWNBROKERS.

See Municipal Corporations, 5; Police Power, 2, 3.

PAYMENT.

1. PAYMENT—PRESUMPTION OF.—A partnership holding collateral security for notes is not presumed to have received payment merely because one member of the firm is bound to pay the collateral. (*Sampson v. Fox*, 950.)

2. PAYMENT—PRESUMPTION OF.—No presumption of the payment of the debts of a corporation arises from the fact of the assumption of such debts by another corporation whose president and chief stockholder is a member of a firm to which such debts are due. (*Sampson v. Fox*, 950.)

3. DEBTOR AND CREDITOR—PRESUMPTION OF PAYMENT.—It is only when the dual obligation to pay and authority to demand and receive payment of a debt concur and coexist in the same person, that the law conclusively presumes the debt to be paid. (*Sampson v. Fox*, 950.)

4. PAYMENT—PLEADING—EVIDENCE.—The plea of payment is an affirmative plea and the burden of proof is on the party who pleads it. (*Sampson v. Fox*, 950.)

PENALTY.

See Damages, 1-7.

PERPETUITIES.

See Charities, 1, 2, 7.

PER STIRPES.

Wills, 10.

PHYSICIANS AND SURGEONS.

PHYSICIANS AND SURGEONS—LIABILITY FOR UNSKILLFUL TREATMENT.—A physician who sends another physician to attend a patient whom the former has promised to attend, is not liable for the unskillful or negligent acts of the latter. (*Myers v. Holborn*, 606.)

See Damages, 19.

PLEADING.

1. PLEADING.—The contents of a complaint in a former action which are set out in full in the complaint in suit are properly before the court, although the action pending is not founded thereon. (*Westfield Gas etc. Co. v. Noblesville etc. Road Co.*, 244.)

2. PLEADINGS—EVIDENCE.—A count upon an account stated may be supported by evidence that the account was stated with the agent of the plaintiff, or by admissions made to an agent. (*Powell v. Wade*, 915.)

3. PLEADING—DEMURRER—ENTIRETY.—A demurrer, either at law or in equity, is an entirety and must stand or fall as a whole. It should not, therefore, be overruled in part and sustained in part. (*Washington v. Soria*, 555.)

4. PLEADING — PRACTICE — A GENERAL DEMURRER SHOULD BE OVERRULED, WHEN.—To interpose a general demurrer to a whole bill or declaration, and then to assign some causes of demurrer going only to specific parts thereof, is an unwarranted practice. If, therefore, there is no ground of demurrer good as to the whole bill or declaration, the demurrer should be overruled. (*Washington v. Soria*, 555.)

5. RES JUDICATA—INSUFFICIENT DEFENSE.—An answer alleging that the matter in suit has already been adjudicated in equity, and that the bill in equity was so proceeded with, that it was by the court dismissed, is insufficient to prevent judgment, as the bill in equity may have been dismissed on the ground that the remedy was at law and not in equity. (*Blood v. Crew Levick Co.*, 742.)

See Contracts, 12; Insurance, 27; Payment, 4.

PLEDGE.

PLEDGE OF COLLATERAL SECURITY—DUTY OF PLEDGEE.—A pledgee of collateral security for the payment of a debt with power to sell or collect the collateral at the expense of the pledgor, is bound to exercise only ordinary care and diligence, and is not bound to exercise extraordinary diligence in such sale or collection. (*Sampson v. Fox*, 950.)

POLICE POWER.

1. CONSTITUTIONAL LAW—POLICE POWER.—The power conferred by the Colorado statute of 1887 upon superintendents of irrigation in providing for their appointment, fixing their compensation, and prescribing their duties and powers, is executive and not judicial, and is properly exercised as a part of the police power of the state. (*Farmers' etc. Ditch Co. v. Agricultural Ditch Co.*, 148.)

2. PAWNBROKERS—RIGHT TO REGULATE.—The business of pawnbrokers, junk dealers, and dealers in secondhand goods is legitimate, but no inalienable right exists to carry it on without complying with provisions and restrictions required by the legislative power of the state. (*Grand Rapids v. Braudy*, 472.)

3. POLICE POWER—RIGHT TO REGULATE PAWNBROKERS.—The business of pawnbroker, junk dealer, or dealer in second-hand goods and merchandise, is expressly within the control of the police power of the state and is properly subject to reasonable rules and regulations, and a very clear abuse of this power must be shown in order to justify the court in declaring the regulations unreasonable and void. (*Grand Rapids v. Brandy*, 472.)

PRESUMPTIONS.

See Evidence, 6; Payment, 2.

PRINCIPAL AND AGENT.

See Agency.

PRIORITY.

See Assumpsit; Mechanics' Liens, 10, 11; Mortgages, 3.

PRIVATE WAYS.

1. A WAY OF NECESSITY IS CREATED when cotenants partition land by voluntary conveyance, by which a tract is set apart to one of them, not fronting upon any public highway, and which can be reached from a public highway only by crossing the lands of a third person or a tract set apart to another of such cotenants. (*Palmer v. Palmer*, 653.)

2. A PRIVATE WAY OPENED BY OWNERS OF LAND through which each passes for his own use does not become a public highway merely because the public are for many years permitted to travel over it. (*Palmer v. Palmer*, 653.)

3. WAY OF NECESSITY, IMPLIED LOCATION OF.—If a grantor does not locate a way of necessity to which his grantee is entitled, but the latter continues to use a way as formerly existing, such way must be regarded as established and consented to by the parties; and the right to subsequently continue its use cannot be denied by the grantor or his successor in interest, unless the necessity for the use has ceased. (*Palmer v. Palmer*, 653.)

4. A RIGHT OF WAY BY NECESSITY OVER LANDS OF THE GRANTOR CONTINUES only so long as the necessity exists, and is not a perpetual right. (*Palmer v. Palmer*, 653.)

5. WAY OF NECESSITY, HOW TO BE DESIGNATED.—If a grantor conveys lands surrounded by other land of his, or by his lands and those of a third person, a right of way by necessity across the lands of the grantor arises in favor of the grantee and his successors in interest. This way may be designated by the grantor, having due regard to the rights of both parties, but if he declines or omits to exercise that right, the grantee may select for himself, and will be supported in his selection, unless chargeable with palpable abuse. (*Palmer v. Palmer*, 653.)

6. A RIGHT OF WAY BY NECESSITY IS NOT EXTINGUISHED by the fact that the person in whose favor it exists has become a tenant in common with others of an adjoining tract of land, the use of which by him for the purpose of reaching the land owned by him in severalty would render unnecessary the way by necessity. (*Palmer v. Palmer*, 653.)

7. WAY OF NECESSITY, EXTINGUISHMENT OF.—A right of way by necessity to cross lands of the grantor or his successors in interest to a public highway is not extinguished by the existence of

a private way, by means of which, and by crossing other lands, the tract can be reached in favor of which the way of necessity exists, especially where it does not appear that any right exists to cross the land which is necessary to be crossed to reach the private way. (*Palmer v. Palmer*, 653.)

PRIVILEGE.

See Arrest.

PRIVILEGED COMMUNICATIONS.

See Libel, 1-3.

PROCESS.

See New Trial, 1.

PROHIBITION.

1. **PROHIBITION, POWER TO ISSUE WRIT OF.**—A constitution giving the supreme court power to issue writs of mandamus, quo warranto, certiorari, prohibition, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction, does not confine the issue of those writs to cases in which they are necessary for the exercise of its appellate power. That court may, therefore, issue a writ to prohibit an inferior court from acting in cases of which it has no jurisdiction or from acting in excess of its jurisdiction in case over which it has jurisdiction. (*State v. Superior Court*, 907.)

2. **PROHIBITION, CORPORATIONS DE FACTO MAY BE ENTITLED TO WRIT OF.**—A proceeding for a writ of prohibition to prevent a court from appointing a receiver in a case, if it was without jurisdiction to do so, cannot be defeated or suspended by denying that the relator is a corporation or that it has taken the steps necessary to authorize it to do business within the state. Whether it be a corporation de facto or de jure, it is entitled to protect its property from the unauthorized acts of the inferior court. (*State v. Superior Court*, 907.)

PROTEST.

See Negotiable Instruments, 14.

PROXIMATE CAUSE.

See Negligence, 1, 2.

PUBLIC LANDS.

HOMESTEADS — CONTRACT TO CONVEY — VALIDITY. A contract executed before entry of public land as a homestead to make a conveyance thereof on acquiring title is void as against public policy. (*Carley v. Gitchell*, 428.)

See Irrigation, 4.

PUBLIC POLICY

See Contracts, 6-10; License, 1; Lotteries.

PUNISHMENT.

See Criminal Law; Habeas Corpus, 3-5.

QUIETING TITLE.

See Cloud on Title.

QUO WARRANTO

See Appeal, 2.

RAILROADS.

1. **A RAILROAD TRACK** is, of itself, a warning of danger. (Vincent v. Morgan's Louisiana etc. R. R. etc. Co., 287.)

2. **RAILROADS--DAMAGES INCLUDED IN PAYMENT FOR RIGHT OF WAY.**—If a railroad locates and builds its road under a charter requiring it to compensate the owners of the property taken therefor, either by contract or under condemnation proceedings, the amount paid, in either way includes all such damage from overflows as may be incidental to the proper construction and maintenance of the road. (Yazoo etc. R. R. Co. v. Davis, 562.)

3. **RAILROADS--RIGHT OF WAY--OVERFLOW OF LAND.—DAMAGES.**—If the proper construction of a railway will subject adjoining land to overflow, or obstruct its drainage, this is an item of damage which should be estimated and allowed for in condemnation proceedings, and it is conclusively presumed that commissioners, in making their award, in cases of condemnation, have considered and awarded damages for all such injuries. (Yazoo etc. R. R. Co. v. Davis, 562.)

4. **WATERS--OBSTRUCTION BY RAILWAY EMBANKMENT—INJURY TO ADJACENT LANDS.**—A railroad company, in constructing its road across land which, in a state of nature, is all subject to overflow, has the right to build embankments necessary to raise the roadbed above periodical floods. Hence, although an embankment, made by filling in a trestle, somewhat deepens and prolongs, in time, an overflow of water, thus injuring the lands of an adjacent owner, the company is not liable in damages where the road is otherwise properly constructed, where it has large and numerous trestles to give vent to the surrounding waters, and of greater capacity than the creek and bayous crossed by it, where no streams are obstructed, and especially where it has, by contract or condemnation proceedings, already paid such owner for all injuries flowing from the lawful and proper construction of its roadway. (Yazoo etc. R. R. Co. v. Davis, 562.)

5. **WATERS--CONSTRUCTION OF ROADBED OF RAILWAY—"UNPRECEDENTED" OVERFLOWS—FILLING TRESTLES.** It is not the duty of a railroad company to so construct its roadbed as to afford exit for all waters except "unprecedented" overflows, or to preserve the land of an adjoining owner from all injury by reason of water to which it would not have been subject in its natural state. The filling of its trestles on low lands should not, therefore, be treated as obstructions of a watercourse. (Yazoo etc. R. R. Co. v. Davis, 562.)

6. **RAILROADS--CROSSING TRACK--TRAINS.**—Persons having occasion to cross a railroad track must bear in mind that, in the management of railroads, special trains are liable to be sent forward at any moment, and that the rule that a person, before attempting to cross a track, must stop, look, and listen to avoid danger, is not confined to certain hours of the day or night, nor limited to particular trains. Hence, the simple fact that the hour for one of the regular trains has passed, and that it is not yet time for another to pass, does not justify a belief that no train is likely to pass. (Vincent v. Morgan's Louisiana etc. R. R. Co., 287.)

7. **RAILROADS--CROSSING TRACK--OBSTRUCTIONS NEAR TRACK.**—The existence of obstructions, interfering with the view,

near a railroad track, imposes additional caution upon persons approaching the track, as such persons are as much concealed from the view of the railroad company's employés as the latter are from the former. (*Vincent v. Morgan's Louisiana etc. R. R. etc. Co.*, 287.)

8. RAILROADS—CROSSING — DEATH — DAMAGES — CONTRIBUTORY NEGLIGENCE.—There can be no recovery of damages for death resulting to one who was guilty of contributory negligence in attempting to cross a railroad track directly in front of a rapidly approaching train. (*Vincent v. Morgan's Louisiana etc. R. R. etc. Co.*, 287.)

9. RAILROADS—SPEED OF TRAINS—WEATHER CONDITIONS.—As railroad trains are run by schedule, one train conforming itself to the movements of the others, a court will not establish the dangerous rule that weather conditions in one particular neighborhood should control and regulate the speed of the trains in a particular vicinity. (*Vincent v. Morgan's Louisiana etc. R. R. etc. Co.*, 287.)

10. CARRIERS—DUTY TO PASSENGER AT STATION.—A person who, having purchased a railroad ticket, is injured through the remote negligence of the railroad company while standing on a railroad station platform, but not from any cause attributable to such station or platform, is in no more favorable situation as a suitor against the railroad company than if he had been walking alongside the railroad on the public highway, or at any other place where he had a right to be. (*Wood v. Pennsylvania R. R. Co.*, 728.)

11. DAMAGES FOR WORRIMENT AND DISAPPOINTMENT resulting from delay in carrying the plaintiff on a railway train and his being compelled to suspend his journey, and mental anxiety induced by the illness of his wife and his inability to make her comfortable, and from his limited means and his inability to hear from home, owing to the interruption of telegraphic communication, cannot be regarded as the proximate result of the wrong of the railway corporation in sending the passenger with his wife over a line when such line was known not to be in a condition to transport them to their point of destination. (*Turner v. Great Northern Ry. Co.* 883.)

12. RAILWAYS—DAMAGES FOR DELAY IN TRAINS.—Where an intending passenger is falsely informed by an agent of a railway corporation of the condition of its road, and is thereby induced to take passage on such road to a point to which such agent knows the road cannot be operated because out of condition; and such passenger, after reaching a point beyond which the road cannot take him, attempts to reach his destination by another road, on which he is delayed because of its condition, the first named corporation is answerable for the damages resulting from this delay, including the expenses of the passenger while thus detained on the line of the second road. (*Turner v. Great Northern Ry. Co.*, 883.)

13. RAILWAY CORPORATIONS, TICKET SELLERS. LIABILITY FOR.—Passengers have a right to rely on information received by them from ticket agents at railway stations in answer to inquiries respecting the arrival, departure, and running of trains, and may recover of the corporation damages resulting to them from receiving incorrect information upon those subjects. (*Turner v. Great Northern Ry. Co.*, 883.)

14. RAILWAY CORPORATION, LIABILITY FOR MISREPRESENTATION OF UNION TICKET AGENT.—If a ticket seller, authorized to sell tickets for several railway corporations, in response to an inquiry made before purchasing a ticket over a designated

line, represents that such line will carry the intending purchaser to his place of destination at a time stated, whereas, through a previous accident, such line was out of repair and unable to send trains to such place, the corporation whose tickets are sold with such misrepresentation is answerable to the purchaser for damages resulting to him. (*Turner v. Great Northern Ry. Co.*, 883.)

15. **RAILWAY CORPORATIONS, EMPLOYEES, WHEN DEEMED PASSENGERS.**—One who is employed as a clerk of a railway corporation, subject to be discharged at any time, and who resides out of the city in which his work is to be done, and who, under a uniform custom on the part of the corporation with respect to its employes residing out of the city, was furnished with a pass to his home over its line, and who rides upon such pass, is not to be deemed a gratuitous passenger. The pass is a part of the compensation for his services, and gives him the same rights as if he paid therefor in money. (*Doyle v. Fitchburg R. R. Co.*, 417.)

16. **NEGLIGENCE — PROXIMATE CAUSE.**—Failure to give warning of the approach of an express railroad train, which strikes and kills a person, hurling a portion of the body against another person standing on a railroad station platform, is not the proximate cause of the injury to the latter so as to make the railroad company liable therefor. (*Wood v. Pennsylvania R. R. Co.*, 728.)

17. **RAILWAY CORPORATIONS, STIPULATIONS AGAINST LIABILITY FOR NEGLIGENCE.**—A railway corporation cannot, by stipulation, exempt itself from liability for injuries received by a passenger from the negligence of the corporation or its employes; and this rule extends to and in favor of an employe riding on a train as passenger, though without the payment of fare, if the circumstances are such that his right to so ride may be regarded as a part of the compensation for his services rendered to the corporation. (*Doyle v. Fitchburg R. R. Co.*, 417.)

18. **MORTGAGE BONDS, REQUEST FOR FORECLOSURE, WHO MAY NOT MAKE.**—If a mortgage to secure railway bonds requires that, upon the request of the holders of a specified amount thereof, an action may be brought for the foreclosure and sale of the mortgaged premises, a request made by persons claiming to represent that amount of bonds will not sustain an action, if such persons, though having that amount of bonds in their possession, did not own them. (*Farmers' Loan etc. Co. v. New York etc. Ry. Co.*, 689.)

19. **STREET RAILWAYS—NEGLIGENCE—INJURY TO CHILD.** In an action by a child less than eight years old against an electric street railway company, to recover for injuries caused by being run over by defendant's car, the question whether plaintiff was *sui juris* is a question for the jury. (*Consolidated Traction Co. v. Scott*, 620.)

20. **STREET RAILWAYS.—DUTY TO LOOK AND LISTEN** required before crossing the track of a steam railway does not apply with equal force to one in crossing the tracks of a street railway. (*Consolidated Traction Co. v. Scott*, 620.)

21. **STREET RAILWAYS—NEGLIGENCE—QUESTION FOR JURY.**—The negligence of a motorman on an electric street-car and of a child less than eight years old struck by the car when moving a little distance behind another similar car standing on an adjacent track are questions for the jury, when the evidence is conflicting and the motorman admits that he did not have his car under control, and the evidence shows that no bell was sounded or warning given, and that the child did not look before going upon the track. (*Consolidated Traction Co. v. Scott*, 620.)

22. STREET RAILWAYS—NEGLIGENCE AT CROSSINGS.—An electric street railway is required to so regulate the movements of its cars at the intersection of public streets when receiving or discharging passengers from a standing car as not to unnecessarily expose pedestrians to danger from collision with a passing car on an adjacent track. (Consolidated Traction Co. v. Scott, 620.)

23. STREET RAILWAYS—NEGLIGENCE—DAMAGES—CONTINUANCE OF LIFE.—If a child less than eight years of age is killed through the negligence of a street railroad company, the jury, in estimating damages are not limited by the period of the minority of the deceased, but may extend their estimate through such period as they may determine to be a reasonable expectation of the continuance of the life of such deceased. (Consolidated Traction Co. v. Scott, 620.)

24. MORTGAGE OF STREET RAILWAYS, EFFECT AS TO SUBSEQUENTLY ACQUIRED PROPERTY.—A mortgage executed by a street railway corporation, and purporting to cover street railway property, does not embrace a subsequently acquired electric light plant, including buildings, waterwheel, shafting, dynamos, and other property rights and franchises connected with such plant, so as to take precedence over a mortgage of such electric light plant, made, at the time of its purchase, to the vendors thereof for the purpose of securing a balance remaining unpaid of the purchase price. (Lumbert v. Woodward, 175.)

See Bill of Particulars; Damages, 19, 22; Release, 2; Statutes, 10; Waters, 6, 7.

RATIFICATION.

See Agency, 3; Insurance, 1-3.

REAL PROPERTY.

1. REAL PROPERTY—BUILDINGS—DUTY OF OWNER.—It is an owner's duty to see that his building is in a safe condition, and he is liable for all damages which may result from his neglect of such duty. (Steppe v. Alter, 281.)

2. REAL PROPERTY—DUTY OF OWNER TO INSPECT FOR LATENT DEFECTS.—The owner of a private dwelling who has a platform at the bottom of the front steps of his house, constructed of good materials, in a substantial manner, and which is only seven or eight years old, and which has been repainted every year, is under no legal obligation to inspect the platform from time to time, to make sure that those who pass into and out of the house may avoid injury. (Baddeley v. Shea, 56.)

3. REAL PROPERTY—CARE REQUIRED OF OWNER TOWARD PERSONS INVITED.—The law imposes upon the owners of private houses the duty of only ordinary care to avoid injury to persons who are invited there upon lawful business. Ordinary care, in such cases, is that which good housekeepers ordinarily exercise to avoid danger of personal injuries in their own private dwelling-houses. (Baddeley v. Shea, 56.)

4. REAL PROPERTY—LIABILITY OF OWNER—LATENT DEFECTS.—The owner of a private house is not liable to invited visitors on lawful business for injuries occasioned by those latent defects which are either concealed in defective workmanship, or are incidental to the ordinary wear and tear of houses. Such defects are among the casualties which no man can avoid without that extraordinary care and vigilance which the law does not impose. (Baddeley v. Shea, 56.)

5. REAL PROPERTY—LATENT DEFECTS—LIABILITY OF OWNER—ILLUSTRATION.—The owner of a private dwelling who has a platform at the bottom of the front steps of his house, about three feet above the sidewalk, is not liable for an injury to the servant of a transfer company, who, in carrying a heavy trunk on his back from the house, breaks through the platform and fractures a bone of his leg, where the platform was constructed in a substantial manner, of good materials, about seven or eight years before the accident, and would ordinarily wear sixteen or twenty years without repair, where it had been repainted every year, and where the owner had no knowledge, until after the accident, that the platform was unsound by reason of dry rot, or partial decay. (*Baddeley v. Shea*, 56.)

6. REAL PROPERTY—REPAIR BY INSURANCE COMPANY—DAMAGES EX DELICTO—LOSS OF RENT.—If a fire insurance company exercises an option, in its contract of insurance, to repair damage done to a building by fire, but, owing to the bad materials used, and the careless and unskillful performance of the work by the company's employes and workmen, the structure, while in course of completion, collapses and becomes untenable, the company is liable to the owner for damages ex delicto, which may include loss of rent occasioned by the fault and negligence of the defendant's employes in doing the work. (*Henderson v. Sun etc. Ins. Co.*, 292.)

RECEIVERS.

1. CORPORATIONS, RECEIVERS OF.—Under a statute providing that if judgment is rendered against any corporation, the court may cause the costs to be collected by execution against the persons claiming to be a corporation, or by attachment against the directors or other officers, and shall restrain the corporation, appoint a receiver of its property and effects, take an account and make distribution thereof among the creditors, and the court is not authorized to appoint such receiver before the entry of a judgment against the corporation, though the action or proceeding is one in which it is alleged that the defendants are acting as a corporation without being legally incorporated, and the object of the action is to dissolve the alleged corporation, or to exclude the defendants from the exercise of corporate rights. (*State v. Superior Court*, 907.)

2. CORPORATIONS—FOREIGN—BENEFIT SOCIETIES—INSOLVENCY—RECEIVERSHIP—PAYMENT OF ASSETS.—Debts established in a proceeding for the receivership of an insolvent benefit society in a state other than its domicile, must be paid out of its assets therein in such receiver's hands, before the balance, if any, is paid over to a receiver in the state of the domicile of the society. (*Failey v. Fee*, 326.)

See Statutes, 11.

RECORD.

See Mortgages, 6.

REDEMPTION.

See Mortgages, 10, 11.

REFORMATION.

See Equity; Mistake; Wills, 1.

RELEASE.

1. RELEASE AND DISCHARGE—VOIDABLE RELEASE—IGNORANCE OF RIGHTS AS GROUND OF RELIEF.—The right

which one has to nullify an alleged ratification by him of a voidable release executed by him, by showing that, when he was alleged to have so ratified, he was not aware of his private legal right arising out of the facts, to repudiate such release, is a substantive right, and not the mere rule by which a court of chancery administers his right; and, as such substantive right, it is available in avoidance of such alleged release, as well at law as in equity. (Alabama etc. Ry. Co. v. Jones, 488.)

2. RELEASE AND DISCHARGE—IGNORANCE OF RIGHTS—UNFAIRNESS—INSTRUCTIONS.—In an action for damages, by an old and ignorant man, for injuries received by a "kicked" car, necessitating the amputation of a foot, where the railroad company, within two days after the injury, and within twelve hours after the amputation, and while he was suffering from pain and the effects of opium, and therefore incapable of acting rationally, induced him to release his claim for a small cash payment, it is proper, where the company relies upon such release, to instruct the jury that the plaintiff had a right to know the facts of the injury, and their effect upon his right to repudiate the release, voidable for fraud, and that the release was not binding, unless he, subsequently, when competent to act, with full knowledge of the facts, and his rights under them, and of his right to disaffirm, ratified the same. (Alabama etc. Ry. Co. v. Jones, 488.)

See Duress; Suretyship.

RELIGIOUS SOCIETIES.

1. RELIGIOUS SOCIETIES—RIGHTS OF MAJORITY.—A majority of a church organization may direct and control church matters, consistently with the particular and general laws of the organization or denomination to which it belongs, but not in violation of them. (Long v. Harvey, 733.)

2. RELIGIOUS SOCIETIES—OFFICERS—RIGHT OF MAJORITY TO DEPOSE.—A majority of the members of an absolutely independent church congregation, acting in conjunction with members of other similar congregations, or alone, cannot exercise authority to remove duly elected officers in the former congregation whose terms of office are indefinite, except by acting in compliance with the rules and discipline of the church to which they belong. (Long v. Harvey, 733.)

3. RELIGIOUS SOCIETIES.—THE POWER OF COURTS to adjudicate disputes between warring church parties is limited to an examination of the rules of the church organization to ascertain the church law, and if that is not in conflict with the law of the land, to protect the rights of the parties under the law they have made for themselves. (Long v. Harvey, 733.)

REMAINDERS.

See Estates.

RESCISSION.

See Equity, 2; Mistake, 4; Sales, 2.

RES JUDICATA.

See Judgments, 1-3.

RIGHT OF WAY.

See Railroads, 2, 3.

RIPARIAN RIGHTS.

See Waters.

SALES.

1. CONTRACT, PLACE OF ACCEPTANCE, WHEN DOES NOT CONTROL.—If an agent solicits a contract of sale in the state where the buyers reside, where all negotiations take place, and where the goods to be purchased were to be delivered, inspected, and paid for, the contract must be regarded as a contract of the state of the buyers' residence, though the final proposition for purchase, being delivered to the agent there, is accepted by the vendors in the state in which they reside. (*Wilson v. Lewiston Mill Co.*, 680.)

2. SALES—WARRANTY—SUFFICIENCY OF NOTICE OF DEFECTS—EVIDENCE.—A warranty, upon the sale of a steam-engine, requiring, in case the machine failed to operate well, written notice, stating wherein it failed to satisfy the warranty, to be given by the purchaser to the seller, at headquarters, by registered letter, within ten days after delivery, is not satisfied by a verbal notice to the local agent of whom the machine was bought. Evidence, therefore, that the local agent afterward notified the seller, "by letter or otherwise," is properly rejected, if it is not shown when or how, or that such notice was ever received by the seller, or any agent authorized to receive it; and the fact that experts of the seller happened to be present on other business, and examined the engine, but without any general authority being shown for them to do so, could not take the place of the required notice to the seller, or render it unnecessary. (*Aultman etc. Co. v. Gunderson*, 837.)

3. STATUTE OF FRAUDS—SIGNING OF MEMORANDUM, SAME PERSON CANNOT BE AGENT OF BOTH PARTIES.—If an agent, seeking to effect a sale of goods, finally receives an oral proposition, which he transmits to his principal, by whom it is accepted, such agent cannot be deemed the agent of the purchasers so that the letters and other writings forwarded by him shall have the effect of a memorandum signed by them, and thus take the contract out of the statute of frauds. (*Wilson v. Lewiston Mill Co.*, 680.)

4. STATUTE OF FRAUDS—MEMORANDUM, ADMISSION AS. If a vendor of goods writes a purchaser, purporting to confirm a sale of goods made by an agent of the former and stating its terms, to which the purchasers reply that it is impossible for them to take the goods mentioned in the vendor's letter because of want of funds, such reply does not admit the making of the contract of sale, and therefore does not take the case out of the statute of frauds. (*Wilson v. Lewiston Mill Co.*, 680.)

5. SALES ON CONDITION—RESERVING TITLE BUT AUTHORIZING RESALE—INNOCENT PURCHASERS.—To permit the vendor in a conditional sale of personal property, bought in the course of trade for resale, to retain title, and, at the same time, authorize the buyer to resell, would operate as a fraud upon innocent purchasers. Hence, if the vendor reserves title in himself until payment is made, but in the same contract authorizes the vendee to resell, the latter may sell to one of his own creditors, and the purchaser, who buys without notice of the vendor's claim, obtains title to the property. (*Columbus Buggy Co. v. Turley*, 550.)

6. SALES—RESCISSION FOR FRAUD—COMPROMISE—TENDER.—If the buyer of goods purchases them with intent to defraud the seller, and then, with the same intent, enters into a compromise agreement with the latter, by which he agrees to return part of the

goods and pay for the remainder at a future day, the seller may, upon discovery of the fraud in the compromise before such day, immediately rescind the agreement, and, by replevin, retake the goods remaining in the hands of the buyer, without tendering or redelivering to him the goods received under the compromise, although, by its terms, the seller has waived the right to replevin the goods on the ground of fraud in their purchase. (*Munzer v. Stern*, 468.)

SEAL.

See Corporations, 17; Mortgages, 4.

SENTENCE.

See Criminal Law.

SETOFF.

SETOFF—ESTOPPEL.—A party may debar himself by his own agreement, or by his conduct, from insisting upon a setoff. (*Blood v. Crew Levick Co.*, 742.)

SLANDER.

SLANDER—DEFAMATORY WORDS SPOKEN OF AND TO THE WIFE by a third person in the presence of the husband only, constitutes a publication, for which an action of slander may be maintained. (*Luick v. Driscoll*, 224.)

SOCIAL CLUBS.

See Associations.

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE—WHEN GRANTED AND REFUSED.—A court of equity can decree specific performance only when it can dispose of the matter in controversy by a decree capable of present performance, but it cannot decree a party to perform a continuous duty, extending over a series of years, and will leave the aggrieved party to his remedies at law. (*Electric Lighting Co. v. Mobile etc. Ry. Co.*, 927.)

2. SPECIFIC PERFORMANCE—WHEN REFUSED.—If a contract covers an unexpired term of several years, and imposes on the complainant the rendition of continuous mechanical services, demanding the highest degree of skill and necessitating the expenditure of considerable sums of money, and imposing on the defendant the duty of maintaining costly machinery, keeping it in repair, and the daily use of cars moved by electricity, a court of equity cannot enjoin threatened breaches of the contract or decree its specific performance. (*Electric Lighting Co. v. Mobile etc. Ry. Co.*, 927.)

3. CONTRACTS—INVALIDITY—RIGHT TO ENFORCE.—If a contract grows immediately out of, or is connected with, an illegal or immoral act or contract, a court cannot lend its aid to enforce it, though it be in fact a new contract. (*Gist v. Western Union Tel. Co.*, 763.)

See Injunctions, 1.

STABLES.

See Statutes, 4.

STATES.

1. STATES—REVENUES—WARRANTS DRAWING INTEREST—INCURRING INDEBTEDNESS.—The fact that warrants issued in anticipation of assessed but uncollected revenues of the state draw interest, does not make the issuance of the warrants an incurring of indebtedness, to the extent of such interest, within the constitutional prohibition, where the warrants authorized, in respect to interest, are not different from other warrants which may be properly drawn and issued. (In re State Warrants, 852.)

2. STATES—REVENUES—APPROPRIATIONS INCURRING INDEBTEDNESS.—Revenues of the state, assessed and in process of collection, may be considered as constructively in the treasury, and may be appropriated and treated as though actually and physically there. Hence, an appropriation of them by the legislature does not constitute the incurring of an indebtedness, within the meaning of the constitutional prohibition. (In re State Warrants, 852.)

3. STATES—CURRENT EXPENSES—INCURRING INDEBTEDNESS.—APPROPRIATIONS from the assessed, but not yet collected revenues of the state, and the issuance of warrants, in pursuance thereof, to defray current expenses, are not the incurring of indebtedness, within the meaning of a constitutional provision which provides that for the purpose of making public improvements, or to defray extraordinary expenses, or to meet casual deficits or failure in revenue, the state may contract debts never to exceed, with previous debts, the aggregate amount of one hundred thousand dollars, and that no greater indebtedness shall be incurred except for the purpose of repelling invasion, suppressing insurrection, or defending the state, or the United States, in war. (In re States Warrants, 852.)

STATUTE OF FRAUDS.

See Sales, 3, 4; Vendor and Purchaser, 1, 2, 5.

STATUTE OF LIMITATIONS.

See Limitations of Actions.

STATUTES.

1. CONSTITUTIONAL LAW.—STATUTES MUST BE UPHOLD as constitutional, unless their unconstitutionality is made to appear beyond a reasonable doubt. (Farmers' etc. Ditch Co. v. Agricultural Ditch Co., 149.)

2. CONSTITUTIONAL LAW—DUE PROCESS OF LAW.—The Colorado statute of 1887, providing for the appointment of superintendents of irrigation, fixing their compensation, and prescribing their powers and duties, is not unconstitutional as providing for the taking of property without due process of law. (Farmers' etc. Ditch Co. v. Agricultural Ditch Co., 149.)

3. CONSTITUTIONAL LAW—TITLE OF ACT.—An act entitled "An act providing for the appointment of superintendents of irrigation for the water divisions of this state," fixing their compensation and providing for the payment thereof, prescribing their duties and requiring a bond for the faithful performance of such, requiring clerks of district courts to furnish such superintendents with certain certified decrees, and providing for the payment of such clerks' fees, embraces but one general subject, which is clearly expressed in its title, and that is, the appointment of superintendents

of irrigation, fixing their compensation, and prescribing their duties. (Farmers' etc. Ditch Co. v. Agricultural Ditch Co., 149.)

4. CONSTITUTIONAL LAW, POWER OF LEGISLATURE TO LIMIT USE OF PROPERTY.—A statute declaring that no person shall hereafter erect, occupy, or use any building in any city for a stable for more than four horses, unless he is licensed to do so by the board of health of such city, is a valid exercise of the police power of the state, and therefore constitutional. (City of Newton v. Joyce, 385.)

5. CONSTITUTIONAL LAW—PROBATE STATUTE—NOTICE TO FOREIGN HEIRS.—A statute making it the duty of the probate judge, when the heirs of a deceased person, upon whose estate administration is sought, are residents of a foreign country, to notify the consul of such country of the pendency of and of the day set for hearing the application for letters of administration of the probate of a will, and prescribing the form of such notice, is for the sole benefit of foreign heirs, and they alone can take advantage of a failure to give the required notice, and they may waive such notice, at any time before the estate is closed. (Rice v. Hosking, 448.)

6. CRIMINAL LAW—IGNORANCE OF FACT—DEFENSE.—If a statute commands that an act be done or omitted, which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, is no excuse for its violation. (State v. Sasse, 834.)

7. CONSTITUTIONAL LAW—CONSTRUCTION OF STATUTES.—A statute making it the duty of the probate judge, when the heirs of a deceased person, upon whose estate administration is sought, are residents of a foreign country, to notify the consul of such country of the pendency of, and of the day set for hearing an application for letters of administration, or the probate of a will, and prescribing the form of notice, simply provides for an act on the part of a probate judge, and is not in conflict with another statute providing for public notice by personal service or publication of the order for such hearing to all interested parties, nor is such statute in conflict with constitutional provisions requiring that no law shall be revised, altered, or amended by reference to its title only, and that an altered or revised law must be re-enacted and published at length, and that no law shall embrace more than one object which shall be embraced in its title. (Rice v. Hosking, 448.)

8. STATUTES IN PARI MATERIA—CONSTRUCTION.—A statute on garnishment and an independent statute on exemptions must be so construed as to give harmonious effect to both. (Chapman v. Berry, 546.)

9. STATUTES, CONSTRUCTION OF.—A strict and literal construction is not always to be adhered to, and when a case is brought within the intention of the makers, it is within the statute, although by a technical interpretation it is not within its letter. A reasonable construction should be adopted in all cases where there is doubt or uncertainty in regard to the intention of the law-makers. (Spencer v. Myers, 675.)

10. STATUTES—IMPOSING LIABILITY WITHOUT REGARD TO CONTRIBUTORY NEGLIGENCE—CONSTRUCTION.—A statute which prohibits flying, running, walking, or kicking switches within the limits of a city, and makes a railroad company liable for damages for an injury occasioned by such a switch, "without regard to mere contributory negligence of the party injured," imposes liability where his negligence consisted in the want of ordinary care,

and was such as usually and ordinarily contributes to the injury, and without which it would not have occurred; but it does not impose any liability for an injury resulting from the voluntary, deliberate, willful, and reckless exposure of the person injured. (*Alabama etc. Ry. Co. v. Jones*, 488.)

11. **CODE, CONFLICTING PROVISIONS.**—If there is a section of the code relating to the appointment of receivers, and another section providing for receivers of corporations, the latter controls all proceedings for the appointment of receivers of corporations; and such appointment cannot be justified, unless made under the circumstances specified in the section relating to corporations. (*State v. Superior Court*, 907.)

See *Attorney and Client*, 2; *Evidence*, 10; *Marriage and Divorce*, 2; *Officers*, 2; *Police Power*, 1.

STREET RAILWAYS.

See *Railroads*, 20-24.

STREETS.

See *Municipal Corporations*, 1-3; *Telephone Companies*; *Trespass*.

SUBROGATION.

SUBROGATION—PAYMENT BY VOLUNTEER OF PART OF SECURED DEBT.—One who pays a debt under circumstances making him a prime volunteer is not entitled to subrogation, as mere payment alone does not entitle one to subrogation. Hence, if the debtor gives a note, secured by a deed of trust, for money loaned to him, one who, at the debtor's request, pays a part only of the secured debt, and who is under no legal obligation to pay, is not entitled to subrogation, where there is no agreement, express or reasonably inferable from the facts, that the trust deed should be kept alive for the security of the person making such payment. (*Good v. Golden*, 486.)

SUICIDE.

See *Insurance*, 23.

SURETYSHIP.

1. **SURETY—RELEASE OF.**—An agreement extending the time of payment made by the principal debtor with the holder of a note must, in order to release the surety, be such an agreement as the principal debtor may enforce. (*McDougall v. Walling*, 871.)

2. **SURETY, WHEN NOT RELEASED BY AN AGREEMENT TO EXTEND TIME FOR PAYMENT.**—An agreement between the principal debtor and the holder of the indebtedness to extend the time for its payment, made upon a false representation that the surety desired and consented to such extension will not release the surety, because the fraudulent misrepresentation employed in procuring it makes the agreement itself invalid, unenforceable, and not binding on the principal debtor. (*McDougall v. Walling*, 871.)

See *Guardian and Ward*; *Officers*, 4-6.

TAXES.

1. **TAXATION—ASSESSMENT—VALIDITY—WANT OF NOTICE.**—An assessment of "new property not valued and returned by the proper assessor," without giving notice of such assessment, as required by statute, is void. (*Myers v. County Commissioners*, 349.)

2. TAXATION—STOCK IN TRADE.—The average amount of livestock handled by a dealer each week, the greater part of which is imported from other states, and intended for exportation within one day from the time received, is, while in the hands and not in course of transit, subject to taxation as property, within the state at the regular period of assessment for such property. (*Myers v. County Commissioners*, 349.)

3. INHERITANCE TAX.—MONEYS ON DEPOSIT WITHIN THE STATE in one of its banks, though belonging to a nonresident, are, upon his death, subject to the inheritance or transfer tax act. Nor are such moneys any the less subject to the tax because they are on deposit with a trust company, commingled with other moneys which the depositor held in trust for a third person. (*Matter of Houdayer*, 642.)

4. INHERITANCE TAX.—BONDS ISSUED BY THE UNITED STATES are not subject to the inheritance or transfer tax act. (*Matter of Whiting*, 640.)

5. INHERITANCE TAX.—BONDS AND STOCK OF CORPORATIONS.—A statute imposing an inheritance tax upon a transfer by will or by the intestate laws of property within the state, when the decedent was not a resident thereof at the time of his death, does not apply to bonds and other indebtedness not within this state at his death due to him from a corporation organized and existing in this state, but does include stock in such corporation held by him, whether the certificates of such stock are within the state at that time or not. (*Matter of Bronson*, 632.)

6. INHERITANCE TAX.—PROPERTY, WHEN WITHIN THE STATE WITHIN THE MEANING OF THE STATUTE.—Bonds and certificates of stock whether of foreign or domestic corporations, actually within the state at the death of a nonresident decedent, are subject to the inheritance tax. (*Matter of Whiting*, 640.)

7. TAXATION—PROPERTY INTENDED FOR EXPORTATION.—Property brought into the state for the purpose of early exportation therefrom is, while in the hands of the owner and not in course of transit, property permanently within the state, and as such is subject to state taxation thereby. (*Myers v. County Commissioners*, 349.)

TELEPHONE COMPANIES.

MUNICIPAL CORPORATIONS—STREETS — RIGHT OF TELEPHONE LINE IN STREET.—Although posts and wire comprising a telephone line are an additional burden on the street, for which compensation must be made to the owner of the abutting property, yet concurrent legislative and municipal authority granted to a telephone company to erect its poles and suspend its wires in and over the streets of a city will protect it from being treated as a trespasser, and its works from being declared a nuisance, if they are so constructed as not to obstruct or interfere with the use of the streets by the public, or the owner's right of ingress or egress to and from his abutting property. (*Southern Bell Teleph. Co. v. Francis*, 930.)

See *Municipal Corporations*, 6; *Trespass*.

TORTS.

See *Master and Servant*, 4-6.

TREES.

See *Municipal Corporations*, 2, 3; *Trespass*.

TRESPASS.

TRESPASS—RIGHT TO MAINTAIN—CUTTING TREES IN CITY STREET.—If employes of a telephone company are lawfully ordered to remove telephone wires from the streets of a city, and they have authority to cut or trim trees on abutting property in so far as that is necessary to such removal, the fact that they unreasonably cut or trim such trees in the performance of such work, does not render the telephone company liable in trespass to the abutting owners. (*Southern Bell Teleph. Co. v. Francis*, 930.)

See Injunction, 6-8.

TRIAL.

1. **EVIDENCE IS NOT ADMISSIBLE** to rebut a statement made by counsel which there is no evidence to sustain. (*Munzer v. Stern*, 468.)

2. **TRIAL—ONE CANNOT OCCUPY INCONSISTENT POSITIONS.**—One cannot, at the same time, assert that a fact exists and prove that it does not exist. Hence, if the defendant, in an action on a promissory note, alleges in his answer that a certain person signed the note as a witness to his signature, there is no error, as to such defendant, in excluding evidence on his part, that such person signed after the execution and delivery of the note, thus creating an alteration in it. (*Aultman etc. Co. v. Gunderson*, 837.)

3. **JURY TRIAL, VERDICT WHEN NOT OBTAINED BY LOT.** If the jurors, after agreeing to find a verdict for the plaintiff, at the suggestion of their foreman, each wrote on a piece of paper the amount to which he deemed plaintiff entitled, after which the amounts so written were added together and the aggregate divided by the number of jurors, and they subsequently and without making any agreement to do so accepted the quotient as the amount of their verdict, such verdict is not reached by chance or lot, and the mode of reaching it is not objectionable. (*Watson v. Reed*, 899.)

4. **TRIAL—ACQUITTAL.**—The refusal of a court to proceed to trial of an appeal from a conviction under an ordinance and the quashing of the proceedings on the ground that the ordinance is invalid, does not amount to an acquittal, as there has been no trial on the merits in such court. (*Grand Rapids v. Brady*, 472.)

See Instructions.

TRUSTS.

TRUSTS—RESULTING.—If a deed of gift to a charitable use conveys away the entire estate in the premises, a resulting trust does not arise in favor of the grantor by reason of an abuse of the trust. (*Mills v. Davison*, 594.)

See Charities.

ULTRA VIRES.

See Banks, 4.

USURY.

1. **CONTRACT, PLACE OF.**—If a note drawn in Tennessee is sent to Alabama to be executed by a resident of the latter state, who, instead of signing it in the form in which it was drawn, substantially changes it, and then signs and forwards it to his creditor in Tennessee, where it was accepted by the latter in its changed form, it is a Tennessee contract, and, if usurious and void by the

laws of that state, is void in the state where the maker lived when he signed it. (*McGarry v. Nicklin*, 40.)

2. **CONFLICT OF LAWS—CONTRACTS—PLACE OF.**—A contract made by a resident of one state who applied to become a member of a loan association situated in another state, to pay it money at the place of its residence, is to be governed by the law of the latter state as to usury, although the contract was made through an agency situated within the state of the residence of such member, and the payment of the money is secured by mortgage on land therein. (*Bennett v. Eastern Building etc. Assn.*, 723.)

3. **CONFLICT OF LAWS—USURY.**—A note void by the laws of the state wherein it is made and payable, because of usury, is also void in another state in which the maker resided at the time he signed it, though, by the laws of the latter state, it would not be usurious if executed therein. (*McGarry v. Nicklin*, 40.)

4. **USURY--DEFENSE OF, CANNOT BE URGED BY A STRANGER.**—The defense of usury, being a personal privilege, cannot, in a proceeding to establish and foreclose mechanics' liens, be urged by the owner of an equity of redemption, who bought mortgaged premises subject to the mortgage lien, and took a quitclaim deed thereof, as he is a stranger to the contract claimed to be usurious. (*Hill v. Alliance Building Co.*, 819.)

See Negotiable Instruments, 16.

VENDOR AND PURCHASER.

1. **VENDOR AND PURCHASER—CONTRACT FOR SALE OF LAND—STATUTE OF FRAUDS.—AFTER FULL PERFORMANCE,** by one of the parties to an oral agreement for the sale of land, the statute of frauds does not apply. (*Washington v. Soria*, 555.)

2. **VENDOR AND PURCHASER—CONTRACT FOR SALE OF LAND—STATUTE OF FRAUDS.—PART PERFORMANCE** of an oral contract for the sale of lands does not take it out of the statute of frauds. (*Washington v. Soria*, 555.)

3. **VENDOR'S LIEN.—THE ASSIGNMENT OF NOTES** taken for the purchase money of land transfers, as an incident, the vendor's lien. (*Upland Land Company v. Ginn*, 181.)

4. **NOTES, CHANGE IN FORM OF DOES NOT CHANGE CHARACTER OF THE INDEBTEDNESS.**—If a vendee of lands, who has executed a note to the vendor for the balance of the purchase price, subsequently, at the request of his vendor, executes in place of such note two other notes, one to such vendor and the other to a third person, the new notes retain the same character as the old one, and the holders thereof are entitled to the benefits of the vendor's lien. (*Upland Land Co. v. Ginn*, 181.)

5. **VENDOR AND PURCHASER—ACTION FOR UNPAID PURCHASE MONEY—STATUTE OF FRAUDS.**—Under a statute allowing all rights to be redressed by an action on the case, a vendor of land can maintain such an action to recover unpaid purchase money, where the vendee has taken possession under a conveyance reciting a consideration of a certain amount paid in cash, and the vendor has reserved a lien in the deed to secure the balance which is to be paid in installments at specified dates; and the statute of frauds does not prevent a recovery of the unpaid purchase money, although the vendee may not have signed any written promise to pay. (*Washington v. Soria*, 555.)

6. VENDOR AND PURCHASER—RECOVERY OF UNPAID PURCHASE MONEY—STATUTE OF LIMITATIONS—CONCURRENT JURISDICTION OF LAW AND EQUITY.—A vendor of land can maintain an action at law for unpaid purchase money, or he may proceed in equity to enforce his lien therefor. Hence, if he proceeds in equity, his cause of action does not rest upon the "existence of a trust not cognizable by the courts of the common law," and is not controlled by a statute limiting to ten years the period within which proceedings of that character may be brought, but is controlled by a statute declaring that, "whenever there be a concurrent jurisdiction in the courts of the common law and in the courts of equity, of any cause of action, the provisions of this chapter limiting a time for the commencement of a suit for such cause of action in a court of common law, shall apply to all suits to be brought for the same cause of action in a court of equity." (*Washington v. Soria*, 555.)

7. VENDOR AND PURCHASER—RECOVERY OF UNPAID PURCHASE MONEY—STATUTE OF LIMITATIONS.—If a vendor of land gives the vendee possession under a conveyance reciting a consideration of a certain amount paid in cash and a balance to be paid in installments at specified dates, the vendor's right of action to recover the unpaid purchase money, whether he elects to proceed on the promise contained in the deed or that implied by law from the vendee's acceptance of the deed, rests, not upon a contract provable by parol, but one provable by a writing, as the promise to pay is a promise to perform a written, and not an unwritten contract. The statute of limitations which is, therefore, applicable to such a case, is not that of three years, governing unwritten contracts, but that of six years, respecting all actions for which no other time is fixed. (*Washington v. Soria*, 555.)

See Deeds.

VENDOR'S LIEN.

See Vendor and Purchaser, 3.

VERDICT.

See Trial, 3.

WAGES.

See Attachment, 1-3.

WAIVER.

See Mechanic's Lien, 5-7.

WARRANTY.

See Sales, 2.

WATERS.

1. IRRIGATION—APPROPRIATION.—A mere diversion of water from a stream does not constitute an appropriation. To make it such there must be an application of the water to a beneficial use, and, in case of irrigation, it must be applied to the land to make the appropriation complete. (*Farmers' etc. Ditch Co. v. Agricultural Ditch Co.*, 149.)

2. IRRIGATION—APPROPRIATOR OF WATER from the same stream, through the same ditch, may have different priorities of right to the use of such water, based upon the time of the

several appropriations. (Farmers' etc. Ditch Co. v. Agricultural Ditch Co., 149.)

3. WATER AND WATER COURSES.—WATER FROM TRIBUTARIES of a natural stream cannot be appropriated to the injury of prior appropriations from the main stream. (Farmers' etc. Ditch Co. v. Agricultural Ditch Co., 149.)

4. A RIPARIAN OWNER HAS NO RIGHT TO CONSTRUCT AN ARTIFICIAL CHANNEL in front of his lands for the purpose of making his means of access more convenient or valuable to him, and therefore has no ground of complaint because of some use made by the owners of the land covered by water which makes his construction and maintenance of such canal impossible. (Hedges v. West Shore R. R. Co., 660.)

5. A RIPARIAN PROPRIETOR HAS NO RIGHT AS SUCH TO MAKE CHANGES IN THE BED OF A RIVER, as by cutting a canal from his lands to the channel, to enable him to have access to such channel in a mode and to an extent not possible when the river was in its natural state. (Hedges v. West Shore R. R. Co., 660.)

6. NAVIGABLE WATERS, OBSTRUCTIONS OF WHICH RIPARIAN PROPRIETOR CANNOT COMPLAIN.—If, by the authority of the state, a railway is constructed in the waters of a navigable river, and openings are left, so that a riparian proprietor may have access to the channel, and the natural condition of things is left unchanged, and opportunity is afforded at all time for reasonable modes of access, the owner of lands upon the shore has no just ground for complaint. (Hedges v. West Shore R. R. Co., 660.)

7. NAVIGABLE WATERS, OBSTRUCTION IN.—A railway constructed in front of the lands of a riparian proprietor under authority of the state, so long as the sovereign or its grantees provide for a reasonable and suitable access to the stream under all circumstances and at all times, gives the riparian owner no ground for complaint. (Hedges v. West Shore R. R. Co., 660.)

8. LANDS ADJOINING AND BENEATH NAVIGABLE WATERS, RIGHTS OF OWNERS OF RESPECTIVELY.—A riparian owner has nothing but the natural easement of right of access over lands beneath navigable waters for the purpose of reaching the channel of such waters, and the sovereign or state owns the lands under the waters subject to such easement, and has the right to put them to any use consistent with the exercise of the easement on the part of the riparian proprietor. The latter cannot so exercise his right of passage to the channel as to destroy, or unreasonably interfere with, the right of the sovereign to put its own lands to such use as it may think proper. Each right or interest is always subject to the qualification that it cannot be exercised or enjoyed in such a way as to destroy the other. (Hedges v. West Shore R. R. Co., 660.)

9. WATERS—BAYOU—QUESTION FOR JURY.—Whether an obstructed bayou is a watercourse or not is, under the evidence, a question for the jury. (Yazoo etc. R. R. Co. v. Davis, 562.)

See Irrigation; Railroads, 4, 5.

WAYS.

See Private Ways.

WILLS.

1. WILLS—COURTS CANNOT REFORM AND CORRECT.—No court can decree the reformation and correction of a will to make

it conform to the purpose and intention of the testator not expressed in the instrument as executed by him. (*Schlottman v. Hoffman*, 327.)

2. **WILLS COMMENCE TO OPERATE, WHEN.**—A will speaks from the death of the testator, that being the point of time at which it becomes operative, unless the language used, such as the word "now," or a verb in the present tense, which requires it to be taken at the time it is used. Hence, if instructions are given in a will, to executors, to sell the testator's "Rlenzi plantation," and a designated time is given them in which to act, accompanied by directions that the testator's wife shall receive the proceeds of the plantation, if worked, until it is sold, she is entitled to the net proceeds of the place including crops growing thereon, from the time of the testator's death, until the sale of the place. (*Succession of Allen*, 295.)

3. **WILLS—DISPOSITION OF RESIDUUM—HEIRS.**—If there is no expression in a will, following the particular description of the property, after the general description, to indicate the intended disposition of the residuum, the testator, as to this part of his estate, must be deemed to have died intestate, and the residuum goes to his legal heirs, a disposition which the law favors, in doubtful cases. (*Succession of Allen*, 295.)

4. **WILLS—RIGHT TO THINGS "IMMOVABLE BY DESTINATION"—RESIDUUM.**—The legal heirs are not entitled to coal, hay, corn, and fodder placed on a plantation for the use of the place, and consumed in the cultivation of the place, in working the crop, and preparing the same for market, as such things are "Immovable by destination," but timber and old iron, not essential for the use of the plantation, and not employed for its cultivation, fall into the residuum. (*Succession of Allen*, 295.)

5. **WILLS—RESIDUARY LEGATEE.**—While no particular form of words is requisite to constitute a residuary legatee, it must appear to have been the intention of the testator that the residuary legatee should take the residue of the estate after payment of debts, and meeting all the appointments of the will. (*Succession of Allen*, 295.)

6. **WILLS—PARTIAL INTESTACY.—THE PRESUMPTION** is, that the testator intended to dispose of his entire estate and not to die partially intestate. (*Succession of Allen*, 295.)

7. **WILLS.—A GENERAL DESCRIPTION OF PROPERTY**, or description of the class or kind, preceded or followed by words of narrower import, if the bequest is not residuary, will be confined to species of property of the same kind with those previously described. The adoption of the more comprehensive meaning would have the effect of rendering the superadded expression nugatory, and make the testator employ additional language, without any additional meaning. (*Succession of Allen*, 295.)

8. **WILLS—RULES OF CONSTRUCTION.**—The intent of the testator is to be determined from the whole will; and every word shall have effect if it can be done without defeating the general purpose of the will, which is to be carried into effect in every reasonable method. (*Succession of Allen*, 295.)

9. **WILLS—CONSTRUCTION—MOLDING LANGUAGE.**—If the reading of a whole will produces a conviction that the testator must necessarily have intended an interest to be given, which is not bequeathed by express and formal words, the court will supply the defect by implication, and so mold the language of the testator as to carry into effect, as far as possible, the intention which it is of opinion that he has, on the whole, sufficiently declared. (*Succession of Allen*, 295.)

10. WILLS—CONSTRUCTION—PUNCTUATION—TAKING PER STIRPES.—Punctuation must give way whenever it interferes with the proper and reasonable construction of a will. Hence, if the testator, by a complete clause in a will, makes a devise to the families of his brother's four children, and this is followed by the distinct words: "And to the five children of my sister Cynthia A. Smith," the devise to his brother's children should be connected with the devise to his sister's children as one continuous sentence; and, it being the evident intention that the five children should be grouped as a family, and that they should participate in the legacy, each set of children takes *per stirpes*, and not *per capita*. (*Succession of Allen*, 295.)

11. WILLS—LATENT AMBIGUITY—WORDS OF DOUBLE MEANING.—The difficulty of distinguishing between patent and latent ambiguities has led to the recognition of an intermediate class, partaking of the nature of both patent and latent ambiguities; as where the words in question are all sensible, and have a settled meaning, but at the same time admit of two interpretations, according to the subject matter in the contemplation of the parties. The more satisfactory solution of the difficulty, however, is to assign ambiguities of this character to the class of latent ambiguities. (*Schlottman v. Hoffman*, 527.)

12. WILLS—ONLY QUESTION OPEN AFTER BAR OF CONTEST.—After the statutory limitation of two years from the probate of a will has expired, thereby barring a contest, the only question remaining open is that of the true construction of the instrument, as a court cannot decree its reformation and correction. (*Schlottman v. Hoffman*, 527.)

13. WILLS—RULES AS TO ADMISSION OF PAROL EVIDENCE.—In construing a will, the court will take into consideration the attending circumstances of the testator, the quantity and character of his estate, the state of his family, and all facts known to him which may reasonably be supposed to have influenced him in the disposition of his property; and, if the will, as made, may, without violence to its terms, be so construed as to effectuate the purpose of the testator, as disclosed by the will and attending circumstances, the courts will so construe it, but no circumstances are sufficient to control the clear and unambiguous language of the will. (*Schlottman v. Hoffman*, 527.)

See Distribution; Evidence, 2, 3.

WITNESSES.

1. EVIDENCE—THE OPINION OF A WITNESS as to the value of an attorney's time is not a question of science or skill, such as could not be determined by a person of ordinary intelligence, and therefore is not admissible in evidence. (*Turner v. Great Northern Ry. Co.*, 883.)

2. EVIDENCE OF DAMAGES FROM LOSS OF TIME.—It is not permissible to permit a plaintiff to give his opinion or estimate of the value of his time while delayed through the wrongful act of a railway corporation without stating the facts upon which such opinion was based. (*Turner v. Great Northern Ry. Co.*, 883.)

See Depositions.

Library Use Only

Library Use Only

UC SOUTHERN REGIONAL LIBRARY FACILITY



A 001 190 711 0

